JUDGMENT OF THE COURT
27 October 1992 *

In Case C-240/90,

Federal Republic of Germany, represented by E. Röder, Ministerialrat in the Federal Ministry for the Economy, acting as Agent, with an address for service in Luxembourg at the Embassy of the Federal Republic of Germany, 20-22 Avenue Émile Reuter,

applicant,

v

Commission of the European Communities, represented by D. Booss, Legal Adviser, acting as Agent, assisted by M. Hilf, Professor in the University of Bielefeld, with an address for service in Luxembourg at the office of R. Hayder, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Article 6(6) of Commission Regulation (EEC) No 3007/84 of 26 October 1984 laying down detailed rules for the application of the premium for producers of sheepmeat (OJ 1984 L 283, p. 28), as amended by Regulation (EEC) No 1260/90 of 11 May 1990 (OJ 1990 L 124, p. 15), and Article 13(3)(b) and (c) of Commission Regulation (EEC) No 3813/89 of 19 December 1989 laying down detailed rules for the application of the system of transitional aids to agricultural income (OJ 1989 L 371, p. 17), as amended by Regulation (EEC) No 1279/90 of 15 May 1990 (OJ 1990 L 126, p. 20),

* Language of the case: German.

THE COURT,

composed of: O. Due, President, C. N. Kakouris, G. C. Rodríguez Iglesias, M. Zuleeg and J. L. Murray (Presidents of Chambers), G. F. Mancini, R. Joliet, F. A. Schockweiler, J. C. Moitinho de Almeida, M. Diez de Velasco and P. J. G. Kapteyn, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 1 April 1992,

after hearing the Opinion of the Advocate General at the sitting on 3 June 1992,

gives the following

Judgment

1 By application lodged at the Court Registry on 1 August 1990 the Federal Republic of Germany brought an action under the first paragraph of Article 173 of the EEC Treaty for the annulment of Article 6(6) of Commission Regulation (EEC) No 3007/84 of 26 October 1984 laying down detailed rules for the application of the premium for producers of sheepmeat (OJ 1984 L 283, p. 28), as amended by Regulation (EEC) No 1260/90 of 11 May 1990 (OJ 1990 L 124, p. 15), and Article 13(3)(b) and (c) of Commission Regulation (EEC) No 3813/89 of 19 December 1989 laying down detailed rules for the application of the system of transitional aids to agricultural income (OJ 1989 L 371, p. 17), as amended by Regulation (EEC) No 1279/90 of 15 May 1990 (OJ 1990 L 126, p. 20).

2 Those provisions lay down penalties to be imposed by the national authorities on producers who have committed irregularities when making an application for the

financial aid provided for by the Council regulations. The penalties consist either in the payment of a surcharge calculated on the amount of aid wrongly paid, or the exclusion of the producer from the benefit of the aid or scheme of aid for the marketing year following that in respect of which the irregularity was established.

3 The first contested provision, Article 6(6) of Regulation No 3007/84, relates to the common organization of the market in sheepmeat and goatmeat set up by Council Regulation (EEC) No 3013/89 of 25 September 1989 (OJ 1989 L 289, p. 1, hereinafter 'the first basic regulation'). Article 5 of the latter regulation provides for the grant of a premium to sheepmeat producers on certain terms.

4 The third subparagraph of Article 5(9) of the first basic regulation empowers the Commission, acting in accordance with the Management Committee procedure provided for in Article 30, to adopt implementing rules for this article covering, in particular, the submission of premium applications and payment of the premium.

5 Under that provision the Commission adopted Regulation No 3007/84 of 26 October 1984 laying down detailed rules for the application of the premium for producers of sheepmeat (hereinafter 'the first implementing regulation'). Article 6(1), as amended by Regulation No 1260/90 cited above, provides that if the actual number of eligible animals recorded during the check, referred to in the previous article, is less than that in respect of which the application for premium has been submitted, no premium is in principle to be paid. Article 6(5) goes on to provide that premiums improperly paid are to be recovered, together with interest to be fixed by the Member State in respect of the period between payment of the premium and its recovery. If the discrepancy is found to be due to a false declaration made deliberately or as a result of serious negligence, Article 6(6) provides that the producer shall also be excluded from entitlement under the premium arrangements for the marketing year following that in respect of which the false declaration is established.

The other provisions in question relate to the system of transitional aids to agricultural income established by Council Regulation (EEC) No 768/89 of 21 March 1989 (OJ 1989 L 84, p. 8, hereinafter 'the second basic regulation'). That regulation created the possibility of granting transitional aid to farmers satisfying certain conditions. Article 12 of that regulation provides that rules for the application of the regulation are to be adopted in accordance with the Management Committee procedure provided for in Article 13.

7 On the basis of those provisions the Commission adopted Regulation No 3813/89 of 19 December 1989 (hereinafter 'the second implementing regulation'). Article 13(3), as amended by Regulation No 1279/90, is worded as follows:

'Whenever an AIA (agricultural income aid) is found to have been granted on the basis of inaccurate data provided by the farmer who certified it, the following measures shall be taken by the Member State concerned:

(a) The amount of the aid unduly paid shall be recovered from the farmer, plus the interest thereon from the date when the aid was paid until the date when it is recovered. The rate of interest to be applied shall be that in force for similar recovery operations under national law;

(b) in addition where the competent authority determines that the amount was wrongfully paid as a result of serious irregularities on the part of the farmer, the Member State shall either:

— in all such cases charge the farmer an amount equal to 30% of the aid wrongfully paid, or

— as a general rule charge the farmer an amount equal to 30% of the aid wrongfully paid but have the possibility to apply on the basis of the gravity of the particular case of charging an amount not less than 20% nor greater than 40% of the aid wrongfully paid;

(c) furthermore a farmer who is responsible for inaccurate date giving rise to a charge as provided for in paragraph (b) shall be excluded from eligibility for all payments under any PAIA for a period of 12 months from the date that the charge was determined. In instances where the aid has been capitalized the Member State concerned shall take the steps necessary to ensure equivalent treatment to that applying had payments not been capitalized;

...'

It is subparagraphs (b) and (c) of Article 13(3) which the German Government is challenging in the present proceedings.

8 As has already been pointed out, the contested provisions may be divided into two groups: Article 13(3)(b) of the second implementing regulation, as amended, which requires the defaulting farmer to pay an amount in addition to reimbursement with interest of the premium already paid (hereinafter 'surcharges'); and Article 6(6) of the first amended implementing regulation and Article 13(3)(c) of the second amended implementing regulation which require the national authorities to exclude farmers for one year from the benefit of the aid or system of aid concerned (hereinafter 'exclusions').

9 Against those measures the German Government raises two pleas. In the first it challenges the Community's competence and in the second the Commission's competence.

Community competence

10 As a preliminary matter it should be observed that the first plea concerns only the aforementioned provisions on exclusions. In other words the German Government does not deny that the Community has power to impose penalties such as the payment of surcharges provided for in Article 13(3)(b) of the second implementing regulation.

11 In that respect it must be remembered first of all that the Community's power to impose penalties necessary for the effective application of the rules in the sphere of the common agricultural policy has repeatedly been recognized by the Court. That power is based on Article 40(3) and Article 43(2) of the Treaty.

12 The case-law shows that those penalties may take various forms. Thus, for example, the Court has recognized the lawfulness of measures requiring a trader to refund with interest a benefit unduly received (see the judgment in Case 288/85 *Hauptzollamt Hamburg-Jonas* v *Plange Kraftfutterwerke* [1987] ECR 611) or the loss of the security equivalent to that benefit (see in particular the judgment in Case C-199/90 *Italtrade* v *AIMA* [1990] ECR I-5545). In the same way it considered that forfeiture of a security constituted a penalty in accordance with Community law in cases where the security served only to guarantee the obligation to export, undertaken by those concerned, and they had not received any pecuniary benefit from the Community (see the judgments in Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr-und Vorratstelle für Getreide und Futtermittel* [1970] ECR 1125 and Case 137/85 *Maizena* v *BALM* [1987] ECR 4587).

13 That power to impose penalties implies that in the field of the common agricultural policy the Community has power to provide for penalties to be imposed by the national authorities on traders guilty of fraud.

14 In the present proceedings the German Government maintains that the Community's abovementioned power to provide for penalties, does not extend to exclusions. The grounds which it puts forward in that respect are threefold.

15 First of all, exclusions are too different from those listed in Article 40 to be covered by the power contained therein. In that respect it stresses that in the matter of penalties the Community's powers must be strictly interpreted.

16 The German Government infers from Article 87(2)(a) of the Treaty that fines and periodic penalty payments are the only penalties authorized in Community law. Since their consequences for the traders concerned are not quantifiable, exclusions, unlike surcharges, cannot be equated with those two types of penalty.

17 The German Government alleges in conclusion that exclusions constitute penal sanctions which neither the Council nor the Commission has the power to impose. Such penalties in fact constitute a penal judgment of the impropriety of the trader who has committed the irregularity.

18 That argument cannot be accepted. The reply to the first argument put forward by the German Government must be that the measures referred to in Article 40(3) are merely illustrative and, furthermore, that exclusions satisfy the sole condition imposed by that provision in order to come within the powers of the Community, namely that the measures contemplated should be necessary to attain the objectives of the common agricultural policy.

19 In that respect it must be stressed that, as the German Government itself recognizes, exclusions, like surcharges, are intended to combat the numerous irregularities which are committed in the context of agricultural aid. Because they weigh heavily on the Community budget those irregularities are likely to compromise the action undertaken by the institutions in that field to stabilize markets, to support the standard of living of farmers and to ensure that supplies reach consumers at reasonable prices.

20 Furthermore, it is for the Community legislature alone to determine the solutions most appropriate for attaining the objectives of the common agricultural policy. By providing for exclusions in order to penalize irregularities by traders in relation to the subsidy schemes in question in the present proceedings, the Community legislature did not exceed its powers.

21 It may be observed in that respect that since applications for aids are too numerous to be subject to systematic and full checks, it is difficult to envisage any reinforcement of existing controls. Similarly, the imposition of penalties at national level would preclude any guarantee of uniformity of measures applied to fraudsters.

22 Consequently it must be concluded that there is nothing in Article 40(3) of the Treaty to take exclusions outside the Community's power to impose penalties in relation to the common agricultural policy.

23 The two other arguments put forward by the German Government are equally unconvincing. As to the argument in relation to Article 87(2)(a) of the Treaty, that provision concerns only penalties determined and imposed directly by the Community institutions. Since the exclusions in question are intended to be imposed by the national authorities in accordance with the uniform provisions of Community

law, Article 87(2)(a) of the Treaty can provide no guidance in the context of the present proceedings.

24 As to the German Government's final argument, there is no ground in the present proceedings to express a view on the Community's power in the penal sphere.

25 In fact the exclusions at issue do not constitute penal sanctions. In that respect the German Government, which has not challenged the Community's power to impose the surcharges challenged in the present action, has not shown that there is any fundamental difference between the penalty consisting in the imposition on an operator of a surcharge and a penalty consisting in the withdrawal for a certain period of the right to receive a benefit. In both cases the person concerned suffers a financial loss greater than the mere reimbursement, perhaps with interest, of the aid improperly received.

26 Furthermore, the imposition of a penalty on a trader presupposes that he has just been granted a right. Since that right relates to a scheme of Community aid paid out of public funds and based on the notion of solidarity, it must be subject to the condition that the beneficiary offers all guarantees of probity and trustworthiness. From that point of view the contested penalty constitutes a specific administrative instrument forming an integral part of the scheme of aid and intended to ensure the sound financial management of the Community public funds.

27 It follows from the foregoing that the German Government has put forward no ground for removing exclusions from the Community's power to impose penalties in connection with the common agricultural policy. The Community must accordingly be regarded as having competence to order such exclusions.

28 That is all the more so since in the aforementioned *Internationale Handelsgesellschaft* judgment the Court, as already stated, recognized the lawfulness of penalties which, like exclusions and also the surcharges challenged in the present proceedings, go beyond the mere refund, perhaps with interest, of a benefit improperly paid.

29 It follows from the foregoing considerations that the Community has competence to provide for penalties which, like the exclusions provided for by Article 6(6) of the first implementing regulation and Article 13(3)(c) of the second implementing regulation, go beyond the mere refund of a benefit improperly paid.

Commission competence

30 In connection with the second plea the German Government considers that only the Council has power to impose penalties such as surcharges and that such power may in no event be delegated to the Commission. On the assumption, moreover, that the Community is recognized as having power to provide for exclusions, the German Government does not consider that this power can be exercised by the Commission either.

31 In support of its view the applicant Government first of all alleges that the Treaty, when it refers to the imposition of penalties, mentions only the Council. That is true of Article 87(2)(a) which calls upon the Council, and not the Commission, to provide for fines and periodic penalty payments in the measures which it adopts under Article 87(1) and under Article 172 which gives the Court unlimited jurisdiction only as regards penalties provided for in Council regulations.

32 The German Government goes on to evoke the principle of lawfulness, according to which the imposition of penalties is a matter for the legislature alone, and the principle of the institutional balance. In its capacity as Community legislature the Council alone has power to determine the essential components of the common organizations of the market. Penalties such as exclusions and surcharges which go beyond the mere reimbursement of a due benefit improperly paid, thus affecting the fundamental rights of individuals, form part of those essential component features.

33 Finally, in the German Government's view, the imposition of penalties on traders who have committed irregularities cannot be regarded as the exercise of executive power within the meaning of Articles 145 and 155 of the Treaty. The objective of such rules is not to enforce basic Council regulations but to supplement them.

34 To answer that argument it is necessary first of all to preclude the application of Articles 87(2)(a) and 172 of the Treaty. As already stated at paragraph 23 in relation to Article 87(2)(a), Article 172 concerns only penalties fixed and imposed directly by the Community institutions. That is not true of the penalties at issue in the present proceedings.

35 For the rest, it is necessary to refer to the legislative system established by the Treaty. Whereas the third paragraph of Article 43(2) in principle gives the Council power to adopt, on a proposal from the Commission and after consulting the European Parliament, rules relating to a common organization of the market, Articles 145 and 155 allow the Council to confer on the Commission, in the acts which it adopts, implementing powers in respect of the rules which it lays down. Article 145 nevertheless provides that the Council may also reserve the right, in specific cases, to exercise those powers itself.

36 It follows from the judgment in Case 25/70 *Einfuhr-und Vorratstelle für Getreide* v *Köster* [1970] ECR 1161, paragraph 6, that the aforementioned provisions distinguish between rules which, since they are essential to the subject-matter envisaged, must be reserved to the Council's power, and those which being merely of an implementing nature may be delegated to the Commission.

37 In the present case the rules challenged by the German Government cannot be classified as essential to the common organization of the market established by the first basic regulation and the scheme of aid established by the second basic regulation. Such classification must be reserved for provisions which are intended to give concrete shape to the fundamental guidelines of Community policy. That is not true of penalties, such as surcharges or exclusions, which are intended to underpin the options chosen by ensuring the proper financial management of the Community funds designated for their attainment.

38 Finally it should be added that the inclusion of the power to impose penalties in the implementing powers was already recognized by the Court in the aforementioned *Köster* judgment. It will be remembered that in that judgment it was held that provisions which made the issue of an export licence conditional upon the provision of security and which provided for the forfeiture of that security when the obligation to export was not fulfilled within the requisite time-limits came within the Commission's implementing powers. Like surcharges and exclusions which are at the origin of the present proceedings, that penalty did not comprise merely the refund of a payment improperly made.

39 Consequently, it must be concluded that measures consisting of the imposition of penalties such as surcharges and exclusions on a trader giving false information to the administrative authorities amount to no more than implementation of the principles established in the basic regulations and, since the Council did not reserve that power to itself, it was properly delegated to the Commission.

40 In the alternative, the German Government maintains that, on the assumption that the power to impose the contested penalties could properly be delegated to the Commission, the third paragraph of Article 5(9) of the first basic regulation and Article 12 of the second basic regulation are couched in terms too general for that purpose. It cites in that respect the second sentence of the first paragraph of Article 1 of Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33), under which the Council is to specify the essential elements of the powers conferred on the Commission. In the present case that provision required the Council expressly to empower the Commission to provide for penalties, that is to lay down the type thereof and the maximum amounts of such penalties.

41 That argument does not carry conviction either. It is clear from the aforementioned *Köster* judgment that since the Council has laid down in its basic regulation the essential rules governing the matter in question, it may delegate to the Commission general implementing power without having to specify the essential components of the delegated power; for that purpose, a provision drafted in general terms provides a sufficient basis for the authority to act.

42 That principle is not affected by the aforementioned decision. As a measure of secondary law it cannot add to the rules of the Treaty, which do not require the Council to specify the essential components of the implementing powers delegated to the Commission.

43 In view of the foregoing considerations it must be concluded that the Commission has power to lay down the surcharges and exclusions provided for in Article 6(6) of the first implementing regulation and Article 13(3)(b)(c) of the second implementing regulation.

44 Consequently the application must be dismissed.

Costs

45 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Federal Republic of Germany has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the Federal Republic of Germany to pay the costs.

Due Kakouris Rodríguez Iglesias Zuleeg

Murray Mancini Joliet

Schockweiler Moitinho de Almeida Diez de Velasco Kapteyn

Delivered in open court in Luxembourg on 27 October 1992.

J.-G. Giraud O. Due

Registrar President