REPORT FOR THE HEARING
in Case C-240/90 *

I — Legislative background

The measures challenged by the German Government were adopted under the Common Agricultural Policy. The first relate to the sheepmeat sector, the second to the system of transitional aid to agricultural income.

A — *Measures concerning the sheepmeat sector*

Article 5 of the Council Regulation on the common organization of the market in sheepmeat and goatmeat (Regulation No 3013/89 of 25 September 1989, OJ 1989 L 289, p. 1, hereinafter 'the first basic regulation') enables a premium to be granted to sheep and goatmeat producers to compensate for any loss of income during a marketing year.

The third subparagraph of Article 5(9) empowers the Commission, acting in accordance with the procedure laid down in Article 30, to adopt implementing rules covering, in particular, the submission of premium applications and payment of the premium.

Pursuant thereto, the Commission adopted the regulation laying down detailed rules for the application of the premium for producers of sheepmeat (Regulation No 3007/84 of 26 October 1984, OJ 1984 L 283, p. 28, hereinafter 'the first implementing regulation'). Article 6(1) of Regulation No 3007/84, as amended by Regulation No 1260/90 of 11 May 1990 (OJ 1990 L 124, p. 15, hereinafter 'the first amending regulation'), provides that if the actual number of eligible animals recorded during a check provided for in Article 5 is less than that in respect of which the application for premium has been submitted, no premium is 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 premiums and its recovery.

Where the discrepancy is found to be due to a false declaration made deliberately or as a result of serious negligence Article 6(6) increases the penalty: the producer is then also 'excluded from entitlement under the premium arrangements for the marketing year following that in respect of which the false declaration is established.'

* Processprog: tysk.

B — *Measures concerning aid to agricultural income*

The second group of contested measures relates to the system of transitional aid to agricultural income.

Council Regulation No 768/89 of 21 March 1989 establishing a system of transitional aids to agricultural income (OJ 1989 L 84, p. 8, hereinafter 'the second basic regulation') created the possibility of granting transitional aid to farmers in order to make it easier for them to adapt themselves to the new market conditions.

Article 12 provides that detailed rules for the application of the regulation are to be adopted in accordance with the management committee procedure provided for in Article 13.

Pursuant thereto, the Commission adopted Regulation 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, hereinafter 'the second implementing regulation'). Article 13(3) was amended by Commission Regulation No 1279/90 of 15 May 1990 (OJ 1990 L 126, p. 20, hereinafter 'the second amending regulation') as follows:

'Whenever an AIA 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 data 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.

...'

The provisions challenged by the German Government in the present action may be divided into two groups: exclusion from the benefit of a future premium provided for by the implementing regulations, namely Article 6(6) of Regulation No 3007/84 and Article 13(3)(c) of Regulation No 3813/89, as amended (hereinafter 'exclusion') and surcharges provided for in the second implementing regulation, namely Article 13(3)(b) of Regulation No 3813/89, as amended (hereinafter 'surcharges').

II — Course of the procedure

The German Government brought its action on 1 August 1990.

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 preparatory inquiry.

III — Conclusions of the parties

The *German Government* claims that the Court should:

— annul Article 6(6) of Commission Regulation (EEC) No 3007/84;

— annul Article 13(3)(b) and (c) of Commission Regulation No 3813/89;

— order the defendant to pay the costs.

The *Commission* contends that the Court should:

— dismiss the application of the Federal Republic of Germany;

— order the applicant to pay the costs.

IV — Pleas in law and arguments of the parties

The *German Government* submits that there is a distinction between the provisions on exclusions and those providing for surcharges.

The German Government objects to exclusions on two grounds: in the first place the Community had no power to provide for them; in the second place, even if the Community had power under the Treaty it was for the Council and not the Commission to exercise it. As regards exclusions, the second plea may thus be regarded as being made in the alternative.

On the other hand the German Government does not question the Community's competence concerning surcharges. It considers only that it was not within the Commission's power to impose them.

The German Government states that the Community's power and that of the Commission had already been challenged by its representatives in the management committees at the time when the contested regulations were drawn up.

Furthermore the German Government also expressed analogous criticism in regard to two earlier Commission regulations which also contained measures for exclusion and surcharges, namely Regulation No 714/89 of 20 March 1989 laying down detailed rules applying to the special premium for beef producers (OJ 1989 L 78, p. 38) and Regulation No 915/89 of 10 April 1989 laying down detailed rules for the application of arrangements for producers who had taken part in the arrangements for the set-aside of arable land to be exempted from the co-responsibility levies in the cereals sector (OJ 1989 L 97, p. 9). Those doubts as to the Commission's competence were confirmed by the Council's Legal Department in an opinion of 12 July 1989. As a result of the Council's objection, the German Government has been unable to produce that opinion.

The *Commission*, for its part, refutes the two pleas put forward by the German Government. It considers that the contested measures are within the Community's competence and that it itself had power to adopt them. In those circumstances the contested provisions are perfectly in accordance with the Treaty.

In view of the pleas in law put forward by the German Government the present summary is divided into two parts: (A) Community competence and (B) Commission competence.

A — *Community competence*

1. *The position of the applicant State*

As a preliminary, the *German Government* cites Case 117/83 *Könecke* v *BALM* [1984] ECR 3291 and Case 137/85 *Maïzena* v *BALM* [1987] ECR 4587 in which the Court held that 'a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis.' What applies to a rule imposing penalties also applies to the power on which it is based.

The German Government considers that Article 40(3) of the Treaty does not give the Community power to order exclusions. Article 40(3) provides that the common organization of agricultural markets 'may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carry-over arrangements and common machinery for stabilizing imports or exports.' Although the exclusions adopted by the Commission may be necessary to achieve the objectives of the Common Agricultural Policy, they are neither identical nor similar to the measures listed in Article 40 and are therefore not covered by the power which it contains.

The German Government further asserts that since exclusions are of a penal nature but are neither fines nor penalty payments they cannot be imposed under Community law.

In the absence of Community competence it is, according to the German Government, for the Member States to determine the sanctions required to implement the Common Agricultural Policy.

The reasoning for that contention may be set out in six propositions as follows.

(a) Exclusions are needed to achieve the objectives of the Common Agricultural Policy

The German Government concedes that exclusions are needed to achieve the objectives of the Common Agricultural Policy defined in Article 39 of the Treaty. Such sanctions enable more effective action to be taken against frauds committed in the sector.

Since penalties cannot be effective without effective prior checks, it appears unwise to justify, as the Commission does, the increase in the severity of sanctions by the inadequacy of checks carried out in regard to applications for subsidies.

In any event the inadequacy of checks cannot provide the basis of a power conferred on the Commission.

(b) Article 40(3) does not give the Community power to order exclusions

Even if exclusions are needed to achieve the objectives of the Common Agricultural Policy, the German Government considers that Article 40(3) does not empower the Community to impose penalties such as exclusions.

First of all exclusions are not among the measures listed in Article 40(3). Admittedly, that list, preceded by the words 'in particular', is not exclusive, but any power to impose penalties must be expressly mentioned in the Treaty. That is the principle to be inferred from Article 87(2)(a) of the Treaty which in competition matters gives the Council express power to provide for fines and periodic penalty payments in order to ensure compliance with the prohibitions laid down in Articles 85(1) and 86.

Even on the assumption that it is not exhaustive, Article 40(3) could, according to the German Government, be supplemented only by measures similar to those referred to therein. Thus the Community is empowered to adopt measures such as the refund of aid or surcharges in order to re-establish a situation of legality but not measures such as exclusions which impose additional burdens on producers. The refund of wrongly paid subsidies is moreover the only obligation imposed by Article 2 of the Financial Regulation of 21 December 1977 applicable to the general budget of the European Communities (OJ 1977 L 356, p. 1). Article 2 provides

that: 'the budget appropriations shall be used in accordance with the principles of economy and sound financial management.'

As regards surcharges the German Government cites Case 288/85 *Hauptzollamt Hamburg-Jonas* v *Plange Kraftfutterwerke* [1987] ECR 611 concerning export refunds. In that judgment the Court accepted the lawfulness of a Commission regulation providing for the payment of a security guaranteeing the refund of an amount of 20% more than the refund paid. The sole object of that supplement was to take away any profit which a trader might have obtained from the use of the refund between the time it was paid to him and the time he had to repay it. That decision followed in Case 137/85 *Maïzena* v *BALM* [1987] ECR 4587, is therefore no authority for the proposition that the Community has power to impose measures such as exclusions which do more than simply re-establish a situation of legality.

(c) The exclusions are of a penal nature

While declining to be drawn into the subtle distinction between penal and administrative sanctions the German Government is concerned to demonstrate that, contrary to the Commission's contention, the exclusion, just like the surcharge, is of a penal nature.

In the first place the German Government alleges that exclusions in fact constitute a penal judgment of the impropriety of the recipient of the subsidy. In that respect the contested rules are different from those which gave rise to the judgment in *Maïzena* v *BALM*, already cited in relation to the question of surcharges. In that case the Court considered, moreover, that the obligation on exporters who had not exported during the validity of the export licence to repay security previously released was a penalty without any criminal nature on the ground, in particular, that the penalty was imposed on the basis of strict liability. In the German Government's view that reasoning cannot be applied in the present context since exclusions are specifically based on the notion of culpability.

Secondly, the German Government considers that exclusions and the obligations which they enforce are not of a voluntary nature. Often the trader has no other choice to assure his minimum subsistence than to claim the subsidies offered by Community law.

For that twofold reason — the penal and involuntary nature of the exclusions — they cannot, contrary to what the Commission contends, be compared to security payments. To assimilate them thereto would be contrary to the proposal for a Council regulation on the checks and penalties applicable under the Common Agricultural and Fisheries Policies (submitted by the Commission on 21 May 1990, OJ 1990 C 137, p. 10) in which forfeiture of a guarantee was not to be considered a penalty. After defining penalties as 'measures entailing unfavourable financial or economic consequences for an operator who has unjustifiably received a benefit or who has failed to fulfil an obligation

imposed by legislation' Article 4 of the proposal states that 'measures whose consequences are limited to ... a simple forfeit of a guarantee lodged in support of an application for a benefit or for the receipt of an advance' are not to be regarded as penalties.

In the same way exclusions cannot be compared to contractual penalties. In contrast to the latter, exclusions are not based on a promise additional to the contract but automatically threaten the trader who has obtained a premium under the relevant regulations without his having to express any particular consent thereto. Furthermore the provisions are of a mandatory nature so that individuals have no possibility of escaping them.

The judgment of 6 March 1986 of the Bundesverwaltungsgericht (E 74, 78 et seq.), cited by the Commission, provides no support for that comparison. In that judgment the Bundesverwaltungsgericht recognized as lawful a penal clause imposing on the recipient of a loan for training, in addition to repayment of the loan, payment of a tax equivalent to 50% of the loan should he fail to observe his undertaking to practise as a dentist for a certain number of years in the public service. That judgment does not demonstrate that under German law it is possible to insert a penalty clause in a contract governed by administrative law where there is no express legal basis for it. Paragraph 62 of the Verwaltungsgsverfahrensgesetz (law on administrative procedure) provides that the provisions of the Bürgerliches Gesetzbuch (Civil Code) shall apply by analogy to contracts governed by public law in so far as they are not governed by the rules for which it provides. Those provisions include Paragraph 339 of the Bürgerliches Gesetzbuch on contractual penalties.

The German Government considers that the solution adopted by the Bundesverwaltungsgericht is perfectly compatible with the position which it puts forward in the present action. The German Government admits that Article 40(3) enables the Community to adopt measures to re-establish the legality of a situation. That is the objective of the surcharge which the German court had to judge: that was intended solely to cull the 'financial and abstract' profit which the person concerned had been able to derive from the loan which had been granted to him. That loan had enabled him to be admitted more speedily to university and to set himself up earlier as an independent dentist. That does not apply to exclusions.

(d) Exclusions cannot be equated with fines and penalty payments which are the sole penalties authorized by the Treaty

Since the changing and diverse nature of national laws makes the distinction between the criminal and administrative penalty impracticable in Community law, the German Government prefers to rely only on the rules of the Treaty to determine the penalties which it authorizes.

It infers a principle from Articles 87(2)(a) and 172 of the Treaty that fines and penalty payments are the only kinds of penalties rec-

ognized under Community law. Any other means of coercion which affects fundamental rights and constitutes unwarrantable interference in the affairs of traders is unlawful under the Treaty.

Applying that principle, the German Government distinguishes between surcharges and exclusions. It does not doubt the Community's power to impose surcharges since, because a figure can be put on their amount, they may be classified as fines. It is different with regard to exclusions whose effects depend on future events such as a change in the particular system of aid or the financial situation in agriculture.

(e) Exclusions cannot be analysed as prior application of a condition of good faith

The German Government considers that it is not possible to agree with the Commission in regarding exclusions as the application of a condition of good faith to be satisfied by the recipient of this aid.

First of all it observes that there is no such condition in the relevant regulations.

In the German Government's view the contested rules differ in two respects from those considered by the Court in its judgment in Case 217/88 *Commission* v *Federal Republic of Germany* [1990] ECR 2879, to which the Commission refers. In that judgment the Court considered that a provision of a Council regulation allowing vintners who had not complied with an obligation to deliver table wine for distillation to be excluded from the benefit of various intervention measures for which the regulation provided did not amount to a sanction. According to the Court such a provision merely sets out a condition for eligibility to certain intervention measures provided for in the regulation. The German Government observes that, contrary to the provisions at issue in the present case, those rules were concerned with the conditions for participating in intervention measures and not the exclusion from the benefit of such measures for the future. Furthermore they were adopted by the Council whereas in the present case the contested penalties were laid down in a Commission regulation.

(f) Exclusions are within the competence of the Member States

Since the Treaty has not empowered the Community to impose penalties such as exclusions the German Government considers that provision for them falls within the competence of the Member States. The legal basis of that competence is Article 5 of the EEC Treaty and Article 8(1) of Regulation No 729/70 of the Council of 20 April 1970 on the financing of the Common Agricultural Policy (OJ, English Special Edition 1970 (I), p. 218).

As regards Article 5 the German Government refers to paragraph 23 of the judgment in Case 68/88 *Commission* v *Hellenic Republic* [1989] ECR 2965 where the Court declared that: 'where Community legislation

does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law.'

Article 8(1) of the regulation on the financing of the Common Agricultural Policy provides that 'the Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary ... to prevent and deal with irregularities'. In the German Government's view, a State which does not comply with its obligations is liable, even financially, to the Commission.

In that respect the German Government observes that German law provides for a broad band of penalties under administrative law. It extends from heavy punishment under the criminal law (Paragraph 264 of the Strafgesetzbuch (Criminal Law), 'fraud in relation to subsidies') to minor offences. In relation to the last mentioned group the German Government particularly highlights Paragraph 36 of the Gesetz zur Durchführung der gemeinsamen Marktorganisation (Law on the implementation of the common organization of the market). That provides for a fine of up to DM 100 000 to be imposed on any person who gives false particulars in order to obtain an advantage provided for under a common organization of the market.

2. *The Commission's position*

The *Commission* does not agree with the German Government: in its view the Community clearly has power to provide for exclusions. Furthermore there is no ground for distinguishing that type of penalty from surcharges.

Since such penalties are necessary in order to achieve the objectives of the agricultural policy they are covered by the power in Article 40(3) of the Treaty. Whenever the Treaty gives the Community power to make substantive provisions it also gives it power to impose penalties intended to ensure compliance with them.

The Commission maintains in addition that exclusions and surcharges are penalties authorized by Community law. Contrary to what the German Government claims they are not of a criminal nature and the penalties allowed by the Treaty are not confined to fines and penalty payments.

Finally the Commission considers that the contested penalties are in accordance with the principle of proportionality and the fundamental rights recognized by Community law.

Since the Community has competence, the States have only to supplement, where necessary, the system of penalties established by Community law.

In accordance with the scheme of the arguments put forward by the German Government each of those propositions will be considered separately.

(a) The need for the contested penalties

In order to come within the power given by Article 40(3) of the Treaty it suffices that the measure contemplated should be necessary to attain the objectives set out in Article 39.

The Commission considers first of all that both exclusions and surcharges satisfy that requirement. As is apparent from the preambles to the Commission's amending regulations those measures are intended to deal with irregularities committed under the Common Agricultural Policy which, according to unofficial sources, cause the Community a financial loss of some 10 to 15% of the total volume of such aid. In that respect the Commission explains that applications are too numerous for them to be systematically and fully checked. The national authorities carry out only spot checks: only 2% of applications are in fact checked in connection with the rules on sheepmeat and goatmeat and 10% in connection with aid for farming income. Since such checks are based almost exclusively on data provided by the farmers it is imperative to supplement the system of checking by more stringent penalties imposed on those guilty of fraud. In that respect measures which merely require them to refund aid wrongly received do not have a sufficiently dissuasive effect.

Supplemented in that way, the system of spot checking could therefore be maintained with the twofold advantage which that entails. First of all the system is less onerous than systematic and full checks; secondly it limits interference by the authorities with the liberty of individuals.

Finally, the Commission maintains that State measures do not allow the objective just described to be achieved.

First, Community institutions are best placed to determine an appropriate relationship between the intensity of checks, a sector which undoubtedly falls within the Community's legislative power, and the extent of administrative penalties.

Secondly, only a Community regulation is likely to ensure the uniformity of measures applied to those guilty of fraud. The differences between the various Member States with regard to organization, administrative procedures and systems applicable to penalties risk giving rise to distortions in competition between the various economic operators in the Community and thus jeopardizing the objectives of the Common Agricultural Policy.

Thirdly the Commission doubts whether the penalties in force in the States are effective in dealing with a large number of minor irregularities.

Fourthly the States do not have appropriate judicial and administrative apparatus for proceedings in all cases where an irregularity has been found.

Finally the Commission considers that an increase in checks as suggested by the German Government would not offer a valid alternative to severer penalties. First of all it would require financial and human resources which may not be available to the States. It would also be likely to increase administrative interference in the trader's sphere of freedom. Finally and above all it would not offer the same guarantees as the contested measures in respect of uniformity in the application of Community law.

(b) The Community's power derives from Article 40(3) of the Treaty

First, the Commission contends that Article 40(3) of the EEC Treaty contains no provision which excludes the contested penalties from the power which it confers.

The power which Article 40 gives the Community is not confined to the measures expressly mentioned therein. As is shown by the use of the words 'in particular' the measures mentioned are meant only to be illustrative.

Article 87(2) of the Treaty cannot be regarded as the application of a more general principle according to which any power in relation to penalties must be conferred on the Community expressly in the Treaty. The fact that penalties are not expressly mentioned in Article 40(3) of the Treaty is simply because in 1957 when the Treaty was drafted it was impossible to conceive how the common organizations of the market would function.

Finally there is nothing in the wording, spirit, purpose or origin of Article 40(3) to justify restricting the power which it gives to measures similar to those mentioned therein.

Secondly the Commission considers that since the Treaty gives the Community power to adopt substantive provisions, it also gives it power to adopt measures to monitor them and to provide for the penalties which are necessary for their implementation without the need for any express provision in that respect in the Treaty.

That principle has a threefold basis in logic, legislation and case-law. First of all, it is necessary in order for the Treaty to be effective. Secondly a general power to provide for penalties is to some extent implied in Article 172 of the Treaty which refers in general terms to the penalties provided for in Council regulations. Finally it was recognized, at least by implication, in paragraph 23 of the aforementioned judgment in Case 68/88 *Commission* v *Hellenic Republic.*

The Commission observes that the penalties referred to in Article 172 relate to a different system of management from those which are the subject of the present application. Although both derive from measures adopted by the Community institutions only those referred to in Article 172 are imposed by the institutions. In contrast the imposition of surcharges and exclusions are matters

for the State authorities. The German Government has overlooked the distinction between centralized and decentralized management methods.

Thirdly the Commission considers that the power referred to is of a general nature. In other words no distinction should be made between surcharges, administrative penalties and criminal penalties at least in so far as the provisions of Community law may require the States to provide for criminal penalties.

The Commission is unable to follow the German Government's distinction between exclusions, which the Community has no power to impose, and surcharges which do fall within its power.

The German Government, it may be recalled, bases the distinction on two grounds: first, exclusions, in contrast to surcharges, seek more than the simple restoration of a situation of legality; secondly, they are not to be equated with fines and penalty payments, which are the only kinds of penalties authorized by the Treaty.

As regards the first ground, the Commission considers that the German Government has extended the scope of the aforementioned judgments in *Maïzena* v *BALM* and *Hauptzollamt Hamburg-Jonas* v *Plange Kraftfutterwerke*. In those cases the Court simply considered that in view of the period which elapses between the time a refund is paid and repaid surcharges of 20% imposed on exporters must be regarded as compatible with the principle of proportionality. However, neither in those judgments nor in any others has the Court held penalties which go beyond the restoration of a situation of legality to be unlawful.

The second submission reveals a misconception of the structures of Community law. Contrary to the position in some national legal systems, there is no Community law of penalties conceived as a separate legal sphere. Each branch of law has its own penalties either as an integral part of the substantive provisions or as an appendage thereto. Article 4 of the abovementioned Proposal for a regulation on the checks and penalties applicable under the Common Agricultural and Fisheries Policies shows that the definition of penalty in Community law, as moreover in national law, covers measures other than fines and penalties.

Secondly the Commission considers it futile in the present case to query Community competence in penal matters. Clearly, the contested penalties constitute administrative sanctions authorized by the Treaty.

To show that exclusions and surcharges are not of a penal nature the Commission puts forward two arguments.

First, contrary to the German Government's contentions, the penalties do not imply the

passing of any judgment of impropriety and their objective is not to impose a penalty in respect of an unlawful act.

In contrast to criminal penalties punishing infringements of rules of conduct unilaterally imposed by the legislature, the contested penalties are of a voluntary nature. Since the aid is granted at the request of the person concerned, the resulting obligations as well as the exclusion from the grant of benefit should also be regarded as the consequences of an undertaking freely accepted. It is true that operators are often bound to claim the aid offered by the contested regulations. Their situation is, however, no different from that of exporters who claim an export licence. In that respect the Court held in the judgment in Case 11/70 *Internationale Handelsgesellschaft* v *finfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 that the loss of a deposit as a result of a failure to fulfil an undertaking to export could not be equated with a penal sanction, since the deposit merely constituted the guarantee that an undertaking voluntarily assumed would be carried out.

That reasoning is to be found in the judgment in Case 137/85 *Maïzena* v *BALM* [1987] ECR 4587. In that case exporters, who were the plaintiffs before the national court, had received export licences and had to lodge security to guarantee their obligation to export. Subsequently they opted for a special scheme enabling them to obtain payment in advance of the export refunds after placing their products under customs control. Under the second system they had to lodge further security guaranteeing the repayment of the refund together with a supplement representing 20% of its value. At the same time the first security was released. When the exporters failed to observe the time-limits in the export licences the German authorities demanded, on the basis of a Commission regulation, repayment of the first security which had been released. When the lawfulness of that regulation came before the Court, it considered that since the exporters had decided themselves to take advantage of the special scheme for the advance release of the security, the requirement to repay the security was a non-penal sanction.

Generally, the Commission considers that the contested penalties are similar to securities which, as has just been seen, the Court in the *Handelsgesellschaft* and *Maïzena* cases regarded as not criminal in nature. In that respect the Commission states that the reason the Court stated in the *Maïzena* case that the repayment of security already released did not depend on culpability was to show the irrelevance of the principles of criminal law '*nulla poena sine culpa*' and '*in dubio pro reo*' since the national court had asked whether they had been observed. Contrary to what the German Government seems to think, the Court did not seek to give reasons for the validity of the rules on which the Commission had relied to require the exporters to repay the security which had already been released.

The Commission considers that the contested sanctions may be regarded as similar to contractual penalties which similarly are not criminal in nature. To lend weight to that comparison, at least as regards surcharges,

the Commission refers to the aforementioned German judgment of 6 March 1986 in which the Bundesverwaltungsgericht approved a contractual clause requiring the recipient of an educational loan to repay to the administration in addition to the loan a surcharge of 50%. The Commission thus seeks to show that in German law the authorities may include an agreed penalty in a contract governed by public law without any express enabling provision. The German Government alleges that the authorities relied on Paragraph 62 of the Verwaltungsverfahrensgesetz (Law on Administrative Procedure), which refers to the provisions of the Bürgerliches Gesetzbuch (Civil Code) including Paragraph 339 on contractual penalties, but the Commission replies that the wording of that provision is very imprecise: German public law does not contain any provision specifying in which cases a penalty clause may be authorized in a contract governed by it. Nor does it even confer an express power to include such penalty clauses, and obviously it does not consider the inclusion of such provisions or the conferral of that power to be necessary. Furthermore the Commission maintains that that case shows that under German administrative law, penalty clauses may be included in a contract because, like deposits, such penalties are accepted by the contracting parties.

In reference once again to the aforementioned judgment in the *Maïzena* case the Commission claims that the contested surcharges and exclusions in the present action merely constitute administrative techniques for ensuring sound management of Community funds in accordance with Article 2 of the aforementioned financial regulation (of 21 December 1977, OJ 1977 L 356, p. 1). By those measures the Commission is merely determining, on the grant of aid, the consequences of misuse of that aid.

The Commission adds that surcharges may be regarded differently. They may be considered to be the realization of the condition of good faith imposed on the recipient of Community aid. In other words, in order to be entitled to such aid, the operator must have refrained during the year or the preceding marketing year from knowingly making false declarations. In that respect the contested regulations may be compared with those considered by the Court in its judgment in Case 217/88 *Commission* v *Federal Republic of Germany* [1990] ECR 2879 which allowed wine producers who had not satisfied their obligation to deliver table wine for distillation to be excluded from various intervention measures. Just as wine producers who did not fulfil their obligation to deliver their table wine for distillation were deprived of the benefit of the intervention measures provided for by the regulation in question, farmers who had forwarded false information to the authorities are deprived of the benefit of aid, the sheepmeat premium or farm income aid, which they claimed under the relevant regulations.

(c) Exclusions and surcharges are in accordance with the principle of proportionality and the fundamental rights recognized by Community law

Since surcharges and exclusions constitute penalties freely accepted by the recipients of aid, fundamental rights are observed.

The same is true of the principle of proportionality: the contested measures are necessary to achieve the object of the aid and are appropriate instruments for achieving it. Moreover, they do not give the authorities an opportunity to interfere unduly in the individual's sphere.

(d) The residual power of Member States

In the Commission's view, since the Community has power to lay down penalties under the Common Agricultural Policy, all the Member States have to do, if necessary, is to implement the existing system of penalties. That residual obligation follows at the same time from Article 8 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the Common Agricultural Policy (OJ, English Special Edition 1970 (I), p. 218), as interpreted at paragraph 23 of the aforementioned judgment in *Commission* v *Hellenic Republic*.

B — *The Commission's power to provide for exclusions and surcharges*

In contrast to the previous submission the *German Government* objects that the Commission has no power to adopt either the provisions for surcharges or those relating to exclusion. As regards exclusions the argument is only in the alternative: it applies only if the Court decides that the Community had power to impose such penalties.

The *Commission* considers that there is no doubt about its power to provide for penalties such as surcharges and exclusions.

The parties' argument raises three queries in relation to the second submission.

— Can the Council's power to provide for penalties such as exclusions or surcharges be delegated to the Commission?

— Have the contested provisions exceeded the limits of delegation allowed by the Treaty?

— Was it not necessary to provide for a special enabling power?

1. *Can the Council's power to provide for penalties such as exclusions or surcharges be delegated to the Commission?*

In the view of the *German Government* Articles 87 and 172 of the Treaty must be interpreted as giving the Council power in principle to provide for penalties such as surcharges or exclusions. Article 172 refers to 'regulations made by the Council pursuant to the provisions of this Treaty' and 'penalties provided for in such regulations'. In any event that power cannot be delegated to the Commission.

That is the only division of powers between the Council and the Commission compatible with the principle of lawfulness and institutional balance propounded by the Court of Justice. Since the Council is to some extent the Community's legislature, it must adopt all the decisions necessary for its functioning. Since the contested measures constitute an interference in the fundamental rights of individuals then fall within that class of measures.

The *Commission* recognizes that in principle the Treaty gives general power to the Council to adopt measures on the basis of Article 40(3) and Article 43(3) of the Treaty. The third paragraph of Article 145 and the fourth paragraph of Article 155 however allow the Council to delegate implementing power to the Commission. In the present case that power was exercised by the two basic Council regulations, namely the third subparagraph of Article 5(9) of the regulation on the common organization of the markets in sheepmeat and goatmeat and Article 12 of the regulation establishing a system of transitional aids to agricultural income.

As regards the arguments of an institutional nature put forward by the German Government the Commission retorts that the relationship between the Commission and the Council cannot in any way be compared to that which exists in a State between the legislative and executive powers. Since neither of those Community institutions is elected by universal suffrage the measures which they adopt have the same form and legal force. Like the Council, the Commission has the power to act by regulation and thus to restrict fundamental rights if that is necessary for the purpose of the rules which it lays down. As regards the Commission's power to act by means of regulation the Commission refers to Paragraph 62 of the judgment in Case 41/69 *Chemiefarma* v *Commission* [1970] ECR 661 from which it is clear that the meaning of implementation in Article 155 of the Treaty is not restricted to the exercise of powers other than those of drawing up regulations.

2. *Have the contested provisions exceeded the limits of delegation allowed by the Treaty?*

Assuming that the power to provide for penalties may be delegated the *German Government* considers that provision for a penalty cannot be regarded as the exercise of an implementing power. Accordingly Articles 145 and 155 of the Treaty which allow implementing power to be conferred on the Commission, along with the provisions of the basic Council regulations, which exercise that power, do not afford a sufficient basis for the Commission's power.

It is true that in the judgments cited by the Commission (in particular Joined Cases 279, 280, 285 and 286/74 *Walter Rau Lebensmittelwerke and Others* v *Commission* [1987] ECR 1069 (the Christmas Butter cases), Case 167/88 *AGPB* v *ONIC* [1988] ECR 1653 and Case 22/88 *Vreugdenhil and Another* v *Minister van Landbouw en Vis-*

serij [1989] ECR 2049) the Court favoured a broad interpretation of the term 'implementation' in the field of agricultural policy but that power cannot extend to measures which, like exclusions or surcharges, go beyond the refund of aid. Such measures do not merely implement Council regulations but supplement them.

After thus setting out its position the German Government considers in detail the various cases cited by the Commission in support of its argument.

First of all it considers that Case 357/88 *Oberhausener Kraftfutterwerke* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1990] ECR 1669, to which the Commission referred in support of its defence, provides no argument to refute the German claim. At Paragraph 7 of that judgment the Court declared that 'the Commission is authorized, in the exercise of the powers conferred on it by the Council with a view to implementing a common organization of the markets in the agricultural sector, to adopt all the detailed rules of application necessary for the proper functioning of the system of aid provided for, so long as they are not contrary to the basic regulation or the implementing rules of the Council'. It added that 'the duty of management and supervision with which the Commission is thus entrusted entails the power to fix periods and to provide for appropriate penalties for their non-observance which may go as far as the total loss of the right to aid if observance of those periods is necessary for the proper functioning of the scheme in question.' The German Government states that at no time has it doubted the Commission's power to adopt measures which, like those, have as sole object the refusal or refund of aid.

Finally it considers that the *Christmas Butter*, *ONIC* and *Vreugdenhil* cases cited by the Commission are based on a principle which does not apply in the present case. The reason that in those judgments the Court favoured a broad interpretation of 'implementation' is that market variations in the agricultural sphere may sometimes call for a speedy reaction on the part of the Community. In the German Government's view there is not the same need with regard to exclusions and surcharges: first they apply permanently and secondly they are intended to remove irregularities and not to provide guidelines for the agricultural market.

Another reason why the reference to the *Christmas Butter* and *ONIC* cases is irrelevant is due to the fact that in both those cases the fundamental rules for the implementation of the measures in question were previously determined by the Council. On the contrary, in the present case the Council's intervention is confined to general enabling rules in the basic regulations.

Objection of the same kind is made by the German Government to the reference to Case 25/70 *Einfuhr-und Vorratsstelle für Getreide und Futtermittel* v *Köster* [1970] ECR 1161 where the Court accepted the extension to exports by the Commission of a system of security established by the Council for the import of cereal products. The German Government maintains that the reason the Court took the view is that the system of security applicable to imports which was to serve as a model to the Commission

for exports had been laid down very precisely by the Council. Once again the German Government observes that in the present case the Commission cannot intervene in such a way.

As for the *Vreugdenhil* judgment, it was finally an occasion for the Court to deny the Commission's right to exercise a power of implementation. Under cover of that power the Commission had in effect altered the scope of Council Regulation No 754/76 on the customs treatment applicable to goods returned to the customs territory of the Community.

To conclude, the German Government states that in a general way there can be no provision for penalties until the implementing measures of the scheme have been defined. It nevertheless considers that the fact that that is so does not permit the Commission to trespass on the Council's powers. More precisely it considers that the Council could adopt the main features of the penalties even before the implementing measures are adopted.

The *Commission* considers that in adopting penalties such as exclusions and surcharges it has not exceeded the limits of its power of implementation as defined in Articles 145 and 155 of the Treaty and the third subparagraph of Article 5(9) and Article 12 of the first and second basic regulations implementing them. In that respect it refers to the judgments in the aforementioned *ONIC*, *Christmas Butter* and *Vreugdenhil* cases in which the Court declared that 'the concept of implementation must be given a wide interpretation' and 'only the Commission is in a position to keep track of agricultural market trends and to act quickly when necessary'.

In any event the contested provisions are confined to implementing the Council regulations without adding anything to the obligations which it creates.

The Court recognized in the judgment in the aforementioned *Oberhausener Kraftfutterwerke* case that the Commission's implementing power included powers to provide for penalties. The Court stated that the duty of management and supervision with which the Commission is entrusted in the common organization of the market entails the power to fix periods and to provide for appropriate penalties for their non-observance which may go as far as the total loss of the right to aid if observance of those periods is necessary for the common organization of the market. In the present case surcharges and exclusions are also intimately associated with the rules of supervision drawn up by the Commission.

More generally, the Commission's power to provide as part of its implementing powers for the financial consequences of the provisions which it adopts has been recognized by the Court in the judgment in the aforementioned *Köster* case. According to the Commission, the system of deposits at issue in that case was like the system of penalties for which the amount to be paid was fixed in advance.

There are objective reasons for the Commission's power in relation to penalties: it is quite logical that the rules relating to supervision and to the penalties necessary for certain systems cannot be adopted until after the terms of application of the systems had been defined.

The reference to the principle of lawfulness is based on a comparison between the organization of States and the organization of the Community. In the Member States the power to impose penalties is generally reserved to the Parliament. If the Parliament decides to delegate that power to the executive, the enabling power, since it affects the fundamental rights of citizens, must be strictly interpreted.

3. *Was it not necessary to provide for a specific enabling power?*

The *Commission* considers that the provisions of the basic regulations which conferred on the Commission an implementing power were sufficiently clear and precise to satisfy the principle of certainty applicable in every State where the rule of law applies. An enabling power sets the framework for the exercise of power and can never be as precise as the rules adopted under that power. Accordingly the rule laid down in the judgments in the aforementioned *Maïzena* and *Könecke* cases that 'a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis' must be confined to actual rules which provide for penalties.

The *German Government* claims that at the very least the Commission's power ought to have been defined more precisely than in the third subparagraph of Article 5(9) of the first basic regulation and Article 12 of the second. The Council ought to have precisely defined the nature of a penalty and its maximum amount.

As authority for that requirement the German Government relies on Article 1 of the Council Decision of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (Decision 87/373, OJ 1987 L 197, p. 33) as well as the principle of lawfulness.

Finally as regards the argument based on Article 1 of Decision 87/373, the Commission notes that there is no limitation on the powers which that article confers on the Commission.

Article 1 of Decision 87/373 provides that when it confers on the Commission implementing powers the Council is to specify the essential elements of these powers.

R. Joliet

Judge-Rapporteur