OPINION OF ADVOCATE GENERAL LENZ

delivered on 13 July 1995 *

A — Introduction

1. The present case concerns the interpretation of certain provisions on aid for the production of soya beans which were in force in 1991.

The rules under Community law

2. The Community has since 1979 been promoting the cultivation of soya beans within its territory by way of special support measures. The purpose in this was to reduce the amounts of soya beans being imported from non-member countries free of customs duty. Council Regulation (EEC) No 1491/85 of 23 May 1985 laying down special measures in respect of soya beans [1] confirmed this policy. This regulation provided that a guide price for soya beans was to be fixed for each marketing year. In the case where this guide price was higher than the world market price, Article 2(1) of the regulation provided that soya beans 'harvested and processed in the Community' should be granted aid (equal to the difference between those two prices). Article 2(2) of the regulation provided that the aid was to be paid to the first purchaser or processor who concluded with the producer a contract providing for payment to the producer of a specified minimum price. Article 2(6) provided that the general rules for granting aid, the detailed rules for checking entitlement to the aid and other conditions were to be laid down by the Council. Article 2(8) of the regulation, finally, provided that the 'detailed rules for implementing this article, particularly in respect of the standard provisions with which the contracts referred to in paragraph 2 must comply' were to be determined by the Commission.

3. The rules requiring to be adopted pursuant to Article 2(6) of Regulation No 1491/85 were set out in Council Regulation (EEC) No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans. [2] Article 2(1) of this regulation provided that aid would be

* Original language: German.

1 — OJ 1985 L 151, p. 15.

2 — OJ 1985 L 204, p. 1, amended by Council Regulation (EEC) No 2218/88 of 19 July 1988 amending Regulation (EEC) No 2194/85 adopting general rules concerning special measures for soya beans (OJ 1988 L 197, p. 12).

granted upon application to any first purchaser or processor [3] of soya beans harvested in the Community who:

'(a) meets at least the following conditions:

— he keeps stock records meeting requirements to be laid down,

— he undertakes to furnish any further supporting documents that may prove necessary for the purpose of checking entitlement to the aid,

— he undertakes to declare the cases referred to in the second subparagraph of Article 6(1);

(b) submits, before a date to be determined, to the competent agency of the Member State in which the beans are harvested:

— a contract concluded with the producer specifying certain conditions,

— a declaration of the quantity of soya beans actually delivered, that document being signed by both parties.'

4. Under Article 5 of Regulation No 2194/85, the amount of aid to be granted was, without prejudice to Article 6, calculated on the basis of the weight of the soya beans indicated in the delivery declaration.

5. Article 6 of Regulation No 2194/85 was worded as follows:

'(1) Producer Member States shall set up a control system ensuring that only the products entitled to aid receive it. This system shall include, in particular, sample checking on the areas cultivated and on the stock records and, where

3 — The original version of Regulation No 2194/85 referred to the 'first purchaser'. After amendment by Regulation No 2218/88, however, the provision referred, in contrast, to the 'processor'. The purpose behind this was possibly to ensure that aid would be paid only to those first purchasers who were also processors (see also the second paragraph of Article 2 of the regulation). However, other provisions in the regulation continue, even after the amendment, to refer to the 'first purchaser'. This issue does not call for detailed examination here, since it has no bearing on the reply to the questions submitted.

appropriate, on the financial records of applicants for aid.

The Member States shall carry out suitable checks:

— each time the quantity delivered by a producer to a first purchaser exceeds that which may be reasonably produced on the area concerned, or

— in doubtful cases.

(2) Member States shall assist one another.'

6. The rules implementing these provisions were laid down in Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans. [4] Article 6(2) of this regulation set out the information which had to feature in the contract concluded with the producer of the soya beans. That information covered, in particular, the following:

'(e) the actual area sown with soya beans, in hectares and ares;

(f) the particulars necessary for the identification of the areas in question ...

(g) the yields obtained by the producer at the previous harvest'.

7. Particular importance attaches in the present context to Article 6(3) of this regulation, which was worded as follows:

4 — OJ 1989 L 245, p. 8, amended by Commission Regulation (EEC) No 150/90 of 19 January 1990 (OJ 1990 L 18, p. 10). Regulation No 2537/89 replaced Commission Regulation (EEC) No 2329/85 of 12 August 1985 laying down detailed rules for the application of the special measures for soya beans (OJ 1985 L 218, p. 16), which first applied in this area.

'After the contract has been signed, the areas indicated in accordance with paragraph 2(e) and (f) may not be used by the producer for any other purpose than for cultivating soya beans, except in cases of *force majeure*.

As a consequence, any change in the use to be made of areas indicated which may take place after the contract has been signed but before it has been lodged with the competent agency must be the subject of an amendment to the contract correcting such areas and specifying the reason for the change.

In addition, any change in the use to be made of all or part of the areas indicated occurring in the three months preceding the date laid down for the beginning of harvesting of soya beans covered by the contract must be notified by the producer to the competent agency, to the agency responsible for control and to the first purchaser each time that such a change involves more than 10% of the area indicated and more than one hectare of area. Such notification must be made in writing within eight working days from the date on which the change took place.'

8. Article 6(5) of the regulation provided for specific penalties in the event of breach of those provisions. A consideration of the versions of this provision in the different official languages will highlight what are in some respects considerable differences. If we take as our basis the Italian and French versions, the following text may come closest to the legislative intention when the provision was being drafted:

Failure to comply with the provisions of paragraph 2(e) and (f) or paragraphs 3 and 4 may invalidate the contract for the purposes of this regulation and beans harvested under that contract may no longer be eligible for aid, unless it can be proved, to the satisfaction of the Member State, that there has been no serious negligence or serious fault. In addition, failure to comply with the provisions of paragraph 3 may result in the producer being excluded from qualifying for aid under the regulation for the duration of the following marketing year unless it is proved that there has been no serious negligence or serious fault.

However, the provisions of the preceding subparagraph apply only where inspection of the areas shows a difference of more than 10% between the areas declared and the areas actually sown and which may be harvested.

This, as already mentioned, is an attempt to reconstruct actual intention. The German version of this provision, in particular, suggests quite a different meaning. [5]

9. Regulation No 2537/89 was amended by Commission Regulation (EEC) No 150/90 of 19 January 1990. [6] This amendment was intended, 'for the sake of legal clarity', to amend the provisions of Regulation No 2537/89 'covering the consequences of irregularities committed by operators'. This amendment led *inter alia* to the deletion of Article 6(5). At the same time, a new Article 29a was included, which is worded as follows:

'Should an irregularity be discovered on the occasion of a control or verification the following provisions shall apply, without prejudice to any other measures applicable.

1. An irregularity consequent on a deliberately false declaration or serious negligence by the producer on the occasion of conclusion of the contract referred to in Article 6 or of its execution, in particular as regards the accuracy of the information referred to in Article 6(2) or compliance with the provisions of Article 6(3), shall render the contract invalid for the purposes of this regulation, render the beans under the contract ineligible for aid and exclude the producer from the benefit of the provisions of this Regulation throughout the following marketing year.

...

2. ...

3. ...

4. The sanctions specified in this Regulation, and in particular the penalties laid down in Article 21(2) and 32(4), shall be determined on the basis of the nature and gravity of the infringement and at the level necessary to

5 — The German version, which can indeed be regarded as a contribution to the theme of humour in the law, is worded as follows:
'Die Nichtbeachtung der Vorschriften des Absatzes 2 Buchstaben e) und f) oder der Absätze 3 und 4 zieht die Ungültigkeit des Vertrages im Hinblick auf die vorliegende Regelung nach sich. Die Sojabohnen, die unter diesem Vertrag geerntet werden, verlieren die Beihilfefähigkeit, es sei denn, daß nach der Überzeugung der Mitgliedstaaten weder Fahrlässigkeit noch ein schwerer Fehler vorliegt. Im übrigen kann die Nichtbeachtung der Vorschriften des Absatzes 3 den Ausschluß des Erzeugers von den Vergünstigungen der vorliegenden Regelung für die Dauer des folgenden Wirtschaftsjahres nach sich ziehen, falls weder Fahrlässigkeit noch ein schwerer Fehler vorliegt.
Die Bestimmungen des vorstehenden Unterabsatzes finden keine Anwendung, wenn die Kontrolle der Flächen eine Differenz zwischen den erklärten Flächen und den tatsächlich eingesäten Flächen, die geerntet werden können, erkennen läßt, die größer als 10% ist.'

6 — OJ 1990 L 18, p. 10.

ensure proper operation of the mechanism in question.'

10. For the sake of completeness, it should be mentioned that the above system of aid for soya production in the Community has in the interim been amended in significant respects by Council Regulation (EEC) No 3766/91 of 12 December 1991 establishing a support system for producers of soya beans, rape seed and colza seed and sunflower seed [7] and by Council Regulation (EEC) No 1765/92 of 30 June 1992 establishing a support system for producers of certain arable crops. [8] These changes are, however, irrelevant for the purposes of the present proceedings, since they did not enter into force until 1992 or later. [9]

Background to the national proceedings

11. On 27 May 1991 Cereol Italia Srl (hereinafter 'Cereol') concluded a contract with Azienda Agricola Castello Sas (hereinafter 'Castello') relating to the cultivation of soya beans during the 1991/92 marketing year. Cereol undertook in that contract to pay to Castello the minimum price applicable for soya beans. The area to be cultivated was stated in the contract to be 93.22 hectares.

12. Cereol submitted this contract to the competent agency in Italy, the Azienda di Stato per gli Interventi nel Mercato Agricolo (State Agency for Intervention on the Agricultural Market) (hereinafter 'AIMA'), and applied for aid on the basis of the Community provisions outlined above. [10] Pursuant to its application, Cereol received aid from AIMA in the amount of LIT 112 509 187.

13. In the course of an inspection carried out on 7 October 1991, the Ispettorato all'Agricoltura di Treviso (the Agricultural Inspectorate, Treviso) found that, instead of the 93.22 hectares declared, only 77 hectares had actually been planted. Castello claims that this reduction in the area under cultivation was attributable in part to urgent renovation work on drainage ditches and in part to water retention following heavy rainfall. This inspection resulted in a lengthy exchange of correspondence between AIMA, Cereol and Castello. AIMA finally informed Cereol that in view of the irregularities

7 — OJ 1991 L 356, p. 17.

8 — OJ 1992 L 181, p. 12.

9 — These two regulations are examined in greater detail by Advocate General Jacobs in his Opinion of 9 March 1994 in Case C-353/92 *Greece* v *Council* [1994] ECR I-3411.

10 — The information available does not make it unequivocally clear whether Cereol applied for this aid as a 'processor' (as the Commission argues) or as a 'first purchaser'. Cereol, which did not take part in the oral procedure before the Court, used the term 'first purchaser' in its written observations. The question does not require consideration, since it has no bearing on the reply to the questions submitted (see also footnote 3).

committed by Castello the contract had to be treated as invalid and the soya beans in question did not qualify for aid. According to Castello, AIMA also decreed at the same time that Castello would be excluded during the following marketing year from entitlement to benefit under the aid rules. AIMA requested Cereol to repay the aid which it had received.

14. Cereol thereupon brought proceedings against Castello in order to avoid incurring any loss as a result of the request by AIMA. The court before which Cereol brought the matter, the Tribunale Civile e Penale di Ravenna (Civil and Criminal Court, Ravenna), formed the view that the decision in the action brought by Cereol depended on prior elucidation of a number of issues of Community law.

15. The Tribunale Civile e Penale di Ravenna has accordingly referred the following questions to the Court for a preliminary ruling:

'(1) Was the aim of Council Regulations (EEC) No 1491/85 and No 2194/85 (having regard in particular to the eighth recital in the preamble, to Article 2 and to Article 5(1)) for the period up to the 1992/93 marketing year (in other words prior to Council Regulations No 3766/91 and No 1765/92) to ensure the payment of aid in respect of soya beans produced solely within the Community territory, calculated in accordance with the quantity actually produced, the primary obligation for the producer interested in the aid being to produce the soya within the territory of one of the Member States?

(2) Is the duty to notify, set out in Article 6(3) of Commission Regulation (EEC) No 2537/89, one of the methods designed to enable the Community origin of the product to be determined, and as such should it, in the light of previous Community case-law, be considered a secondary obligation in relation to the primary obligation referred to in Question 1?

(3) If the reply to the first two questions is in the affirmative: has the Commission, in adopting Article 29a of Regulation (EEC) No 2537/89, introduced by Regulation (EEC) No 150/90 (imposing serious penalties if the producer is negligent in the execution of the contract, in particular in the observance of Article 6(3)), exceeded the powers conferred on it by the Council in Article 2(8) of Regulation (EEC) No 1491/85 by imposing the penalty, in the case of failure to fulfil one of the secondary obligations, of loss of the entitlement flowing from fulfilment of the primary obligation, thus misusing its powers?

(4) If Question 3 is answered in the negative: does Article 29a of Commission Regulation (EEC) No 2537/89, introduced by Commission Regulation (EEC) No 150/90, which provides that for any serious negligence by the producer in the execution of the contract (in particular as regards compliance with Article 6(3)) the penalty shall be that the contract is rendered invalid, the beans produced under the contract are ineligible for aid and the producer is excluded from the benefit of the aid throughout the following marketing year, infringe the principle of proportionality as defined by the Court of Justice?

(5) If Question 4 is answered in the negative: should the expression "change made in the use of the areas indicated [in the contract]" used in Article 6(3) of Commission Regulation (EEC) No 2537/89 be understood as referring only to the use of part of the area for an agricultural product other than that declared in the contract?

(6) If Question 5 is answered in the negative: does the duty to notify any change in use of part of the areas indicated which occurs in the three months preceding the date laid down for the beginning of harvesting, as set out in the third subparagraph of Article 6(3) of Commission Regulation (EEC) No 2537/89, still apply when the changes occurred before the three months preceding the actual date of the beginning of the harvest of the soya beans which form the subject-matter of the contract?

(7) If Question 5 is answered in the negative: does the duty to notify any change in use involving more than 10% of the area indicated in the contract, as set out in the third subparagraph of Article 6(3) of Commission Regulation (EEC) No 2537/89, still apply in cases where several changes have occurred over time, none of them of itself involving more than 10% but which, taken as a whole, exceed that percentage?'

B — Analysis

The first two questions in the reference

16. In its first question, the national court seeks to determine whether, under the rules in force at the material time, aid was payable only for soya beans produced within the Community and whether the principal obligation on producers interested in receiving

aid was to grow soya beans in the Community. The second question seeks to determine whether the obligation to notify laid down in Article 6(3) of Regulation No 2537/89 should be regarded as a secondary obligation in relation to the principal obligation mentioned in the first question. These questions ought therefore logically to be examined together.

17. The distinction between principal and secondary obligations plays a significant role in the Court's case-law on the rules of Community law governing aid. According to this case-law, an obligation will be a 'principal' obligation if it is 'essential in order for the measure in question to achieve its aim' [11] and its observance is 'of fundamental importance to the proper functioning of a Community system'. [12] Although this distinction is not by itself significant, it is important with regard to the question of the penalties which may be imposed for breaches of obligations laid down in Community-law rules. According to the case-law, total exclusion from the benefit of a favourable Community measure is, for instance, justified under the principle of proportionality in the case where principal obligations have been breached. [13] This, however, does not apply with regard to secondary obligations 'whose infringement should not be punished with the same rigour as is applied to the failure to fulfil a principal obligation'. [14] The question here, therefore, is whether the imposition of certain penalties for breach of a specific obligation is compatible with the principle of proportionality.

The issue of the proportionality of the penalties in the aid rules here under consideration also forms the subject-matter of the fourth question in the reference. This latter question concerns the specific content of the penalties for the breach of the obligation arising under Article 6(3). In the context of the first two questions submitted, therefore, it is necessary only to consider whether breach of this obligation can at all attract such serious penalties, and thus whether — to employ the terms used by the national court — this obligation constitutes a primary or a secondary obligation.

18. Before examining the present case, it may be useful to consider some of the cases in which the Court has already had to address the issue of the proportionality of penalties for the breach of specific obligations.

11 — Judgment in Case C-2/93 *Exportslachterijen van Oordegem* [1994] ECR I-2283, paragraph 26.

12 — Judgment in Case 21/85 *Maas* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1986] ECR 3537, paragraph 15.

13 — Judgment in *Exportslachterijen van Oordegem*, cited above in footnote 11, paragraph 27.

14 — Judgment in *Maas*, cited above in footnote 12, paragraph 15.

The judgment in *Buitoni* [15] concerned licences for the importation of tomato concentrate from non-member countries. The licences were issued only if the applicant had previously lodged a security, which was released once proof of importation had been submitted. The relevant Commission regulation specified that this proof had to be submitted within a period of six months, which — as a recital in the preamble to the regulation in question mentioned — had been introduced 'for administrative reasons'. The regulation provided for forfeiture of the security if the proof was not furnished within this period. The Court ruled that this 'fixed penalty', which was imposed for an infringement which was considerably less serious than that of failure to fulfil the obligation which the security itself was intended to guarantee, had to be treated as 'excessively severe' and consequently as disproportionate. [16]

The *RU-MI* case [17] concerned aid granted for denatured skimmed-milk powder intended as animal feed. Payment of the aid was refused in that case because the Commission formed the view that the denaturing process had departed very slightly from the specified norms. The Court pointed out that there was a considerable risk that the product in question might be used for other, unauthorized purposes and that the Commission was therefore entitled to lay down 'strict conditions'. In the Court's view, the Commission was justified in adopting provisions 'which entail withholding of the aid and loss of the security for failure to fulfil the principal obligation laid down in the tendering procedure and was not obliged to vary the severity of the measure in question according to the gravity of the tenderer's failure to comply with that obligation'. [18] The Court gave a similar ruling in its judgment in *Société Laitière de Gacé*. [19]

The judgment in *Fromançais* [20] concerned tenders for the sale of cheap butter for specified purposes. The successful tenderer was required to ensure that the butter was processed within a specified period. The regulation provided for forfeiture of the security lodged by the successful tenderer if processing was not carried out within this period. The Court found that the aim of this rule was to prevent speculation. This aim was 'of fundamental importance' to the proper functioning of the system. The Court concluded from this that withholding the security in full when this period was exceeded was not a disproportionate measure. [21]

The judgment in *Maas*, [22] finally, concerned aid for the export of grain in connection with food aid for Ethiopia. Shipment had to be completed within a specified period;

15 — Judgment in Case 122/78 *Buitoni* v *FORMA* [1979] ECR 677.

16 — Judgment cited in footnote 15, paragraphs 19 and 20.

17 — Judgment in Case 272/81 *RU-MI* v *FORMA* [1982] ECR 4167.

18 — Judgment cited above in footnote 17, paragraphs 13 and 14.

19 — Judgment in Case 273/81 *Société Laitière de Gacé* v *FORMA* [1982] ECR 4193.

20 — Judgment in Case 66/82 *Fromançais* v *FORMA* [1983] ECR 395.

21 — Judgment cited above in footnote 20, paragraphs 13 and 18.

22 — Cited above in footnote 12.

furthermore, the provisions of the regulation in question stated that no ships which had been in service for more than 15 years could be used. Failure to comply with those provisions entailed forfeiture of the security which had to be lodged. The Court ruled that forfeiture of the security could not be justified where the shipment period was exceeded by only a short time, provided that this did not impair the 'proper functioning' of the food-aid system. [23] With regard to the ship used, the Court pointed out that the party concerned had informed the intervention agency in advance, as it was required to do under the relevant provisions. The intervention agency could therefore have averted the infringement of the obligation in question by objecting to the choice of that ship. The Court also pointed out that a more recent regulation dealing with food aid for Lesotho no longer imposed a similar obligation. From this the Court concluded that this obligation was not viewed by the Commission itself 'as being of fundamental importance to the proper accomplishment of the transport operation'. The total forfeiture of the security was therefore to be regarded as a disproportionate penalty. [24]

19. Let us now consider the present case. It is common ground that the aid promised under Regulations No 1491/85 and No 2194/85 is intended exclusively for soya beans produced within the Community. This follows from both the wording and purpose of those provisions. [25] There can therefore be no doubt that the obligation to grow soya beans within the territory of one of the Member States constitutes a principal obligation for a producer interested in securing aid.

20. Likewise, there can be no doubt that the aid is dependent on the quantity of soya beans produced. As I have already mentioned, the aid was to be calculated, under Article 5(1) of Regulation No 2194/85, on the basis of the weight of beans indicated in the delivery declaration. The aid rules for consideration here can be quite fundamentally distinguished on this point from the system which subsequently replaced it. Article 2(2) of abovementioned Regulation No 1765/92 provides that aid was to be granted *in relation to the area under cultivation*, irrespective of the quantity actually produced.

21. The only question to be addressed, therefore, is whether the obligation to notify, laid down in Article 6(3) of Regulation No 2537/89, is an 'obligation which is essential in order for the measure in question to achieve its aim' or is simply a secondary obligation.

22. I take the view that the obligation set out in Article 6(3) of Regulation No 2537/89 to notify changes in the use of the area declared is of essential importance for the rules on aid here under consideration and must therefore be treated as a principal obligation in the above sense.

23 — Judgment cited above in footnote 12, paragraph 18.

24 — Judgment cited above in footnote 12, paragraphs 24, 26 and 28.

25 — See point 2 above in this regard.

23. As has already been found, aid was payable under the above provisions only in respect of soya beans grown in the Community. In view of the fact, however, that soya beans harvested within the Community cannot apparently be distinguished in appearance from soya beans imported from non-member countries, there arose a need to have controls. [26] The Council also recognized this need when it adopted Regulation No 2194/85, as becomes evident from the eight recital in the preamble to that regulation, which is worded as follows:

'..., if these measures are to operate properly, a control system is required ensuring that only the products entitled to aid receive it; ... it is necessary for this system to include, *in particular, sample checking on the areas cultivated* and on the stock records and, where appropriate, on the financial records of applicants for aid'. [27]

This in itself demonstrates that the area under cultivation has a very special role to play in this aid scheme.

24. This point is given additional emphasis by the rule contained in Article 6(1) of Regulation No 2194/85. The first subparagraph of Article 6(1) required Member States to set up an appropriate control system including, 'in particular, sample checking on the areas cultivated'. The second subparagraph of Article 6(1) required Member States to carry out checks 'each time the quantity delivered by a producer ... exceeds that which may be reasonably produced on the area concerned'. [28] This corresponds to Article 26(2) of implementing Regulation No 2537/89, under which the authorities were required to verify, 'by means of random checks, that the quantities indicated in the delivery declaration could have been produced in the area indicated in the contract according to the established yields for that production zone'.

25. It is very clear from those provisions that the control mechanism provided for by that regulation focuses essentially on the cultivation area used by the producer. In order to carry out their controls the authorities of the Member State concerned require reliable information on the dimensions of the area under cultivation and its yield potential. It is for this purpose that Article 6(2) of implementing Regulation No 2537/89 requires an indication of the area sown and of the yields obtained by the producer at the previous harvest. However, if the controls are intended to determine whether the quantity delivered 'exceeds that which may be

26 — The Commission's representative underlined this need during the oral procedure before the Court by pointing out that the target price for soya beans applicable in the Community at the material time was approximately double that of the price on the world market.

27 — Emphasis added.

28 — It may be recalled that the first purchaser was obliged under heading (a) of the first paragraph of Article 2 of Regulation No 2194/85 to report such cases to the competent authorities of the Member States.

reasonably produced on the area concerned', it is obvious that the authority will be able to determine this only if it knows the *actual* area which was harvested. If, therefore, changes in the area under cultivation occur after conclusion of the contract between the producer and the first purchaser or processor, these changes must be notified to the competent authorities of the Member State in question.

A hypothetical example may illustrate the point. If at first a specific cultivation area is indicated which can be expected to yield 100 tonnes, but the producer subsequently decides to use only part of this area for soya production, the yield will be correspondingly less and will, for instance, amount to only 10 tonnes. Since the national authority, unless notified of this change, will continue to assume that a yield of 100 tonnes can be expected from the area indicated, it would not notice if the producer were to supplement the 10 tonnes which he has produced with 90 tonnes of soya beans imported from non-member countries and declare these 100 tonnes as his own production.

26. The obligation to notify changes in the area under cultivation is thus of fundamental importance for the implementation of the controls provided for in those regulations. Since these controls are necessary in order to ensure that only soya beans produced in the Community can benefit from the aid rules, this obligation to notify must accordingly be treated as a principal obligation in the above sense.

27. Contrary to the views expressed by Castello, this finding is not altered by the fact that the national authorities also have other possibilities of control open to them. Admittedly, it is true that the indication of the cultivation area and the yields obtained on it for the previous harvest allows only an approximate and not particularly accurate control. It is equally true, as Castello notes, that according to the abovementioned eighth recital in the preamble to Regulation No 2194/85 stock records and, where appropriate, financial records of the undertakings concerned can be checked. The Commission, however, correctly points out that examination of the information on the cultivation area and yield makes it possible to carry out a straightforward and effective control and may render unnecessary more extensive control measures involving considerably greater inconvenience for the undertakings concerned. This is all the more significant in view of the fact that the examination under the rules to be considered here can in any event only be carried out by way of random samples. The existence of an easily applicable method of control therefore not only serves to facilitate administration of the scheme but is also of fundamental significance in making that system of control effective. Finally, I also find convincing the Commission's argument that the system of control under the aid rules rests on several 'pillars', all of which are essential for the proper functioning of those rules, without any one of those possibilities of control — considered in isolation

— being sufficient to ensure that the objective of the rules on aid can be attained.

28. Contrary to Castello's argument, the interpretation which I have adopted does not in any way result in the rules contained in Regulation No 1765/92 being rendered applicable in substance to facts predating their entry into force. The essential distinction between the aid scheme for soya beans here under consideration and that provided for in Regulation No 1765/92 is not affected, since it remains the case that under the scheme to be considered here the aid is calculated according to the quantity of produce delivered, not according to the area under cultivation.

The third question in the reference

29. By its third question, the national court seeks to determine whether the Commission exceeded its powers by providing in Article 29a of Regulation No 2537/89 for severe penalties even in the case of a breach of secondary obligations. This question is submitted in the event that the first two questions are answered in the affirmative. This is not the case, since — as I have already explained — the obligation to notify laid down in Article 6(3) of Regulation No 2537/89 must be regarded as a principal obligation and not as a secondary one. It is for that reason unnecessary to examine the third question submitted in any detail.

30. Were it necessary to reply to this question, my view is that it would in any event have to be answered in the negative. The Council conferred express power on the Commission by Article 2(8) of Regulation No 1491/85 to adopt the necessary implementing measures. According to the case-law, those implementing measures include all provisions which are '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'. [29] There can be no doubt that these implementing measures can also include penalties for the breach of obligations arising under the rules in question. [30] There is no contradiction with the regulations of the Council, since Council Regulation No 2194/85 refers expressly to the need for controls. Such controls, however, would scarcely make any sense if it were not possible to impose penalties for breaches of the obligations subject to them.

31. The question whether the Commission provided, in its implementing measures, for penalties commensurate with the breaches of the particular obligations in question will be

29 — Judgment in Case C-357/88 *Hopermann* [1990] ECR I-1669, paragraph 7.

30 — See, for instance, the judgment in Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 38.

addressed in my examination of the fourth question.

The fourth question in the reference

32. The national court seeks by its fourth question to ascertain whether the rule contained in Article 29a of Regulation No 2537/89 is compatible with the principle of proportionality. As is clear from the wording of the question, the national court appears from all the evidence to be proceeding on the basis that *all* the penalties provided for in Article 29a are to be imposed in *all* cases in which the producer demonstrates serious negligence in the performance of the contract. This also appears to have been the view of AIMA, which, according to the information given by Castello at the hearing before the Court, imposed those penalties more or less 'automatically', that is to say, without more detailed examination of the facts of the case.

33. Consideration of the wording of Article 29a(1) will show that such an interpretation does in fact readily suggest itself. This provision presumes an irregularity that is attributable to an intentionally false declaration or to serious negligence on the part of the producer when concluding the contract under Article 6 of Regulation No 2537/89 or during its performance, in particular with regard to the duties arising under Article 6(2) and (3). If there is such an irregularity, Article 29a(1) provides that the contract between the producer and the first purchaser or processor will be invalid, that the soya beans produced pursuant to that contract will not be eligible for aid '*and*' that the producer will be excluded from the benefit of the aid scheme throughout the following marketing year. It thus appears that these penalties are to be applied *cumulatively*.

34. If this were the content of Article 29a(1), it would certainly generate some misgivings in the light of the principle of proportionality. Admittedly, the first two penalties mentioned in Article 29a(1) are closely interrelated and can in one sense be regarded as the two sides of the same coin. If, in the event of an irregularity within the meaning of that provision, the soya beans were excluded from entitlement to aid, this penalty would not affect the producer, who is responsible for this irregularity, but rather the first purchaser or processor. If the irregularity were to have no effect on the contract concluded between the latter and the producer, the producer would continue to be entitled to the minimum price, payment of which was guaranteed to him in that contract. The producer would thus avoid being adversely affected himself despite being responsible for the fact that the beans would no longer qualify for aid. The penalty of invalidity of the contract under Article 29a(1) removes this anomaly. Penalties of this kind, which deprive the undertakings involved of the benefits accruing from the aid scheme if they breach the

relevant obligations, are also to be expected in such a scheme.

The same does not hold true for the other penalty mentioned in Article 29a(1), under which the producer is excluded from the benefit of the aid scheme *throughout the following marketing year*. This would appear in all respects to be a penalty in which the idea of deterrence plays an important role. It would be disconcerting if this penalty were to be imposed in every case of an irregularity based on intentional conduct or serious negligence with regard to compliance with Article 6. For example, in the case — covered by Article 29a(1) according to its wording — where the date of signature of the contract, to be indicated under Article 6(2)(b), is incorrectly given, whether intentionally or through serious negligence, it would surely be more than questionable whether this severe penalty may or even must be imposed on the producer for that reason. As Castello correctly points out, the principle of proportionality essentially requires that penalties be graded in such a way that serious breaches will be penalized more heavily than will minor breaches. [31]

35. The resulting doubts concerning the proportionality of the system of penalties outlined have, however, in my view been removed by the Commission's replies to the written questions put to it. According to the Commission, Article 29a(1) of Regulation No 2537/89 must be read in conjunction with Article 29a(4), under which the sanctions specified 'in this Regulation' are to be determined 'on the basis of the nature and gravity of the infringement and at the level necessary to ensure proper operation of the mechanism in question'. This provision in fact allows the required distinction to be drawn when penalties are being imposed. Considered from this perspective, it follows that the penalties provided for in Article 29a*(1)* need not necessarily be imposed cumulatively, despite the ambiguous wording of that provision, but that this will happen only if the 'nature and gravity of the infringement' and the 'proper operation' of the aid scheme so require. In my opinion, a comparison with the provision in Article 6(5) of the regulation, which was deleted on the introduction of Article 29a, shows that this in fact corresponded to the legislative intention. [32]

36. In the light of the case-law of the Court already considered, [33] it seems to me that the argument that the penalties as such cannot be criticized requires no further justification. The provisions contained in Article 6(2) and (3) of Regulation No 2537/89 are of central importance for the functioning of the aid scheme. It is for that reason entirely appropriate that breaches of those provisions

31 — Castello aptly refers in this regard to the second subparagraph of Article 4(3) of Regulation No 2194/85, which provides that the security to be lodged when the request for aid is submitted will, under certain conditions, be forfeit 'in whole or in part'.

32 — In this regard, see point 8 above.

33 — See point 18 above.

should be liable to be penalized by depriving the first purchaser or processor of entitlement to aid and the producer of entitlement to the minimum price. Exclusion of the producer from entitlement to the benefits of the aid scheme throughout the following marketing year may be necessary in serious cases in order to ensure compliance with those obligations. It must be borne in mind in this regard that all of these penalties can in any event be imposed only if the irregularities are attributable to intention or to *serious* negligence on the part of the producer. It follows from all these considerations that the penalty rules here in issue do satisfy the requirements of the principle of proportionality.

37. In view of what follows, however, it seems to me that some clarification is necessary at this point. The Commission expressed the view during the hearing that a breach of the obligation to notify laid down in Article 6(3) of Regulation No 2537/89 in itself already constitutes a case of serious negligence (and therefore comes under Article 29a(1)). This view must be categorically rejected. Breach of the obligation to notify is one of the *objective* aspects of Article 29a(1). The issue of intention or serious negligence, on the other hand, relates to the *subjective* aspects of that provision and thus concerns the question of the *imputability* of the breach. One cannot, however, infer the existence of intention or serious negligence from the mere fact of the breach without seeking to deprive this subjective element of all meaning. Had the Commission in fact intended, when adopting the provision, to give it such a meaning, it must in any event be stated that this is not evident from the provision. In view of the punitive nature of the provision, this reason is by itself, in my view, a sufficient basis for rejecting the interpretation suggested by the Commission.

The fifth question in the reference

38. The fifth question in the reference concerns the interpretation of the expression 'change in the use to be made of areas indicated' used in Article 6(3) of Regulation No 2537/89. The national court seeks to determine whether this is to be understood as covering only those cases in which the areas in question are used for agricultural production other than the cultivation of soya beans. This question is explicable in the light of the particular circumstances of the case. As I have already mentioned, Castello submits that it was obliged to withdraw from use a portion of the area earmarked for soya bean cultivation because of urgent renovation work and weather conditions. Castello concludes from this that the areas in question had lain fallow and that it was consequently not possible to speak of a 'use' for agricultural purposes.

39. It is not clear from the wording of the provision whether it was also intended that the producer should in such cases be obliged to notify this change. It can, however, be

held that such an interpretation is entirely consistent with the wording. [34]

40. It is, however, obvious that the only interpretation that will take proper account of the purpose and object of the provision is that under which *all* changes in the use to be made of the areas in question must be notified. The information on the area under cultivation and any changes to it is intended to enable the national authorities to carry out the necessary controls. As already mentioned, the national authorities must for this purpose know the *actual* area which was harvested. [35] It is for that reason immaterial whether the areas in question were put to a different agricultural use or simply lay fallow.

The sixth question in the reference

41. The national court wishes by its sixth question to determine whether the third subparagraph of Article 6(3) of Regulation No 2537/89 also requires notification of changes regarding the area under cultivation which occur more than three months before the beginning of the harvest. During the hearing before the Court, Castello stated that harvesting was carried out on 25 September. The first reduction in the area under cultivation was made on 22 June and the second at the beginning of September. It will be for the national court to determine the accuracy of that information. For the purpose of replying to the sixth question in the reference, I shall assume that at least some of the changes to the area under cultivation did in fact occur at a date prior to the three-month period preceding the harvest mentioned in the third subparagraph of Article 6(3).

42. In the event of a change to the area under cultivation taking place after the signing of the contract between the producer and the first purchaser or processor but before it has been lodged with the competent agency, the *second subparagraph* of Article 6(3) of Regulation No 2537/89 required that the contract be amended accordingly. Under the *third subparagraph* of Article 6(3), changes to the area under cultivation occurring in the period of three months preceding the beginning of the harvest had to be notified if they were of specified dimensions. A literal interpretation of those provisions would therefore suggest that changes to the area under cultivation occurring *after* the contract had been lodged with the competent agency but *before* the start of the three-month period preceding the beginning of the harvest did not have to be notified.

43. The Commission first of all submitted that such cases were covered by the second

34 — See also the French version ('toute altération ... dans la destination'), the Italian version ('qualsiasi modifica ... alla destinazione'), the English version ('any change in the use'), the Dutch version ('elke wijziging ... in de bestemming'), the Spanish version ('toda alteración ... en el destino'), the Portuguese version ('qualquer alteração em relação à utilização') and the Danish version ('enhver ændring i anvendelsen').

35 — See point 25 above.

subparagraph of Article 6(3). In view of the clear wording of that provision, this view does not seem to me to be tenable. In reply to a written question put by the Court, the Commission stated that it would be contrary to the meaning of the provision if one were to assume that the producer was not in such cases under an obligation to notify. In the Commission's opinion, it follows from the second and third subparagraphs of Article 6(3) that changes occurring before the start of the three-month period preceding the beginning of the harvest must also be notified.

44. I agree with the Commission that this teleological interpretation is the one which best reflects the purpose and object of the provisions. As already mentioned, the obligation to notify laid down in Article 6(3) is designed to ensure that the competent agencies have available to them accurate information on the areas *actually* used for soya bean production. It is immaterial in this regard whether a change in the area under cultivation occurs during or before the period mentioned in the third subparagraph of Article 6(3).

45. The Commission has, however, been unable to explain why the third subparagraph refers to the period of 'three months preceding the ... beginning of harvesting'. If the Commission's view is correct, this entire passage would have to be regarded as superfluous. However, the existence of this passage does seem to indicate the pursuit of a specific objective. Admittedly, it is not clear what that objective might have been.

46. That notwithstanding, I take the view that the interpretation proposed by the Commission can also be reconciled with the dictates of legal certainty. Although the scope of interpretation is limited by the clear wording of a provision, it must, none the less, be pointed out that the provision is not entirely free from doubt inasmuch as it specifies the period in question by referring to a point in time which it will hardly ever be possible to determine precisely in advance. It is scarcely wrong to suppose that the soya bean harvest, just like that of other agricultural products, will, depending on the climatic conditions, sometimes take place before and sometimes after the date initially contemplated. In view of the fact that the changes in question must, according to the second sentence of the third subparagraph of Article 6(3), be notified 'within eight working days from the date on which the change took place', it was entirely possible that the producer might not have been at all certain at the time in question whether the change occurred in that three-month period. A prudent producer would therefore in any event have notified a change in the area under cultivation if he was at all uncertain.

More importance, however, attaches to the fact that a lacuna clearly unintended by the legislature would otherwise arise. The *first subparagraph* of Article 6(3) provided very generally that the cultivation areas indicated could, *after signature of the contract*, be used solely for the production of soya beans. Only an interpretation under which all changes occurring after that date required in principle to be notified would correspond to the legislative decision expressed therein. The assignment to two separate provisions of the obligation arising under the first subparagraph is explicable on the ground that the *actual* areas under cultivation had to be notified to the competent agencies. So long as the contract had not yet been lodged with the competent agencies, the contracting parties could still take account of new developments, whereas they could not do so after this date. For that reason, account had to be taken of *all* changes occurring before the contract was lodged, whereas only substantial changes would give rise to an obligation to notify after the contract had been lodged.

47. It must, however, be borne in mind that the reference in the third subparagraph to the period of three months preceding the harvest might well have created confusion among the producers concerned regarding the extent of the obligation to notify which was imposed on them. In those circumstances, the national court will have to consider with particular care whether any breach of that provision which Castello may have committed was based on *serious* negligence (or was even intentional). My own view is that it is quite doubtful whether there was at all a case here of negligence. If the Commission is not in a position to use appropriate and unambiguous words to set out a provision which — as we have already seen — is of crucial importance for the operation of the entire aid scheme, it will scarcely be possible to criticize those to whom the provision was addressed if they understand it in the manner suggested by the wording.

The seventh question in the reference

48. The seventh and final question in the reference concerns a problem of interpretation similar to that just considered. The third subparagraph of Article 6(3) of Regulation No 2537/89 required a change to the area under cultivation to be notified 'each time' that the change involved more than 10% of the area indicated and more than one hectare of area. This would appear to suggest that every change had to be considered separately. What is the position, however, in the case where several changes followed in succession, none of which in itself exceeded 10% of the area under cultivation but which, in their totality, did exceed that percentage?

49. On this point, too, I share the Commission's view that the interpretation of this

provision must take account of its purpose. That purpose was to provide the competent agencies with the most accurate information possible on the areas *actually* used for cultivation. In order to simplify matters, it was provided that the obligation to notify would be limited to changes which were substantial in terms of their extent. If, however, one were to apply the 10% threshold mentioned in the third subparagraph to every individual change, this could have the result that changes which might in total be considerable would not have been subject to notification simply on the ground that each individual change did not amount to more than 10% of the area under cultivation. The present case could exemplify this point. This cannot be the purpose of the provision. In my opinion, therefore, it must be assumed that in such cases notification had to be made under the third subparagraph, and also within eight working days, of the change by which the above threshold was exceeded.

50. One indication that this is the interpretation intended by the legislature is provided by the wording of what was previously Article 6(5). [36] Under that provision, the penalties for which it provided could be applied only if there was a difference of more than 10% 'between areas declared and the areas actually sown with soya beans and which may be harvested'.

51. In this context also, however, it must be stressed that the wording of the provision as such was anything but unambiguous and was liable to give rise to misunderstanding. The national court will therefore have to consider whether the conduct of Castello may have been intentional or attributable to serious negligence. Reference may be made in this connection to what I have had to say with regard to the sixth question. [37]

C — Conclusion

52. I accordingly propose that the Court should reply as follows to the questions submitted by the Tribunale Civile e Penale di Ravenna:

(1) The first two questions in the reference:

The purpose of the aid scheme established by Council Regulation (EEC) No 1491/85 of 23 May 1985 laying down special measures in respect of soya

36 — In this connection, see point 8 above.
37 — See point 47.

beans and by Council Regulation (EEC) No 2194/85 of 25 July 1985 adopting general rules concerning special measures for soya beans was to provide aid only for soya beans produced in the Community. In that connection, not only the obligation to grow soya beans in the territory of a Member State but also the obligation to notify set out in Article 6(3) of Commission Regulation (EEC) No 2537/89 of 8 August 1989 laying down detailed rules for the application of the special measures for soya beans constituted a principal obligation for producers interested in receiving aid.

(2) The third and fourth questions in the reference:

The penalties laid down in Article 29a(1) of Regulation (EEC) No 2537/89 were, particularly in view of the rule set out in Article 29a(4) of that regulation, compatible with the principle of proportionality.

(3) The fifth question in the reference:

The phrase 'change in the use to be made of areas indicated' within the meaning of Article 6(3) of Regulation (EEC) No 2537/89 was to be understood as covering not only the case in which the whole or part of those areas was put to a different agricultural use but also that in which the whole or part of those areas was not used at all for agricultural purposes.

(4) The sixth and seventh questions in the reference:

The obligation to notify changes in the areas under cultivation, set out in the third subparagraph of Article 6(3) of Regulation (EEC) No 2537/89, also applied in the case where those changes occurred more than three months prior to the beginning of the harvest. The obligation to notify also applied in

cases where several changes followed in succession, none of which in itself exceeded 10% of the area indicated in the contract but which, in their totality, did exceed that percentage.

With regard to the two cases last mentioned, it should be pointed out that the penalties provided for in Article 29a(1) of Regulation (EEC) No 2537/89 could be imposed only if the producer acted intentionally or with serious negligence. It will be for the national court to determine with particular care whether this is the case, bearing in mind the ambiguous wording of the third subparagraph of Article 6(3) of that regulation.