OPINION OF ADVOCATE GENERAL TESAURO

delivered on 26 September 1996 *

1. By an action brought under Article 173 of the Treaty the French Republic is seeking the annulment of Commission Decision 93/673/EC of 10 December 1993 fixing the flat-rate reduction to advances on the entry of agricultural expenditure in the accounts in the event of non-compliance with the provisions relating to the forwarding of the annual questionnaire on the application of the arrangements for additional levies in the milk sector introduced by Council Regulation (EEC) No 3950/92 [1] ('the decision').

The French Government's main contentions are, first, that the decision was adopted in breach of the provisions constituting its legal basis and of several essential procedural requirements, and of the provisions of the regulation on the financing of the common agricultural policy; and, second, that the penalties laid down by the decision for failure to comply with the relevant provisions are incompatible with the principle of proportionality.

The legislation

2. The additional levy for milk and milk products was introduced in 1984 for the purpose of reducing the gap between supply and demand in those products on the Community market.

The scheme was subsequently extended for seven years from 1 April 1993 by Council Regulation (EEC) No 3950/92 of 28 December 1992, [2] which, in the light of the experience gained over the first few years of the scheme's operation, introduced a number of modifications designed to improve and simplify it ('the basic regulation').

3. Pursuant to Article 11 of the basic regulation, [3] the Commission adopted Regulation (EEC) No 536/93 of 9 March 1993 [4] laying

* Original language: Italian.

1 — OJ 1993 L 310, p. 44.

2 — OJ 1992 L 405, p. 1.

3 — Which provides that the detailed rules for the application of the regulation are to be adopted by the Commission in accordance with a procedure involving the scheme's management committee.

4 — OJ 1993 L 57, p. 12.

down detailed rules on the application of the additional levy ('the implementing regulation').

The fifth recital in the preamble to the implementing regulation reads as follows:

'... experience gained has shown [that] major delays in both the transmission of figures on collections or direct sales and payment of the levy have prevented the arrangements from being fully effective; ... therefore, lessons should be learned from the past and the necessary conclusions drawn by laying down strict requirements as regards notification and payment deadlines and providing for penalties where deadlines are not met.'

Under the fourth indent of Article 8 of the regulation the Member States are required to notify to the Commission 'before 1 September each year, the duly completed questionnaire as set out in the Annex. Where that time-limit is not observed, the Commission shall make a flat-rate reduction to advances on the entry of agricultural expenditure in the accounts.'

The purpose of the questionnaire is to gather information and statistics concerning the application and functioning of the scheme each year and for each Member State.

4. The contested decision, which was adopted on the basis of the fourth indent of Article 8 of the implementing regulation, determines the amount of the reduction to be applied to advances.

In particular, it provides that there is to be a reduction of 1% of the overall amount paid to the Member State concerned under the previous budget year for failure to communicate the questionnaire by 1 September of the current year (Article 1); a reduction of 0.5% for information on the questionnaire which is incorrect by more than 10% (Article 2); and a reduction of 0.04% for each item of missing data, where the questionnaire is incomplete.

5. The provision in the fourth indent of Article 8 of the implementing regulation was recently amended by Commission Regulation (EC) No 82/96 of 22 January 1996. [5]

5 — OJ 1996 L 17, p. 1.

By point 1 of Article 1 of that regulation the following sentence was added to that provision: 'Where the information changes, in part as a result of the text provided for in Article 7, an update shall be communicated to the Commission before 1 December, 1 March and 1 July of each year.' [6]

Pleas in law

6. As I said, the French Government's action is based on three different pleas: breach of the fourth indent of Article 8 of the implementing regulation and of Article 11 of the basic regulation, together with various essential procedural requirements; breach of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural scheme; [7] breach of the principle of proportionality.

First plea

7. As regards the first plea, the French Government maintains that the decision, in particular Articles 2 and 3 thereof, could not be validly adopted on the basis of the fourth indent of Article 8 of the implementing regulation. The latter provides expressly for reductions to the advances in question only in the event of *late* communication of the questionnaire, there being no mention of penalties for *incorrect* or *incomplete* questionnaires (mentioned in Articles 2 and 3 of the decision).

The French Government argues that Article 11 of the basic regulation which, as I said, confers on the Commission the power to adopt detailed implementing rules for the additional levy, likewise cannot constitute an adequate legal basis for Articles 2 and 3 of the decision. That provision provides expressly for the participation of the management committee in the procedure for adopting detailed implementing rules, [8] whereas the committee does not appear to have been consulted when the contested decision was adopted.

8. In order to determine whether the arguments of the French Government in connection with the first plea are well founded, I consider that it would be useful to consider first, albeit briefly, the aims of the additional levy scheme for milk, and then the *ratio* of the relevant provisions in Article 8 of the basic regulation and thus of the provisions of the contested decision.

6 — Article 7 of the basic regulation lays down the checks which the competent national authority must carry out with regard to producers and purchasers in order to ensure that the scheme functions efficiently.

7 — OJ, English Special Edition 1970 (I), p. 218.

8 — The procedure is that governed by Article 30 of Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products.

I should first recall that the scheme in question was introduced, as I said, in order to reduce the gap on the milk market between ever-increasing production and stable levels of internal consumption and exports. By Council Regulation (EEC) No 856/84 of 31 March 1984, [9] the Council first introduced the additional levying scheme, that is to say, a mechanism of financial co-responsibility which would come into operation whenever the quantity of milk (marketed, not produced) in a particular Member State exceeds a predetermined annual quantity (known as the 'reference quantity' or 'milk quota'). The intention was to create a disincentive in order to reduce structural surpluses in the sector, if not on production at least on the marketing of milk and milk products.

9. The scheme, which was extended and modified on several occasions and finally codified in the basic regulation, functions broadly as follows: the reference quantities assigned to each Member State are divided, within that Member State, into individual quantities for each producer. It is on the latter, subject to the control of the competent national authority, that the obligation falls to pay the amount due by way of additional levy where the relevant quantity is exceeded. [10]

The proceeds of the levy, currently fixed at the rate of 115% of the target price for milk, is paid to the Community [11] and used to finance the costs connected with the stabilization and regularization of the market in milk products.

10. Under Article 11 of the basic regulation the Commission adopted the implementing regulation for the declared three purposes of: supplying the additional factors necessary for the final calculation of the levy; establishing measures to ensure payment of the levy in good time; and establishing the rules on checks permitting verification of proper collection of the levy (second recital in the preamble).

Responsibility for the proper collection of the levy lies primarily with the competent national authority, which must carry out the necessary checks and verifications *in loco*. [12] The Commission, however, must be informed annually of the situation regarding collection of the levy in each Member State by means of notification by the national authorities of the questionnaire referred to in the fourth indent of Article 8 of the implementing regulation.

9 — OJ 1984 L 90, p. 10.

10 — For practical reasons the amount of the levy is actually paid to the competent body by the purchaser, who deducts the equivalent from the price paid to producers, who are the real debtors (see Article 2(2) of the basic regulation).

11 — More precisely, the EAGGF (European Agricultural Guidance and Guarantee Fund).

12 — See Article 7, cited above.

11. On the basis of the information received from each Member State the Commission must determine whether it is necessary to adopt corrective measures; if the reference quantities are exceeded in one or more Member States it may, for example, depending on the amount by which the quantity has been exceeded, regulate prices directly, or increase export refunds, or require the excess to be put into storage. In addition, if it is found that a Member State has failed, in breach of Community law, to collect sums payable to the Community, the Commission may apply reductions to the monthly advances on agricultural expenditure on the basis of the powers conferred upon it by the provisions in force and confirmed by the judgment of the Court of Justice in Cases C-342/89 *Germany* v *Commission* and C-346/89 *Italy* v *Commission*. [13]

It is apparent, therefore, that the questionnaire is an instrument essential to the proper management of the scheme at Community level, inasmuch as it enables the Commission to acquire all the information it needs in order to be able to take appropriate action. The data afforded by means of the questionnaire, it must be emphasized, is indispensable not only for the purposes of checking and coordinating collection of the levy but ultimately in order to eliminate or correct as far as possible any distortions which may occur owing to the gap between supply and demand on the market in question; that is, as we have seen, the ultimate aim of the additional levy scheme.

12. In view of that, it is evident that the obligation of Member States to supply the Commission with all the information necessary to enable it to fulfil adequately the management duties attributed to it by the Treaty in this area can only properly be met if the questionnaire submitted is *complete* and *accurate*; however, to interpret the fourth indent of Article 8 of the implementing regulation as imposing an obligation merely *as to time*, that is to say the obligation to communicate a questionnaire (even, paradoxically, incomplete or inexact) within a particular time, would deprive such a provision of all meaning.

There is, in addition to that, the actual wording of the provision, which, as I said, requires the Member States to communicate each year by 1 September 'the *duly completed* questionnaire as set out in the Annex'. [14]

In the circumstances I do not consider that there can be any reasonable doubt that the contested decision falls entirely within the scope of the requirements listed in the fourth indent of Article 8 of the implementing

13 — [1991] ECR I-5031 and I-5057.

14 — The emphasis is mine.

regulation, including where it provides for financial consequences for Member States who have communicated a questionnaire which, although it was submitted in due time, is incomplete or inaccurate.

13. As regards, lastly, the argument put forward by the French Government to the effect that the decision was adopted in breach of the essential procedural requirements laid down in Article 11 of the basic regulation, it is, in my view, likewise unfounded.

As the Commission rightly pointed out, in fact the decision itself is not one of 'the detailed rules for the application' of the regulation within the meaning of Article 11 which, as such, requires the opinion of the management committee; it is merely a measure fixing, at an equal percentage for each Member State, the rate of reduction to be applied to advances in connection with various forms of breach of the fourth indent of Article 8 of the implementing regulation.

14. The Commission could quite well, in fact, have proceeded to impose those reductions by means of individual decisions adopted in relation to each individual Member State on the basis of the powers directly conferred upon it by the fourth indent of Article 8 of the implementing regulation.

Consequently, the first plea is unfounded.

Second plea

15. In the second plea the French Government alleges breach of Council Regulation (EEC) No 729/70, [15] cited above, on the financing of the common agricultural policy, as interpreted by the consistent case-law of the Court of Justice.

It relies in particular on the judgments of 17 October 1991 in which the Court of Justice acknowledged that the Commission had the power to reduce the sums owed by way of monthly advances, based on the accounting situation of each Member State *vis-à-vis* the EAGGF, in the case of sums not collected, in breach of Community law, but stated that such reductions were not definitive but temporary and provisional, and could not prejudice the final and definitive decision on the annual clearance of accounts. [16]

The French Government argues that the consequences imposed by the contested

15 — As amended by Regulations (EEC) Nos 3183/87 and 2048/88.

16 — Judgments cited in footnote 13, paragraphs 16 to 19.

decision are in fact definitive, contrary to what the Court of Justice stated, particularly in view of the fact that they apply automatically, without there being any presumption of breach of Community law on the part of the Member State concerned and without that Member State being given an opportunity to present its views.

16. That argument appears to me to be quite clearly unfounded, since there is no reason to suppose that the reductions in question do not have the same temporary and provisional character as any other reduction in agricultural expenditure in the context of the EAGGF, in view of the re-examination which must take place when the final decision is adopted on the annual accounts defining the financial position of each Member State *vis-à-vis* the EAGGF itself.

Moreover, the sole circumstance cited by the French Government to justify its assertion is that neither the implementing regulation nor the decision *expressly* provides that the reductions are to be re-examined in the context of the final decision on the clearance of annual accounts.

17. All I need say in that connection is that the Commission itself has confirmed on a number of occasions, both in its written observations and at the hearing, that the measures are provisional and temporary and that they are to be reviewed when the final decisions are adopted in relation to each Member State.

In particular, the Commission has stated that, as is apparent from the provisions concerning the financing of the common agricultural policy, as interpreted by the Court of Justice, reductions applied to monthly advances which prove, at the time the definitive decision on the clearance accounts is made, to have been unjustly applied (for example because the delay for which the penalty was imposed was attributable to *force majeure*) will be adequately compensated for in the final calculation of the sum attributable to each Member State. Moreover, at this stage the Court does not have any evidence that casts doubt on what appears to be the current practice in such matters, a practice which, moreover, is in accordance with settled case-law.

Third plea

18. In the third plea the French Government alleges that the Commission breached the principle of proportionality in its determination in the contested decision of the rates of reduction to be applied.

In particular, it claims that the contested provisions 'exceed what is appropriate and necessary to attain the objective sought' as stated in *Buitoni*, [17] inasmuch as they introduce concrete penalties for Member States who are in breach of their obligation to submit the questionnaire, and that, since the penalties are applied not to breach of the

17 — Case 122/78 [1979] ECR 677, paragraph 16.

(principal) obligation to guarantee collection of the levy but to breach of the (secondary) obligation to inform the Commission as to the manner in which it has been collected, it might also be in conflict with the Court's judgments in *Man* and *Kurt Drewes*. [18]

19. The Commission, for its part, denies that the reductions are penalties and, in particular, in view of their provisional and temporary character, defines them as 'negative financial consequences' for the Member State. It also notes that the distinction between principal and secondary obligations employed by the Court in the context of a well-defined set of circumstances quite different to those at issue in this case, that is to say where there was an obligation to lodge a security in respect of export certificates, [19] cannot be transposed *sic et simpliciter* to the case at issue here.

Reiterating the fact that the information in the questionnaire is essential to ensure the proper management of the whole levy scheme, the Commission asserts that the measures in question are proportionate to the objective to be achieved.

20. As I stated in my Opinion in *Otto Pressler*, [20] I do not believe that as a matter of principle a definition of the legal nature of provisions attaching unfavourable legal consequences to a failure to comply with certain requirements is essential in order to be able to determine whether those provisions comply with the principle of proportionality. In other words, as far as the facts at issue here are concerned, whether we are concerned with penalties *stricto sensu*, as the French Government maintains, or negative financial consequences, as the Commission contends, is not relevant for the purposes of determining whether they meet the requirements of the principle of proportionality.

What is to be ascertained in any event, then, in accordance with case-law of the Court of Justice which is now consistent, is whether the provisions of the contested decision exceed what is appropriate and necessary to achieve the aim pursued and, more particularly, whether the means used in order to achieve that aim correspond to the importance of that aim and whether they are necessary in order to achieve it. [21]

18 — Case 181/84 [1985] ECR 2889 and Case 358/87 [1989] ECR 891 respectively; in particular, in paragraph 17 of the second-named judgment, concerning non-marketing premiums for milk, the Court stated that 'failure to fulfil the obligation not to market ... is capable of undermining the objective of the premium scheme, namely the reduction of surpluses of milk and milk products, to such an extent that it justifies recovery, in their entirety, of the amounts already paid, whereas failure to comply with any of the checking procedures ... can have such an effect only to the extent to which the checking in question is thereby prevented.'

19 — *Man*, cited above.

20 — Opinion delivered on 13 December 1991 in Case C-319/90 [1992] ECR I-203, at p. I-209, points 3 and 4.

21 — See *inter alia Pressler*, paragraph 12.

21. As I have already said, the decision does not seek to achieve any aim other than that of defining in detail a rule already contained, in fact, in Article 8 of the implementing regulation; it determines the rate of reduction applicable for various types of breach of the obligation on Member States to communicate to the Commission within a certain time a duly completed questionnaire.

In view of the importance of the information contained in the questionnaire for the purposes of ensuring the proper management of the additional levy scheme, and the fact that the Commission can only pursue its essential role of coordinating and regulating the market in milk if the information necessary to apply the appropriate intervention measures when needed is made available to it in due time, I do not consider that the unfavourable consequences attached by the decision to breach of the obligation in question are disproportionate to the aim to be achieved.

22. That conclusion is borne out by the provisional nature of the reductions to advances which the Commission itself is authorized to apply, and by the fact that they may be revised when the final decision is adopted concerning the clearance of accounts for each Member State, which, as I stated in point 17, I regard as one of the essential features of the scheme.

In other words, the fact that the reductions to advances, applied to a Member State which, by delay or omission, has risked undermining the functioning of the whole scheme, are not irreversible or definitive but, on the contrary, will be reviewed, is sufficient to demonstrate that they are proportionate to their aim.

23. For the sake of completeness, I would note, finally, that at the hearing the French Government mentioned a recent regulation of the Council, Council Regulation (EEC) No 82/96, referred to above, amending Article 8 of the implementing regulation by introducing the obligation for Member States to communicate, by means of four-monthly updates, any changes in the data covered by the questionnaire resulting from the checks referred to in Article 7 of the regulation. The French Government maintains that that amendment shows that in fact the Commission is in a position to manage the scheme if the data it requires is communicated on a date other than that provided for, 1 September, and even thereafter.

However, that argument, too, is without foundation. The four-monthly updates are in fact merely corrections which the new regulation provides for in the event of abnormal situations (such as the communication to the Commission of data which prove, after verification, to be erroneous); they do not, therefore, alter the substance of the obligation on Member States in normal situations to communicate a fully and accurately completed questionnaire within a time-limit.

24. In conclusion, I do not consider that the arguments put forward by the French Government can reasonably cast doubt on the validity of the decision at issue, which, in fact, has the merit of encouraging the Member States to assume their responsibility of contributing, within the extent of their powers, to the functioning of a complex scheme for regularizing the milk market.

As regards the size of the penalties, next, I consider it significant that, as the Commission pointed out, the penalty provisions have to this date not had to be applied since the Member States have so far fulfilled their obligation correctly and in due time.

Conclusion

25. In the light of those observations I propose that the Court:

— dismiss the application;

— order the applicant State to pay the costs.