OPINION OF ADVOCATE GENERAL GULMANN
delivered on 3 December 1992 *

Mr President,
Members of the Court,

1. In these cases, the Court is requested to rule on whether the Commission was legally able to make a regulation retroactive.

The legal and factual background to the cases is set out in the Report for the Hearing, to which I refer. For my answer to the question raised it is sufficient to state as follows.

2. On 19 March 1986 the Commission adopted Regulation (EEC) No 805/86 introducing a charge on denatured skimmed-milk powder coming from Spain. [1] The reasons for that special export charge were set out as follows in the preamble to the regulation:

'Whereas large quantities of skimmed-milk powder were, after being denatured in accordance with the provisions in force in Spain, imported into Spain before 1 March 1986 at prices below the Community intervention price;

Whereas, in order to prevent this skimmed-milk powder from being re-exported to other Member States with a zero accession compensatory amount or to third countries with a refund, a transitional measure should be adopted which introduces an export charge in respect of the difference between the price of the imported product and the intervention price in the other Member States;'.

Regulation No 805/86 concerned therefore a clearly defined category of products, namely *skimmed-milk powder imported into Spain before 1 March 1986.* [2]

It appears from the documents before the Court that:

— 1 March 1986 was the date on which the provisions of the Act of Accession of Spain concerning adjustments to the Community agriculture policy entered into force;

— the milk powder referred to by the regulation had a fat content below 1.5%;

— the export of denatured skimmed-milk powder to other Member States was not subject to the payment of accession compensatory amounts, and

* Original language: Danish.

1 — OJ 1986 L 75, p. 15.

2 — Under Article 1(2) of the regulation it is for the trader to prove that the skimmed-milk powder was not imported, but produced in Spain.

— the special export charge introduced by the regulation was ECU 100 per 100 kg, namely the approximate difference between the price of the imported products and the Community intervention price.

3. The Commission considered itself in a position to state in February 1987:

— that significant quantities of denatured powdered milk coming from Spain had been put on the market in Germany and in Holland at very low prices;

— that the products concerned would have been covered by Regulation No 805/86, but that fat had been added so that the products no longer constituted skimmed-milk powder within the meaning of Regulation No 805/86, and

— that the addition of fat was carried out with the sole object of avoiding payment of the export charge provided for in Regulation No 805/86, but paying only the accession compensatory amount applying to milk powder other than denatured skimmed-milk powder, which was significantly lower.

4. The Commission subsequently submitted a draft regulation to the Management Committee for Milk and Milk Products. That draft, which was approved by the Management Committee on 12 February, included two amendments to Regulation No 805/86. The word 'skimmed' was deleted and it was decided that the products subject to a charge under the amended regulation were not at the same time subject to an accession compensatory amount.

The Commission adopted that draft on 16 March 1987 and the regulation was published in the *Official Journal of the European Communities on 17 March 1987* as No 744/87. [3] The regulation provided that it was to enter into force on the day of its publication and that *it applied with effect from 12 February 1987.*

5. The plaintiffs in the main action are two Spanish companies marketing milk powder. Between 12 February and 16 March, they exported to Germany 207 and 120 tonnes of milk powder respectively, the fat content of which was, according to the documents before the Court, 12 and 18% respectively. The companies argued that it was not technically possible or economically profitable to add fat to skimmed-milk powder containing less than 1.5% fat content in order to obtain a product with a fat content of 12% or more. In my opinion, that information can only be understood as meaning that the companies contend that the products which they exported were not covered by Regulation No 805/86 as originally drafted. I shall return later to the significance of that point.

The companies have contended that they were not bound to pay the export charge provided for by Regulation No 805/86, since it was unlawful to make the amending regulation retroactive. They argued that the amending regulation did not give a sufficient statement of the reasons for its retroactive application and that the requirements for

3 — OJ 1987 L 75, p. 14.

provisions to apply retroactively were not met.

6. It is not possible to come to a decision on these cases on the question of the validity of the amending regulation without first ascertaining what was the *wording of the amendment* or, in other words, what products were affected by the special export charge after the amendment.

7. There are two possible interpretations of the amending regulation.

The first is that the amending regulation merely extended the application of the export charge to products originally covered by Regulation No 805/86, namely denatured *skimmed-milk powder* imported into Spain before 1 March 1986, when it had subsequently been enriched with fat and was therefore *no longer* skimmed-milk powder.

The second interpretation is that the amending regulation extended the application of the export charge to all denatured milk powder — *regardless of its fat content* at the time of its importation into Spain before 1 March 1986.

8. It clearly appears from the Commission's observations in this case that the Commission considers that the first of the two possible interpretations is the right one. From among numerous examples, I may quote the following statement taken from its written observations, according to which the amendment was decided:

'With the sole object of re-establishing the balance sought by Regulation (EEC) No 805/86, which was disturbed by the abovementioned commercial manipulations, which fraudulently evaded the charge and obtained an abnormal and unjustified profit for those who devised that scheme ...'. [4]

It is, however, possible that the Spanish authorities, when they applied the amended regulation, used the second interpretation, which is wider. In any event, that must have been the case if — as the two companies claim — the products exported were not enriched with fat, that is to say if it involved products which were not covered by the original regulation.

9. It is not easy to ascertain which of the two interpretations is the right one. Admittedly, at first sight the choice seems simple. Where an institution which has adopted a measure which is unfavourable to private individuals considers that it should be interpreted restrictively, that is to say in favour of the individuals, and where it has been able to put forward in support of that interpretation a persuasive line of argument based on the purpose of the measure, it seems indisputable that it is appropriate to choose that interpretation. However, the difficulty in this case comes from the fact that the actual wording of the amendment — the term 'skimmed-' appearing in the original regulation is quite simply deleted — is difficult to reconcile with the restrictive interpretation.

10. It would take a little good will to understand the recitals in the preamble as meaning that the regulation sought solely to prevent the original regulation from being evaded by

4 — See point 2.4 of the Commission's observations.

the addition of fat to skimmed-milk powder imported into Spain before 1 March 1986. [5]

Nevertheless I consider that the regulation should be interpreted as the Commission has stated. In accordance with the case-law of the Court, Community legislation should be interpreted in accordance with the general principles of Community law. [6] The Commission's interpretation implies that the amended regulation does not impose any burden on private individuals going beyond the objective sought by the export charge — namely to prevent speculation. Nothing in the documents before the Court shows that there was any need to extend the application of the export charge to denatured milk powder *other* than skimmed-milk powder imported into Spain before 1 March 1986 and subsequently enriched with fat for the purpose of tax avoidance. There is no reference anywhere in the documents before the Court to such milk powder having caused problems. In my opinion, the amending regulation is to be considered as being contrary to the principle of proportionality and, accordingly, void if it necessarily had to be interpreted as meaning that it extended the application of the export charge to all denatured milk powder imported into Spain before 1 March 1986.

In those circumstances, it seems to me to be proper and justifiable to accept the interpretation advocated by the Commission, according to which the amending regulation extended the applicability of the export charge only to skimmed-milk powder referred to by the original regulation and subsequently enriched with fat.

11. In any event, this has two significant consequences as regards these cases.

First, the export transactions at issue in the main proceedings are not concerned by the special export charge if, as the plaintiffs claim, the products exported were not those which were originally covered by Regulation No 805/86.

Secondly, the lawfulness of the amending regulation must be assessed having regard to the fact that it referred only to a given group of products which were already covered by the export charge and that it was solely designed to prevent traders evading, seriously and obviously, the obligation to pay the special export tax which had been introduced to put a stop to the speculative transactions.

12. Against that background, I consider that the general conditions specified by the Court for a measure to apply, by way of exception, retroactively, that is to say that the purpose of the measure so demands and that the

5 — The preamble to the regulation includes the following recitals:
'Whereas, in order to prevent quantities of skimmed-milk powder imported into Spain and denatured, in accordance with the provisions in force in Spain, before 1 March 1986 from being re-exported on abnormally advantageous terms a charge on exports of that product was introduced by Commission Regulation (EEC) No 805/86, as amended by Regulation (EEC) No 3956/86; whereas, for the same reasons, the application of the said regulation should be extended to milk powder, regardless of its fat content; ...
Whereas in order to prevent speculation in the product covered by this regulation the latter's provisions should be introduced as a matter of urgency.'

6 — See in particular the judgments in Joined Cases C-90/90 and C-91/90 *Neu* [1991] ECR I-3617 and Case C-314/89 *Rauh* [1991] ECR I-1647.

legitimate expectation of those concerned is duly protected. [7]

Since the objective of the regulation was to prevent, as quickly and effectively as possible, serious acts of speculation, I consider that no objections may be raised against the Commission's view that that objective required making the amending regulation retroactive. [8]

In my opinion, it is appropriate to accept the Commission's point of view to the effect that the legitimate expectation of traders in a case such as this ought not to be protected. I agree with the Commission's statement that:

'The principle of the protection of the legitimate expectation of those concerned is not infringed for the simple reason that this is a case in which the traders in question cannot have any *legitimate* expectation.

... Regulation (EEC) No 805/86 certainly concerns *skimmed* milk, and cannot provide otherwise since it was in that state that the product was imported. Where that product is enriched with fat, in the light of the principle "salvis verbis legis, sententiam eius circumvenit", it is to be expected that the legislature, once informed of the situation, would immediately re-establish the *status quo ante* by putting a stop to that situation, just as no trader could hope that the court would extend its protection to his speculative transactions which were made possible by taking advantage of the letter of the law'. [9]

It was therefore lawful for the Commission to make the regulation apply as from 12 February, which was, first, the date of approval of the regulation by the Management Committee and, secondly, a date close to the time at which the Commission became aware of the existence of the transactions which were to be considered as circumventing Regulation No 805/86.

13. It seems to me, on the other hand, more difficult to accept that the Commission did not adopt the regulation before 16 March. The Commission has not put forward any convincing justification for that delay and the problem of the significance to be attached, regard being had to legal certainty, to such delay is, in my opinion, a very difficult question to resolve. The Commission clearly cannot simply state that the traders involved were probably in any event aware of the fact that a draft regulation had been submitted to and approved by the Management Committee. In other circumstances it

7 — See, *inter alia*, Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17, Case 98/78 *Racke* [1979] ECR 69, paragraph 20, and Case 99/78 *Decker* [1979] ECR 101 at paragraph 8. Particular reference should be made to the judgment in Case C-337/88 *Società Agricola Fattoria Alimentare* [1990] ECR I-1 in which the purpose of making the measure in question retroactive was, as in these cases, to prevent speculative movements in connection with the transitional schemes applying at the time of accession of new Member States.

8 — The Commission stated as follows in paragraph 5 of its written observations:
'In other words, in order to re-establish the effect of Regulation (EEC) No 805/86, which was compromised by manipulations circumventing its provisions, Regulation (EEC) No 744/87 had to provide for express retroactivity, but not as to the substance, since it was merely intended to ensure that the objective of Regulation (EEC) No 805/86 was achieved as if it had never ceased to be operative. When contemplating the contested regulation in this light, it should be noted that there is no question of "genuine" retroactivity but rather a provision which is necessary for re-establishing and, therefore, permanently safeguarding the effectiveness of the rule which was circumvented.'

9 — See paragraph 6 of the Commission's observations.

would be natural to consider that the late adoption of an unfavourable measure necessarily results in a failure to attribute to it the retroactive effect which it seeks. However, in this case I do not consider that the delay should have that result. That is due to the special objective of the regulation which is to prevent traders who have already tried once to speculate on foreseeable 'gaps' in the Community agricultural rules to circumvent the Community legislation once more.

14. In short, I consider that the regulation, construed in accordance with its objective, meets the conditions specified by the Court for accepting the retroactive effect of a measure.

15. It appears from the settled case-law of the Court that the requirement laid down by Article 190 of the Treaty for a statement of reasons must be considered in the light of the legal and factual context of the measure at issue. [10] The plaintiffs in the main proceedings have contended that as far as concerns retroactivity the requirement of a statement of reasons is stricter, and that the statement must include in particular the information justifying the retroactive effect.

It is self-evident that a measure having a retroactive effect must include a statement of reasons explaining why it has been deemed necessary to derogate from the ordinary rule concerning the date on which legal measures are to apply. However, the scope and compelling nature of the requirement of a statement of reasons must also depend in this regard on the special circumstances peculiar to every case.

16. The preamble includes the following statement of reasons:

'Whereas, in order to prevent quantities of skimmed-milk powder imported into Spain and denatured, in accordance with the provisions in force in Spain, before 1 March 1986 from being re-exported on abnormally advantageous terms a charge on exports of that product was introduced by Commission Regulation (EEC) No 805/86, as amended by Regulation (EEC) No 3956/86; whereas, for the same reasons, the application of the said regulation should be extended to milk powder, regardless of its fat content; ...

Whereas in order to prevent speculation in the product covered by this regulation the latter's provisions should be introduced as a matter of urgency.'

It may be questioned whether the Commission has managed to give the statement of reasons in the amending regulation an entirely appropriate form of words. In my opinion, that does not however prevent the statement of reasons from being considered as sufficient. The traders specifically concerned did not have any difficulty in understanding the reason for the amending regulation on the basis of the grounds stated in the preamble, their knowledge of the original

10 — See in particular the judgments in Case C-27/90 *Société Industrielle de Transformation des Produits Agricoles (SITPA)* [1991] ECR I-133 and Case 125/77 *Koninklijke Scholten-Honig and De Verenigde Zetmeelbedrijven 'De Bijenkorf'* [1978] ECR 1991.

regulation and the facts which had led to its adoption. Added to that, the traders concerned, namely those who may have enriched milk, could not have had any difficulty in understanding why the Commission considered it necessary to make the regulation retroactive. The second part of the statement of reasons cited above is sufficient for understanding the reason for the retroactivity. [11]

17. I therefore propose that the Court should answer the questions raised as follows:

An examination of the questions submitted for a preliminary ruling has not disclosed any factors of such a nature as to affect the validity of Regulation (EEC) No 744/87.

11 — Some doubt has been expressed in this case as to whether the issue of the retroactivity of the amending regulation was submitted to the Management Committee. Since the Commission has confirmed that the issue was indeed submitted to the Management Committee, I do not consider that there is any need to go further into that matter.