JUDGMENT OF THE COURT (Fourth Chamber)
18 January 1990 *

In Case C-345/88

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht (Federal Administrative Court) for a preliminary ruling in the proceedings pending before that court between

Federal Republic of Germany, represented by the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry),

and

Butterabsatz Osnabrück-Emsland eG, Osnabrück,

on the interpretation of Article 5 of Commission Regulation (EEC) No 2793/77 of 15 December 1977 on detailed rules of application for granting special aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1977, L 321, p. 30),

THE COURT (Fourth Chamber)

composed of: C. N. Kakouris, President of Chamber, T. Koopmans and M. Díez de Velasco, Judges,

Advocate General: F. G. Jacobs
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

Butterabsatz Osnabrück-Emsland eG, party to the main proceedings, respondent in the appeal on a point of law, by Jürgen Gündisch, Rechtsanwalt, Hamburg,

* Language of the case: German.

the Government of the Federal Republic of Germany, party to the main proceedings, appellant on a point of law, by Michael Bergemann, Regierungsrat at the Bundesamt für Ernährung und Forstwirtschaft, acting as Agent,

the Commission of the European Communities, by Bernhard Jansen, a member of its Legal Department, acting as Agent,

having regard to the Report for the Hearing and further to the hearing on 11 October 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 November 1989,

gives the following

Judgment

1 By an order of 1 September 1988, which was received at the Court on 28 November 1988, the Bundesverwaltungsgericht referred a number of questions to the Court pursuant to Article 177 of the EEC Treaty for a preliminary ruling on the validity and interpretation of certain provisions of Commission Regulation No 2793/77 of 15 December 1977 on detailed rules of application for granting special aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1977, L 321, p. 30).

2 Regulation No 2793/77 was adopted by the Commission in order to establish a monitoring system to ensure that the aid in question was used for its intended purpose. Such a system was considered necessary because the amount of aid granted for the use of skimmed milk in animal feed differs according to whether the product in question is intended as feed for young calves or for other animals, especially pigs. For the purposes of such monitoring, the regulation lays down, amongst other things, obligations relating to 'specialized' farms, on which no young calves are kept, and obligations relating to 'mixed' farms, on which both young calves and other animals are kept. A dairy may qualify for special aid for animals other than young calves only if it submits a written undertaking whereby

the farmer states that he will use the skimmed milk only as feed for his herd; he must forward an exact statement of the size of the herd to the dairy in question on a regular basis.

3 The questions submitted for a preliminary ruling arose in a dispute between a German dairy, Butterabsatz Osnabrück-Emsland eG (hereinafter referred to as 'Butterabsatz'), and the German intervention agency in the dairy sector, the Bundesamt für Ernährung und Forstwirtschaft (Federal Office for Food and Forestry). The latter had demanded repayment of special aid granted to the dairy on the ground that the dairy had not received in due time statements of herd size from five specialized farmers.

4 In the proceedings before the national courts which heard the dispute, the Bundesamt relied on Article 5(3)(b) of Regulation No 2793/77, according to which any application for the payment of special aid submitted by the dairy to the competent authority must be accompanied by a declaration that the dairy will 'forgo or repay the special aid' if it is found that the farmer has not abided by one of the undertakings referred to in Article 4 of the regulation. According to the second indent of Article 4(1)(b), the farmer must give the dairy and the competent authority, in the case of a specialized farm, an undertaking 'to forward to the dairy, before the beginning of each quarter, a statement of the size of his herd'.

5 The Bundesverwaltungsgericht took the view that the dispute raised questions concerning the validity and the interpretation of those two provisions. It therefore stayed the proceedings and asked the Court to give a preliminary ruling on the four questions set out below:

'(1) Is Article 5(3)(b) of Commission Regulation (EEC) No 2793/77 of 15 December 1977 invalid in so far as it provides that it is a condition for the grant of special aid that a dairy applying for special aid must submit a declaration that it will repay the special aid if a farmer has not abided by one of the undertakings under Article 4, on the ground that the Commission was not empowered by Article 10(3) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 to adopt a substantive provision of that kind?

(2) Is Article 5(3)(b) of Regulation (EEC) No 2793/77 invalid in so far as it provides that a dairy applying for special aid must submit a declaration that it will repay the special aid if a farmer has, *inter alia*, failed to abide by the undertaking given pursuant to the second indent of Article 4(1)(b) to supply before the beginning of each quarter a statement of the size of his herd, on the ground that it infringes the principle of proportionality inasmuch as the dairy must undertake to repay in its entirety the special aid in respect of the farmer and calendar quarter in question even when the farmer has only slightly exceeded the time-limit for submission of the statement (by a few days) and it is established that he has duly used the subsidized skimmed milk as animal feed?

(3) Is Article 1(3) of Commission Regulation (EEC) No 1438/79 of 11 July 1979 to be interpreted as meaning

(a) that the obligations imposed on a farmer until 31 December 1979 by the second indent of Article 4(1)(b) of Regulation (EEC) No 2793/77 to supply a statement of the size of his herd every quarter lapsed on 1 January 1980, or

(b) that those obligations on the farmer's part continue to exist after 31 December 1979 and until such time as the Member State in question has made its choice between quarterly and yearly statements of herd size?

(4) Is the first sentence of Article 5(4) of Regulation (EEC) No 2793/77 to be interpreted as meaning

(a) that the term "undertaking referred to in Article 4" means the obligations imposed on farmers by Article 4 as revised from time to time, or

(b) that the commitments contained in farmers' undertakings given prior to 1 January 1980, and in particular the commitment to supply quarterly statements of herd size, should remain valid even when the underlying obligations on the part of the farmers, set out in Article 4, are altered or

lapse as a result of subsequent amendments to Article 4 — in this case, by Article 1(3) of Regulation (EEC) No 1438/79?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

First and second questions (validity of Article 5(3)(b) of Regulation No 2793/77)

7 The first two questions are concerned with the validity of Article 5(3)(b) of Regulation No 2793/77, which requires the dairy to submit a declaration relating to the undertakings given by farmers. The first question relates to the issue whether the Commission was competent to adopt such a provision, whilst the second question seeks to ascertain whether or not the penalty provided for, namely repayment of the aid granted, is disproportionate to a minor delay in forwarding the requisite statements of herd size.

8 It should be observed first that the wording of the first question is based on the view that the contested provision adds a substantive condition to the conditions laid down by the relevant Council regulations for the grant of special aid.

9 However, that view is incorrect. The requirements laid down by Article 5(3) form an integral part of the system of monitoring and proof which had to be set up so as to ensure the smooth operation of the aid scheme. Since those requirements form part of the detailed rules for the application of the system of aid for skimmed milk and skimmed-milk powder produced in the Community and used as animal feed, the Commission was empowered to impose them under Article 10(3) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176), which is the basic regulation in this sector.

10 As there is nothing in the documents before the Court to show that in setting up this monitoring system the Commission went beyond what is necessary to ensure the smooth operation of the aid scheme, it must be concluded that the Commission did not exceed the powers conferred on it.

11 It must therefore be held that the Commission had the power to adopt the contested provision.

12 However, Butterabsatz contends that recognition by the Court of the Commission's power implies that the obligation imposed by the contested provision is a subsidiary obligation of an administrative nature. Non-compliance with such an obligation cannot attract a penalty as severe as that provided for in the event of non-compliance with the main obligation.

13 In its second question the national court raised the same problem in relation to the principle of proportionality, inasmuch as the contested provision requires the dairy to undertake to repay the special aid in its entirety even where the farmers in question have only slightly, for example by a few days, exceeded the time-limit for submitting a statement of the size of their herd to the dairy.

14 It is not apparent from the documents before the Court that in this case the time-limit was exceeded by only a few days. However, it is for the national court and not for the Court of Justice to carry out the necessary verifications in that regard and to draw the appropriate conclusions. In any event, the question as submitted must be understood as referring in particular to a situation in which the time-limit is exceeded by only a few days.

15 In that regard it must be pointed out that Commission Regulation (EEC) No 188/83 of 26 January 1983 amending for the 12th time Regulation (EEC) No 2793/77 (Official Journal 1983, L 25, p. 14) added a new paragraph to Article 4 of the latter regulation, providing that 'where a statement made to a dairy of the size of a herd . . . is not forwarded on time but not more than 10 days late, the amount of aid shall be reduced by 10% for the period concerned'.

16 It is true that Regulation No 188/83 was adopted after the events which gave rise to the dispute in the main proceedings; however, according to Article 2 of that regulation, the new paragraph of Article 4 of Regulation No 2793/77 is applicable, at the request of applicants, to applications for aid already submitted under the latter regulation.

17 It follows from the aim of Regulation No 188/83, which is to prevent the strict application of the time-limit from leading to loss of the total amount of the aid in the event of a minor delay, and from the context of Regulation No 2793/77 in which the new paragraph of Article 4 appears, that the retroactive effect provided for by Article 2 of Regulation No 188/83 applies not only to applications for aid on which no decision has yet been given but also to claims for repayment of the aid which have not yet been settled. The issue of the lack of proportionality of total forfeiture of the aid where the time-limit is only slightly exceeded arises in the same manner in both cases.

18 Accordingly, the amendment made by Regulation No 188/83 in cases where the time-limit for making a statement of herd size has been only slightly exceeded may be relied upon by a dairy both in support of an application for aid and against a claim for repayment, where the application for aid was made prior to the date on which that regulation entered into force.

19 In such a legal context the question may still arise whether the principle of proportionality is contravened by the fact that entitlement to special aid is lost in its entirety where the time-limit has been exceeded by more than 10 days. However, the Court has already held in its judgment of 8 October 1986 in Case 9/85 *Nordbutter* v *Germany* [1986] ECR 2831 that Regulation No 188/83 takes into account the considerable disadvantage represented by the loss of the entire aid where the time-limits prescribed have been exceeded only slightly and that it is not for the Court to decide whether the legislative bodies of the Community should have provided that time-limits were only slightly exceeded where they were exceeded by a period slightly longer than that actually laid down.

20 It follows from the foregoing considerations that the rules applicable where the time-limit for the submission of the statement of herd size has been exceeded are not contrary to the principle of proportionality.

21 Accordingly, the answer to the first and second questions must be that examination of those questions has disclosed no factor of such a kind as to affect the validity of Article 5(3)(b) of Commission Regulation No 2793/77.

Third and fourth questions (interpretation of the provisions relating to statements of herd size)

22 Commission Regulation (EEC) No 1438/79 of 11 July 1979, amending for the fourth time Regulation (EEC) No 2793/77 (Official Journal 1979, L 175, p. 23), amended Article 4(1)(b) of the latter regulation so as to provide that as from 1 January 1980 farmers were to undertake to forward to the dairy 'at the option of the Member State' either a statement of the size of their herd before the beginning of each calendar quarter, as before, or a statement of the average size of the herd before the beginning of each calendar year.

23 It is apparent from the documents before the Court that following the adoption of that regulation the Bundesamt stated, in a circular of 5 November 1979 addressed to the dairies, that it intended to retain the existing system of quarterly statements of herd size. The Hessische Verwaltungsgerichtshof (Higher Administrative Court, Hessen), the appeal court in this case, considered that the issuance of that circular did not constitute a valid exercise of the choice given to the Member States by Regulation No 1438/79. Accordingly, a legal vacuum was created.

24 The third and fourth questions are based on the assumption that the Member State concerned did not, on 1 January 1980, make the choice provided for by Regulation No 1438/79. The third question seeks to ascertain whether, in that case, the obligation of farmers to forward a statement of the size of their herd to the dairy every quarter lapsed or whether it subsists until such time as the Member State has made its choice. The fourth question seeks to ascertain the effect of failure to make any choice on the validity of the undertakings given by farmers.

25 Neither the aim of Regulation No 2793/77, which is designed to ensure supervision of the smooth operation of the aid scheme in question, nor the terms in which its provisions are couched support the conclusion that failure by a Member State to opt for a new method consisting in an annual statement of herd size, as provided for by Regulation No 1438/79, automatically brings to an end the

method requiring a quarterly statement which was previously applied and was acknowledged to be valid in that regulation. The aid scheme as introduced by various Community regulations cannot operate without an undertaking by the farmer to provide information on the size of his herd.

26 The answer to the third question must therefore be that Article 4(1)(b) of Commission Regulation No 2793/77 and Article 1(3) of Commission Regulation No 1438/79 must be interpreted as meaning that the undertaking given by a farmer who has a specialized holding entails the obligation to forward a statement of the size of his herd to the dairy every quarter until such time as the Member State concerned has chosen, in accordance with the option available to it after 1 January 1980, whether to require a quarterly statement or an annual statement of the average size of his herd.

27 In the light of that answer, it is unnecessary to answer the fourth question.

Costs

28 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions submitted to it by the Bundesverwaltungsgericht, by order of 1 September 1988, hereby rules:

(1) Examination of the first and second questions has disclosed no factor of such a kind as to affect the validity of Article 5(3)(b) of Commission Regulation

(EEC) No 2793/77 of 15 December 1977 on detailed rules of application for granting special aid for skimmed milk for use as feed for animals other than young calves.

(2) Article 4(1)(b) of Commission Regulation (EEC) No 2793/77 and Article 1(3) of Commission Regulation (EEC) No 1438/79 of 11 July 1979 amending for the fourth time Regulation No 2793/77 must be interpreted as meaning that the undertaking given by a farmer who has a specialized holding entails the obligation to forward a statement of the size of his herd to the dairy every quarter until such time as the Member State concerned has chosen, in accordance with the option available to it after 1 January 1980, whether to require a quarterly statement or an annual statement of the average size of his herd.

Kakouris Koopmans Díez de Velasco

Delivered in open court in Luxembourg on 18 January 1990.

J.-G. Giraud
Registrar

C. N. Kakouris
President of the Fourth Chamber