2793/77 for the fourth time must be interpreted as meaning that the undertaking to be given by a farmer who has a specialized holding in order to qualify for aid for skimmed milk for use as feed for animals other than young calves 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 the herd.

REPORT FOR THE HEARING
delivered in Case C-345/88 *

I — Facts and procedure

1. *Legislation*

With a view to reducing milk surpluses in the Community, Article 10 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) provides for the grant of aid for skimmed milk manufactured in the Community for use as animal feed.

According to Article 10(1) of that regulation, general rules governing such aid are to adopted by the Council in accordance with Article 10(2), whilst the Commission is to adopt detailed rules for the application of that aid in accordance with the management committee procedure (Article 10(3)).

The general rules for granting the aid were laid down by Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (Official Journal, English Special Edition 1968 (I), p. 260).

Since skimmed milk is traditionally used as feed for calves, the Council decided in 1977 to create a special incentive to encourage the use of that product as feed for other animals, particularly pigs. The aid scheme in force since 1968 was thus extended inasmuch as the use of skimmed milk as feed for calves continued to confer entitlement to the payment of the aid, whilst a higher 'special aid' for the use of that product in the rearing of other animals was introduced by Council Regulation (EEC) No 876/77 of 26 April 1977 amending Regulation No 986/68 (Official Journal 1977, L 106, p. 24).

* Language of the case: German

As a result of the dual nature of that system, however, there is a risk that the aid may be deflected from its intended purpose, particularly in mixed farms, that is to say those on which both calves and other animals are reared. In order to prevent any risk of fraud, the Commission established an inspection system whose detailed rules are laid down in Regulation (EEC) No 2793/77 of 15 December 1977 on detailed rules of application for granting aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1977, L 321, p. 30), which is based on Article 10(3) of Regulation No 804/68.

According to Article 3 of Regulation No 2793/77, the special aid is to be granted to a dairy only in respect of the skimmed milk covered by an undertaking on the part of the farmer. The dairy concerned must produce a document in which the farmer undertakes to satisfy the conditions laid down in Article 4 of the regulation. In the case of specialized farms, Article 4(1)(b) imposes on the farmer an obligation:

(i) not to keep young calves or, if he keeps young calves, to take delivery from the dairy only of skimmed milk denatured in accordance with the third indent of Article 3(1)(b);

(ii) to forward to the dairy, before the beginning of each quarter, a statement of the size of his herd.

Commission Regulation (EEC) No 1438/79 of 11 July 1979 amending for the fourth time Regulation (EEC) No 2793/77 on detailed rules of application for granting special aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1979, L 175, p. 23) amended Article 4(1)(b) to the effect that as from 1 January 1980 the farmer was to undertake to forward to the dairy, at the option of the Member State concerned, either — as before — a statement of the herd size before the beginning of each calendar quarter or, before the beginning of each calendar year, a statement of the average herd size.

Article 4 was supplemented by Commission Regulation (EEC) No 188/83 of 26 January 1983 amending for the 12th time Regulation (EEC) No 2793/77 on detailed rules of application for granting special aid for skimmed milk for use as feed for animals other than young calves (Official Journal 1983, L 25, p. 14). That regulation adds a third paragraph to Article 4, which provides 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' (Article 1(1)(b) of Regulation No 188/83). That regulation entered into force on 30 January 1983.

Article 5(3)(b) of Regulation No 2793/77 provides that the application for the payment of special aid is to be submitted by the dairy to the competent national authority. As the direct recipient of that aid, the dairy must also submit with its application a declaration attesting that it 'will, as appropriate, forgo or repay the special aid wholly or in part to the competent authority if it is found that the farmer has not abided by one of the undertakings referred to in Article 4'.

2. *Facts of the case*

The parties to the main proceedings are Butterabsatz Osnabrück-Emsland eG (hereinafter referred as 'Butterabsatz') and the Bundesamt für Ernährung und Forstwirtschaft. In 1979 and 1980 Butterabsatz applied to the Bundesamt for the grant of special aid. Butterabsatz attached to each application for special aid the declaration provided for in Article 5(3)(b) of Regulation No 2793/77.

In response to the applications for aid, the Bundesamt granted special aid totalling approximately DM 6.5 million in respect of the period from September 1979 to September 1980.

In July 1980 and in June 1981 the Bundesamt carried out inspections on the premises of Butterabsatz at Beesten (Federal Republic of Germany). The Bundesamt found that five pig-breeders had not forwarded the relevant statments of herd size, in writing and on the appropriate forms, before the beginning of each calendar quarter. Following the inspection carried out in July 1980, Butterabsatz drew up and forwarded the missing statements of herd size on the basis of information supplied by the farmers on the telephone. The forms in question were not signed by the individual farmers. By notices dated 25 June and 9 November 1981, the Bundesamt demanded the repayment by Butterabsatz of part of the special aid, amounting to approximately DM 141 000, on the ground that the five farmers in question had not forwarded the statements of herd size to the dairy.

Butterabsatz brought an action before the Verwaltungsgericht (Administrative Court) Frankfurt am Main challenging those two demands for repayment. In two judgments of 19 May 1983 the Verwaltungsgericht annulled the two notices on the ground that the Bundesamt had no right of recovery against Butterabsatz. The grant of aid under Regulation No 2793/77 was subject only to the condition that the farmers give the requisite undertakings, and this had been done by the five farmers in question. Inadequate compliance with the undertaking was not material.

The Bundesamt appealed against those judgments to the Verwaltungsgerichtshof (Higher Administrative Court) Kassel. By judgments of 9 June 1986 the Verwaltungsgerichtshof allowed the appeal in respect of the demand for repayment in respect of the period from October to December 1979. It expressed doubts as to whether the Commission was empowered to impose additional conditions for the grant of aid, but it did not consider the question of the validity of the contested provisions, on the ground that, in any event, the plaintiff's obligation to make repayment arose out of its undertakings.

However, with regard to the demand for repayment in respect of the period from January to September 1980, the Verwaltungsgerichtshof dismissed the appeal. It held that the duty of farmers to supply quarterly statements of the size of their herds lapsed as a result of the amendment made to the regulation with effect from 1 January 1980. The Federal Republic of Germany had not made a choice between quarterly and yearly statements of herd size, at any rate until September 1980, and this had left a legal vacuum.

The parties both appealed on a point of law to the Bundesverwaltungsgericht against those judgments.

3. *Observations of the Bundesverwaltungsgericht*

The Bundesverwaltungsgericht concludes from the relevant provisions as a whole that none of those rules expressly provides that observance by the farmer of his undertaking to supply the dairy with a statement as to the size of his herd is a condition for the grant of special aid. If that were a substantive rule, it could only have been adopted by the Council pursuant to Article 10(2) of Regulation No 804/68. Moreover, Commission Regulation No 2793/77 provides that the dairy must undertake to repay any aid if the farmer fails to abide by his undertaking. The rationale for that undertaking by the dairy is that observance by the farmer of his undertaking is not required by legislation as a condition for the grant of the aid. In other words, a separate commitment on the part of the dairy to repay the aid was necessary, so as to compel the dairy to ensure that the farmers abided by their undertakings. The Bundesamt could therefore found its entitlement to repayment of the special aid on the undertakings given by Butterabsatz on the basis of the relevant provisions of Community law. If those provisions were invalid, it would be necessary to consider whether the Bundesamt was entitled to assert its claims arising from those undertakings against Butterabsatz.

Those are the reasons for which the Bundesverwaltungsgericht asked the Court of Justice, in accordance with Article 177 of the EEC Treaty, to give a preliminary ruling on four questions.

With regard to the first question, the national court concludes from the distinction made in Article 10(2) and (3) of Regulation No 804/68 between the 'general rules governing the aid' and 'conditions under which such aid may be granted', which are to be laid down by the Council, and the 'detailed rules for the application' of the article, which must be adopted by the Commission, that there may be some doubt whether the Commission is entitled to adopt the contested rule.

The second question seeks to ascertain whether the contested provisions are contrary to the principle of proportionality. The dairy must undertake to repay all the aid, even in the event that the prescribed period is only slightly exceeded. In Article 4(3) of Regulation No 2793/77, as amended by Regulation No 188/83, the Commission provided that where the statements of herd size are not forwarded on time, but not more than 10 days late, the amount of the aid for the period concerned is to be reduced by only 10%. However, that provision did not enter into force until 30 January 1983.

With regard to the third and fourth questions, the national court expresses doubts regarding the effects on the farmers' obligations of the failure by a Member State to choose between the two options conferred upon it by the amendment of Regulation No 1438/79.

4. *Questions*

The questions submitted by the Bundesverwaltungsgericht are worded as follows:

'(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?'

5. *Procedure*

The Bundesverwaltungsgericht's order for reference of 1 September 1988 was received at the Court Registry on 28 November 1988.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by

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

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

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

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to assign the case to the Fourth Chamber and to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations

1. *The Commission's power to adopt detailed rules of application* (first question)

Butterabsatz points out in the first place that the obligation to repay the aid arises exclusively from an undertaking which is not provided for in a basic Community regulation. Neither the fact of requiring such an undertaking nor the imposition of serious penalties in the event of the time-limit being exceeded can be regarded as detailed rules of application whose adoption is a matter for the Commission.

In its judgment of 15 May 1984 in Case 121/83 *Zuckerfabrik Franken* v *Hauptzollamt Würzburg* [1984] ECR 2039, concerning a provision comparable to Article 10(1) and (2) of Regulation No 804/68, the Court took the view that the Commission is empowered to adopt all the measures which are necessary or appropriate for the implementation of basic legislation, provided that they are not contrary to such legislation or to implementing legislation adopted by the Council. In Article 5(3)(b) of Regulation No 2793/77 the Commission needlessly imposed additional conditions for the grant of aid. In providing that aid which meets the conditions laid down by the Council may be recovered subsequently where there has been a failure to comply with an administrative obligation within the prescribed period, the Commission in fact amended the general rules laid down by the Council.

The German Government and the Commission point out that the Court has already considered the validity of Article

5(3)(b) of Regulation No 2793/77 in its judgment of 28 June 1984 in Joined Cases 187 and 190/83 *Nordbutter* v *Germany* [1984] ECR 2553. In that judgment the Court took the view that the provision in question is not contrary to the general principles of liability recognized by Community law. The Court acknowledged that in adopting that provision the Commission did not exceed the power to adopt detailed rules of application conferred upon it by Article 10(3) of Regulation No 804/68.

Furthermore, the contested declaration forms part of the set of provisions designed to prevent abuse of that aid scheme. The declaration is necessary to ensure the proper functioning of that scheme and is thus part of the detailed rules for the application of the scheme. In that regard, reference may be made to the Court's judgment of 18 October 1988 in Case 121/87 *Bayernwald Früchteverwertung* v *Germany* [1988] ECR 6273, which is comparable to this case.

2. *Breach of the principle of proportionality* (second question)

According to Butterabsatz, Article 5(3)(b) of Regulation No 2793/77 is invalid on the ground that it is contrary to the principle of proportionality. It points out that, according to the case-law of the Court (judgment of 24 September 1985 in Case 181/84 *Man Sugar* v *IBAP* [1985] ECR 2897), it is necessary first to ascertain whether the means which a provision employs are appropriate and necessary to attain the objective pursued. Where Community legislation makes a distinction between a primary obligation and a secondary obligation of an administrative nature, it cannot penalize failure to comply with the secondary obligation as severely as failure to comply with the primary obligation. In a case such as this, the obligation involved is a secondary obligation of an administrative nature. The statements of herd size serve exclusively to monitor observance of the obligations imposed on dairies and on farmers, in order to prevent the skimmed milk from being used as feed for young calves. In this case that objective had already been achieved, since the five farmers in question were engaged in the fattening of pigs. Accordingly, only the secondary obligation was not complied with.

Moreover, a dairy which receives subsidies cannot itself discharge the obligation to produce statements of herd size. It is dependent on the cooperation of the farmers to whom it sells the skimmed milk at reduced prices. If the aid is discontinued, the dairy cannot recover the amounts in question from the farmers. The withdrawal of the aid therefore constitutes irreparable damage.

The fact that in Regulation No 188/83 the Commission imposed a more moderate penalty shows that it had itself realized that the penalty initially provided for contravened the principle of proportionality. Since Regulation No 188/83 was not yet in force during the contested period, the Court can only declare the previous legislation invalid.

The German Government and the Commission point out in the first place that in its judgment of 8 October 1986 in Case 9/85 *Nordbutter* v *Germany* [1986] ECR 2831 the Court stated that the Community legislation takes into account the considerable disadvantage represented by the loss of the entire aid where the time-limits prescribed have been exceeded only slightly. The reduction of the aid provided for by Article 4(3) of Regulation No 2793/77 where the delay does not exceed 10 days must be regarded

as an expression of the principle of proportionality. The fact that no such provision existed before January 1983 cannot have the effect of rendering Article 5(3)(b) of Regulation No 2793/77 'invalid' with regard to instances in which the period prescribed for submitting the statement of herd size is exceeded. Furthermore, it must be pointed out that the national court has not referred to Article 2 of Regulation No 188/83, which expressly provides that the amended penalty is applicable, at the request of the person concerned, to applications for aid already submitted. Such retroactivity may apply in this case, since no final decision had yet been taken on the application for aid at the time of the entry into force of Regulation No 188/83.

However, the Commission considers that the initial version of the contested provision was not disproportionate either, in view of the fundamental importance of the prior submission of statements of herd size for effective monitoring.

3. *Application of Article 1(3) of Regulation No 1438/79* (third and fourth questions)

Butterabsatz states that the provisions of Community law must be interpreted strictly, particularly where they are likely to give rise to consequences such as the repayment of aid which has already been paid. The wording of Article 1(3) of Regulation No 1438/79 would appear to suggest that the obligation to forward a statement of herd size before each quarter lapsed with effect from 1 January 1980. Where a Member State has not chosen between the two systems provided for by the Community legislation, the harsh penalty of repayment cannot be imposed on the recipient of the aid.

The German Government and the Commission argue that according to the meaning and purpose of Regulation No 2793/77 the obligation on the part of farmers to forward a statement of herd size continues to apply until the Member State in question has chosen whether to require a quarterly or an annual statement. The monitoring system has not been replaced by a different system; it has merely been supplemented in order to facilitate administrative management at national level. It is clear that in the context of a monitoring system the Community legislature cannot have intended to abolish the obligation to forward the statement of herd size and thereby deprive itself of a means of supervision in the event that a Member State failed to choose between the two systems provided for.

The German Government adds that it exercised its option before 1 January 1980.

With regard to the fourth question, the German Government and the Commission consider that in order to meet the mandatory requirements laid down in Article 4 of Regulation No 2793/77, the undertakings given must be adjusted in keeping with any amendment of that article.

III — Conclusions of the Commission

The Commission suggests that the questions should be answered as follows:

'(1) Consideration of the questions raised has disclosed no factor of such a kind as to call into question the validity of Article 5(3)(b) of Regulation No 2793/77.

(2) The second indent of Article 4(1)(b) of Regulation No 2793/77, as amended by Article 1(3) of Regulation No 1438/79, must be interpreted as meaning that specialized farms are still required, even after 31 December 1979, to forward in advance a quarterly statement of the size of their herd to the relevant dairy, until such time as the relevant Member State has exercised its right to choose another system.

(3) Farmers' undertakings are affected by any amendment of Article 4 of Regulation No 2793/77. However, the amendments have no effect in a case such as this, inasmuch as the alteration of the undertakings depends on the exercise by the relevant Member State of its right to choose and this has not yet been done.'

IV — Reply to a question from the Court

The Court asked the German Government to indicate when and how it exercised the right provided for by Article 1(3) of Regulation No 1438/79 to choose between the monitoring system based on a quarterly statement of the herd and that based on an annual statement of the average herd.

The German Government replied that it made its choice immediately after the publication of Regulation No 1438/79 of 11 July 1979. It published its decision to retain the system of a quarterly statement of the herd in the form of a general provision that was notified to the dairies by Circular 6/1979 of 5 November 1979. The reason for the maintenance of that type of supervision was that only a quarterly statement of the herd was capable of ensuring an assessment of the actual size of the herd that was as accurate as possible.

The German Government has submitted a copy of the circular in question.

T. Koopmans
Judge-Rapporteur