OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 19 October 1989 *

Mr President,
Members of the Court,

1. By two decisions of 18 August 1987 [1] the Commission refused to recognize as chargeable to the European Agricultural Guidance and Guarantee Fund ('the EAGGF') grants made by the Federal Republic of Germany in 1984 and 1985 to butter producers in the *Land* of Baden-Württemberg by way of special aid for skimmed milk and skimmed-milk powder for use for feeding animals other than young calves.

For the relevant provisions governing the grant of such aid — which are, however, extremely complex and not easy to survey owing to the fact there has been a continuous build-up of layers of amending instruments — reference is made to the Report for the Hearing, which provides a detailed description.

In this Opinion, apart from a number of particulars relating to the more directly relevant provisions, it appears appropriate to set out the following details.

2. The relevant regime constitutes a refinement of a more general system of aid designed to encourage the use of skimmed milk for animal feed in order to reduce, or at least contain, the costs to Community funds arising from the storage of skimmed-milk powder. Compared with that general system, the scheme at issue is characterized by its having introduced higher aid ('special aid') applicable only to milk used for feeding animals other than young calves. The rationale is clear: since young calves (that is to say, calves less than four months old) are in any case fed essentially on milk, it would therefore be pointless to provide 'special' incentives for that particular use.

3. No matter how consistent with the fundamental objectives, that dual aid system was none the less exposed to obvious risks of abuse, since, as the Court has pointed out,

'in particular, on farms known as mixed farms, that is to say those on which calves as well as pigs or other animals for slaughter are reared, there might be a tendency to obtain skimmed milk under the particularly favourable conditions governing the special aid and to use that milk for rearing calves'. [2]

Precisely because it was impossible to tell in that case whether the milk was actually used for feeding animals other than young calves, a flat-rate system for calculating the aid was introduced which, in the specific case of mixed farms producing butter and using

* Original language: Italian.

1 — Decisions 87/468/EEC and 87/469/EEC on the clearance of the accounts presented by the Member States in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1984 and 1985 (OJ 1987, L 262, pp. 23 and 35).

2 — Judgment of 28 June 1984 in Joined Cases 187 and 190/83 *Nordbutter* v *Germany* [1984] ECR 2553, paragraph 6.

their own milk for feeding animals, is based on the following elements:

(i) for each kilogram of butter sold, aid corresponding to 23 kilograms of skimmed milk is granted;

(ii) the aid is granted up to a maximum annual quantity of 2 800 kilograms of skimmed milk for each cow registered on the farm;

(iii) in addition, a flat-rate deduction is made from the amount of aid calculated in that manner to take account of the quantity of milk which is presumed to be used for young calves (six kilograms per day or 180 kilograms per month for each calf) and in respect of which therefore no special aid is granted.

4. It is obvious that the proper functioning of the system depends on the reliability of the data provided by farms with regard to the calculation parameters. For that reason, under the Community rules farmers have to comply with a variety of requirements relating to the documentation and notification to the national authorities of the relevant data. For their part, the Member States are under a duty to adopt the necessary measures so as to ensure effective supervision. Finally, any infringements by farmers make them liable to criminal or administrative sanctions. That is the context of the provisions with which this dispute is concerned. Those provisions are, first and foremost, Article 6(1) of Regulation (EEC) No 2793/77,[3] which provides as follows:

'1. With regard to the special aid for skimmed milk referred to in Article 2(1)(b) of Regulation (EEC) No 986/68,

(a) the farmers concerned shall forward to the competent agency in their Member State:

(i) an application including a statement of the size of their herd at the beginning of each month in question,

(ii) an undertaking immediately to notify any change in this information which might involve a change in the rate of aid;

(b) the undertakings provided for in Article 4(1)(a), (b) and (c) shall apply by analogy, without prejudice to the provisions of Regulation (EEC) No 1105/68.'

Article 4(1) of Regulation No 2793/77, to which Article 6(1)(b) refers, provides *inter alia* as follows:

'1. The undertaking referred to in Article 3(1)(a) shall be a document drawn up in at least three copies whereby the farmer undertakes to the dairy and the competent authority:

...

(c) in the case of a mixed farm:

(i) to forward to the dairy, together with the undertaking, a statement of the size of his herd at the time of application for delivery,

3 — OJ L 321, 16.12.1977, p 30

(ii) to declare to the dairy, before the beginning of each quarter, the maximum number of calves less than four months old which will be kept on the farm during the quarter in question; this undertaking may be replaced by an undertaking to make such declaration before the beginning of each month for the month in question, and

(iii) to take delivery, for each calf declared pursuant to the above indent, of a minimum quantity of skimmed milk not qualifying for special aid equal to six kilograms per day or 180 kilograms per month.'

5. The Commission takes the view that, under those provisions, mixed farms producing butter must notify the statement of herd size and the declaration relating to the maximum number of young calves *before* the beginning of the period for which the aid is applied for. On that view, the practice, applied for several years in the Federal Republic of Germany, according to which farms forward those returns at the same time as the quarterly application for aid, that is to say, *at the end* of the reference period, is unlawful. As a result, the Commission, acting in accordance with the general rules on the financing of the common agricultural policy, refused, by means of the contested decision, to charge to the EAGGF the sums paid by the Federal Republic of Germany by way of special aid in 1984 and 1985.

6. In brief the question is: is it or is it not a requirement under the rules for the aforementioned data to be notified *ex ante*?

A few words by way of preface seem appropriate.

The provisions in question must be interpreted in the light of their aims and context. In particular, in this case it must be borne in mind that the duties with respect to the notification of data are essential in order to ensure that the aid is calculated correctly and the relevant checks are effective.

None the less, it should not be overlooked that infringements of those provisions entail unfavourable — even very severe — consequences for the persons concerned: sanctions (and even criminal sanctions) and the possibility that the national authorities will claw back the aid granted. I therefore consider that the obligations in question must ensue plainly and unequivocally from the Community rules.

Moreover, that requirement seems to me to be consistent with what the Court has stated in the past, precisely with regard to the clearance of the accounts of the EAGGF:

'Community legislation must be certain and its application foreseeable by those subject to it. That requirement of legal certainty must be observed all the more strictly in the case of rules liable to entail financial consequences, in order that those concerned may know precisely the extent of the obligations which they impose on them'. [4]

4 — See the Court's judgments of 15 December 1987 in Cases 326, 332, 336, 346, 348/85, 237/86 and 239/86, ECR 5091, 5173, 5197, 5225, 5251 and 5271; see in particular the judgment of 15 December 1987 in Case 325/85 *Ireland* v *Commission* [1987] ECR 5041, paragraph 18.

A fortiori I would say that Community legislation must be clear and precise when failure to comply therewith gives rise to the application of sanctions, especially sanctions of a criminal nature. In such cases the imposition of the sanction depends upon the Community measure defining the offence; it is irrelevant that the sanction is laid down by national legislation. This is the line taken, it seems to me, by the judgment in *Könecke*,[5] where the Court emphasized that:

'a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis'.

In that case, the Court went on to consider whether a particular provision, interpreted in the light of the traditional criteria, that is to say in the light of its wording, context and purpose, constituted such a legal basis, and reached the conclusion that it did not. It seems to me — as has just been pointed out — that the requirement of clarity applies to the (substantive) provision laying down and defining the illegal act or omission as much as it applies to the provision establishing a sanction.

Lastly, it appears from another precedent[6] that where failure to comply with a formal provision requiring a particular procedure to be followed (in the case in question, a provision laying down a time-limit) has the effect of depriving a Member State of a financial advantage, the principle of legal certainty requires that the provision should be 'clearly and precisely drafted so that the Member States may be made fully aware of the importance of their complying [therewith]'.

7. Having made that clear I shall turn to the interpretation of the provisions at issue in this case.

As regards the requirement, set out in the first indent of Article 6(1)(a), to forward the statement of herd size, it is readily apparent that that provision does not include any express indication to the effect that that requirement must be complied with *before* the beginning of the period for which the aid is requested.

On the contrary, it appears to me that the argument of the Federal Republic of Germany to the effect that a schematic as well as literal interpretation of the provision bears out the completely opposite view, namely that the statement of herd size should be forwarded at the end of the reference period, is well founded.

In the first place, it seems to me that the Federal Republic of Germany is right in maintaining that the application in which the statement of herd size is given is none other than the application for aid, which is to be forwarded to the national agency at the end of each quarterly period covered by the aid.

The Commission sought to challenge that view by maintaining in particular that the 'application' referred to in Article 6(1) consists of an initial indication of interest on the part of the person concerned in participating in the special aid system; in particular, that application could be the

5 — Judgment of 25 September 1984 in Case 117/83 *Könecke* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1984] ECR 3291, paragraph 7 *et seq.*

6 — Judgment of 26 May 1982 in Case 44/81 *Germany* v *Commission* [1982] ECR 1855, paragraph 16

request for registration pursuant to Article 8(2) of Regulation (EEC) No 1105/68.[7]

However, the argument is not convincing. The statement of herd size must be handed in periodically; for that reason alone it cannot be included in a document — constituting the initial indication of interest in participating in the scheme in question — which, by definition, should be drawn up once only. But, above all, it seems obvious that the statement of herd size should be designed to be contemporaneous with the application for the grant of the aid, since it is used to calculate the aid itself. Consequently, that statement should be notified at the time when the application is made and must, logically, contain data about the herd which relate to the period to which the aid refers.

8. The Commission further objects that that interpretation of the first indent of Article 6(1)(a) would make nugatory the second indent of that provision, under which farmers must forward to the competent authority 'an undertaking immediately to notify any change in this information which might involve a change in the rate of aid'. In the Commission's view, if the statement of herd size had to be forwarded *ex post*, it would already incorporate the changes which had taken place in the previous quarter, and that would make it unnecessary to notify changes immediately.

In that connection, it seems to me that it should be pointed out that the provisions contained in the two indents of Article 6(1)(a), albeit complementary, are different in scope. In particular, whilst the first indent refers to a statement which is to be made periodically and constitutes the basis for granting the aid, the second indent puts the farmer under a specific obligation continually to update the data, which is important, as the Federal Republic observes, above all for the purpose of the performance of checks by the national authorities. However, for that very reason that obligation is to a certain degree independent of the obligation set out in the first indent, and its function is not affected by whether the statement of herd size is forwarded at the beginning or at the end of the period to which the aid relates.

9. In sum, it seems to me that it appears from Article 6(1)(a) that the statement of herd size should be forwarded at the same time as the application for the grant of aid, that is to say, at the end of the period for which the aid is requested.

However, in any event should doubts remain in that regard it would have to be considered as a result that the relevant rules do not lay down a sufficiently clear and precise obligation as regards the time at which the statement should be forwarded. In those circumstances, it must be considered that the relevant regulation gives the national authorities the power to lay down rules on that specific aspect and that they are free to decide whether to require the statement of herd size to be forwarded *ex ante* or *ex post*.

It follows that in this case the Federal Republic of Germany cannot be held to have committed an infringement and that therefore, from that point of view, the contested decision appears to be unfounded.

10. However, as has already been mentioned, the Commission maintained that

7 — OJ, English Special Edition 1968 (II), p. 379.

the Federal Republic of Germany also failed to observe another provision of Regulation (EEC) No 2793/77. That provision is the second indent of Article 4(1)(c) which, although relating to farmers who purchase skimmed milk from dairies, also applies, as a result of the reference made by Article 6(1)(b), to farmers who produce their own skimmed milk for animal feed.

The second indent of Article 4(1)(c) provides that farmers must 'declare to the dairy, before the beginning of each quarter, the maximum number of calves less than four months old which will be kept on the farm during the quarter in question'.

According to the Commission, that provision, which is covered by the reference in Article 6, applies on the same terms to farmers who are producers of skimmed milk, except, obviously, that the addressee of the statement will no longer be the dairy but the competent national agency.

In the view of the Federal Republic of Germany, however, when that provision is applied to farmers who are producers of skimmed milk it should be read as providing for the declaration relating to the maximum number of calves to be made, not before, but after the quarter in question. It bases its view on the differences in the mechanism for paying the aid according to whether the farmer purchases the skimmed milk from the dairy or produces it directly.

In the first case, the aid is paid, not directly to the farmer, but to the dairy, which, in turn, passes it on to the farmer in the form of an equivalent reduction in the selling price. It must be borne in mind that in that case the price discount, which represents the special aid, relates to a quantity of milk which will not be consumed until in the future. It is therefore obvious that for the purposes of the correct calculation of the amount the farmer must provide data in the nature of a forecast, that is to say relating to the utilization of milk on the farm in the course of the next quarter.

That requirement of advance notification, however, does not apply to farmers who are producers of skimmed milk, since they qualify for aid on the basis of the quantities of skimmed milk which have already been consumed during the preceding quarter.

It is argued that since in that case the aid and the relevant flat-rate deductions are calculated after the skimmed milk has been used on the farm it would be entirely logical for the data relating to the maximum number of calves on the farm to be forwarded *ex post* and to refer to any changes recorded in the course of the preceding quarter.

11. Certainly, the applicant's argument is not without logic. It is in fact based on the finding that the data relating to the maximum number of calves must in any event relate to the quarter for which the aid is granted. Consequently it is the preceding quarter in the case of farmers who produce their own skimmed milk and the subsequent quarter in the case of farmers who purchase the milk from a dairy. Consequently, it will be necessary in the first case to forward the data *ex post* and in the second case *ex ante*.

However, it must be pointed out that the advance declaration relating to the maximum number of calves, whose importance the Court emphasized in the judgment of 8 October 1986 in Case 9/85 *Nordbutter*,[8] is important not only for the purposes of calculating the flat-rate deductions, but also for the purposes of effective supervision by the national authorities. The advance declaration is more binding on the farmer, who is always at risk of being subjected to checks carried out without warning, in which he must justify any discrepancy between the situation as found and the forecast data previously supplied.

Consequently, the requirement to notify data in advance is not without significance also in the case of farmers who produce skimmed milk themselves.

Furthermore, it should be observed that that obligation is couched in absolutely unequivocal terms in Article 4, which provides that it must be made 'before the beginning of each quarter'.

In view of the clear wording of the provision and of the importance of the advance declaration in any event as regards the aim of ensuring effective supervision, I consider that the interpretation of Article 4 on which the Commission based the decision at issue is correct.

12. I therefore propose that the Court should dismiss the application and order the Federal Republic of Germany to pay the costs.

8 — Judgment of 8 October 1986 in Case 9/85 *Nordbutter* v *Germany* [1986] ECR 2831.