

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 17 September 1998 ^{*}

1. The reference for a preliminary ruling made to the Court by the Finanzgericht (Finance Court) Düsseldorf concerns the validity of Commission Regulation (EEC) No 1546/88 laying down detailed rules for the application of the additional levy payable by producers or purchasers of milk. ¹

2. The question arose during litigation concerning implementation of the regulations on milk quotas, a subject which the Court has had to deal with on a number of occasions.

I — Community regulations

3. The common organisation of the market in milk and milk products was established in 1968 by Regulation (EEC) No 804/68. ² Since the situation on that market has, from the outset, suffered from an imbalance between supply and demand, which has led to struc-

tural surpluses, the Community regulations have reflected the concern of the legislator to restrict any increase in production.

Non-marketing and conversion premiums

4. It is for this reason that Regulation (EEC) No 1078/77 ³ laid down a number of measures to reduce supply. In particular, a system of premiums was introduced for holdings who ceased to market milk and milk products from their holdings for a period of five years or who converted their dairy herds to meat production for a period of four years.

The additional levy

5. In 1984 it was found that despite the measures which had been introduced the increase in milk production was continuing unchecked.

^{*} Original language: French.

1 — Regulation of 3 June 1988 laying down detailed rules for the application for the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12), also referred to as 'the contested Regulation' or 'the Commission Regulation'.

2 — Council Regulation of 27 June 1968 on the common organisation of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176).

3 — Council Regulation of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1).

Stricter measures had become necessary, so the common organisation of the market in milk and milk products was radically altered by the introduction of the system of additional levies, which is also known as 'the system of milk quotas'.

6. Article 5c of Regulation No 804/68, which was added by Article 1 of Regulation (EEC) No 856/84,⁴ introduced a system of additional levies payable by every producer (Formula A), or by every purchaser (Formula B) of cow's milk on quantities which exceeded an annual individual reference quantity, referred to as the 'milk quota'. The Federal Republic of Germany adopted Formula A.

7. Under paragraph 3 of that article the sum of the reference quantities allocated to persons subject to the levy in a Member State may not exceed a guaranteed total quantity, which differs between Member States, and is equal to the sum of the quantities of milk delivered to undertakings treating or processing milk or milk products in each Member State during the 1981 calendar year, plus 1%.

8. The general rules for the application of the additional levy were laid down in Regulation

(EEC) No 857/84.⁵ In the Federal Republic of Germany the reference quantity was established on the basis of the year 1983. Article 2(2) of Regulation (EEC) No 857/84 states that Member States may provide that on their territory the reference quantity shall be equal to the quantity of milk or milk equivalent delivered or purchased during the 1982 calendar year or the 1983 calendar year, weighted by a percentage established so as not to exceed the guaranteed quantity defined in Article 5c of Regulation (EEC) No 804/68, as amended.

9. That system did not make provision for granting a quota to producers who, since they were taking part in the temporary non-marketing scheme provided for in Regulation No 1078/77, had not delivered or sold any milk during the reference year adopted for allocation of the quotas (these producers are generally referred to as 'SLOM producers'⁶).

10. In its judgments in *Mulder*⁷ and *Von Deetzen*⁸ the Court of Justice held that such rules, in so far as they did not provide for the allocation of reference quantities to SLOM producers, frustrated those producers' legiti-

4 — Council Regulation of 31 March 1984 amending Regulation No 804/68 (OJ 1984 L 90, p. 10).

5 — Council Regulation of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), referred to also as 'the Council Regulation'.

6 — The term 'SLOM' comes from the Dutch *slachtoffers omschakeling*, meaning 'victims of conversion'. The acronym SLOM already existed in Dutch practice: it comes from *Stopzetting Leveranties en Omschakeling Melkproductie*, meaning 'ceasing supplies and converting from milk production'.

7 — Case 120/86 [1988] ECR 2321.

8 — Case 170/86 [1988] ECR 2355.

mate expectations that the effects of the system to which they had rendered themselves subject would be limited, and should therefore be declared void.

11. In order to comply with those judgments the Council adopted Regulation (EEC) No 764/89,⁹ Article 1 of which added a new Article 3a to Regulation No 857/84. That article provides for the provisional allocation of a special reference quantity to certain categories of producers who had participated in non-marketing schemes and who complied with certain conditions.

12. Paragraphs 1 and 2 of Article 3a were annulled by the judgments in *Spagl*¹⁰ and *Pastätter*.¹¹ The Court declared those provisions invalid for breach of the principle of the legitimate expectations of producers who had taken part in the non-marketing scheme. Under Article 3a(1), producers whose non-marketing period expired before 31 December 1983 were excluded from receiving a SLOM quota for no valid reason. At the same time, the rule contained in Article 3a(2) restricted the provisional special reference quantity to 60% of the quantity of milk delivered or sold by the producer during the twelve months preceding the application for a non-marketing premium, which amounted to a reduction of 40%, considered excessive in comparison with the percentages applying to other producers.

13. Article 3a(3) of Regulation No 857/84, as amended, lays down the conditions for the definitive allocation of the special reference quantity to SLOM producers. In its original version it states that:

'If, within two years from 29 March 1989, producers can prove to the satisfaction of the competent authority that they have actually resumed direct sales and/or deliveries, and that such direct sales and/or deliveries have attained during the previous 12 months a level equal to or greater than 80% of the provisional reference quantity, the special reference quantity shall be definitively allocated to the producers. Should this not prove to be the case, the provisional reference quantity shall be returned in its entirety to the Community reserve. The level of direct sales and/or actual deliveries shall be determined by taking into account production rate trends on the producer's holding, seasonal conditions and any exceptional circumstances'.

14. Article 3a(3) was amended by Article 1(II)(c) of Regulation (EEC) No 1639/91¹² so as to extend the conditions which it lays down for the allocation of a definitive reference quantity to the new category of producers, who may, as a result of this later Regulation, be granted a special reference quantity. Thereafter, producers whose period of non-marketing or conversion in pursuance of their undertaking under Regulation No 1078/77 expired in 1983, or who had already

9 — Regulation of 20 March 1989 amending Regulation No 857/84 (OJ 1989 L 84, p. 2).

10 — Case C-189/89 [1990] ECR I-4539.

11 — Case C-217/89 [1990] ECR I-4585.

12 — Council Regulation of 13 June 1991 amending Regulation No 857/84 (OJ 1991 L 150, p. 35).

received a reference quantity under certain provisions of the additional levy scheme, were brought within the scope of Article 3a. The period of two years in which such producers could provide satisfactory evidence for the allocation of a definitive reference quantity was to run from 1 July 1991 instead of 29 March 1989.¹³

Enabling provisions

15. Article 5c(7) of Regulation No 804/68, as amended, provides that:

'Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 30.'

16. The procedure laid down in Article 30 is the one which takes place before the Management Committee for Milk and Milk Products, a consultative body consisting of representatives of the Member States and presided over by a representative of the Commission.¹⁴ The task of the Management Committee is to give opinions on drafts which are submitted by the Commission representative. The Commission subsequently implements the proposed measures forthwith. However, where those measures do not meet with the agreement of the Committee the Commission is required to refer them to the Council, and if necessary postpone their application. The Council may take a different decision under the procedure laid down in Article 43(2) of the Treaty.

Detailed rules for the application of the additional levy scheme

17. These rules are laid down in the contested Regulation, which was adopted to replace Regulation (EEC) No 1371/84.¹⁵

18. In the same way that the Council Regulation was amended following the *Mulder* and *Von Deetzen* judgments, cited above, in order

13 — According to the first recital in the preamble to Regulation No 1639/91 the new provisions are justified by the need to amend Article 3a in order to take account of the consequences of the judgments of 11 December 1990 cited above, in particular as regards the date on which the non-marketing period expires. Moreover, as stated in the third recital, the changes are intended to enable the category of producers concerned to be granted the reference quantity referred to in Article 3a even if they have already been allocated a reference quantity. However, in such cases the two quantities cannot be combined and the first quantity allocated will be deducted from the quantity provided for in Article 3a. The new Article 3a(3) of Regulation No 857/84, which entered into force on 28 March 1991, also amends the system applying to the provisional reference quantity where the conditions laid down are not complied with: in that case, the provisional reference quantity returns to the Community reserve and a definitive reference quantity equal to the quantity actually delivered or sold is then allocated. It should be noted that the conditions for the allocation of a definitive reference quantity, namely that a producer must prove both that he has actually resumed direct sales and/or deliveries and that the direct sales and/or deliveries reached a level greater than or equal to 80% of the provisional reference quantity during the previous 12 months, have not been amended. Consequently, the amendments to Regulation No 857/84 made by Regulation No 1639/91 do not alter the facts of the issue referred to the Court, which concerns the validity, in respect of Council Regulation No 857/84, of the Commission Regulation which makes the definitive allocation of a special reference quantity conditional upon the resumption of direct sales and/or deliveries of milk having resumed for at least 12 months.

14 — Article 29(1) of Regulation No 804/68, as amended.

15 — Commission Regulation of 16 May 1984 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1984 L 132, p. 11).

to enable SLOM producers to be granted a special reference quality, so the Commission Regulation was amended by Regulation (EEC) No 1033/89¹⁶ in order to adjust it to comply with those amendments.

19. An Article 3a was added at that time. Paragraph 3 of that article, the first subparagraph of which forms the subject-matter of the question referred to the Court, reads as follows:

'In accordance with rules to be laid down by the Member State, the producer shall supply evidence to the competent authority, before 29 March 1991, that he has resumed direct sales and/or deliveries of milk for *at least 12 months*.

The level of direct sales of milk or milk products and/or the level of milk deliveries during the twelve months preceding the supply of evidence shall be determined by the competent authority, taking into consideration the trend in the rate of production on the producer's holding, seasonal conditions and any exceptional circumstances ...'¹⁷

16 — Commission Regulation of 20 April 1989 amending Regulation No 1546/88 (OJ 1989 L 110, p. 27).

17 — Emphasis added.

II — Facts and national proceedings

20. Mr Vorderbrüggen, the applicant in the main proceedings, is a milk producer. He was granted a premium, which was paid in return for a non-marketing or conversion undertaking under Regulation No 1078/77, for a period ending on 25 September 1985.

21. On 28 June 1989 Mr Vorderbrüggen submitted an application to the competent authority requesting calculation of a provisional special reference quantity. A certificate dated 1 August 1989 confirmed that he fulfilled the conditions for allocation of such a reference quantity.

22. Mr Vorderbrüggen resumed milk production on 23 August 1990. By letter of 29 August 1990 the competent milk cooperative informed him of his provisional special reference quantity.

23. On 12 July 1991 the Hauptzollamt (Principal Customs Office) Bielefeld, the competent authority in this matter and the respondent in the main proceedings (otherwise referred to as 'the HZA'), informed him that the definitive special reference quantity would be allocated only if he had resumed milk production by 28 March 1990.

24. By decision of 25 September 1991 the HZA rejected the application for allocation of a definitive special reference quantity which Mr Vorderbrüggen had made on 27 August 1991 on the ground that he had not resumed milk production in due time.

25. When Mr Vorderbrüggen's complaint against that decision was rejected he brought proceedings on 5 March 1992 in the Finanzgericht Düsseldorf.

26. In his action he claims in essence that Article 3a(3) of Regulation No 857/84, as amended, does not lay down a time-limit for starting deliveries. He adds that Article 3a(3) of Regulation No 1546/88, as amended, has no legal basis since Article 3a(3) of Regulation No 857/84, as amended, does not include any further condition for the granting of a definitive special reference quantity. He considers also that Article 155 of the EC Treaty does not confer any power on the Commission to adopt Article 3a(3) of Regulation No 1546/88, as amended. Mr Vorderbrüggen considers finally that his right to be granted a definitive reference quantity follows from Article 1(II)(c) of Regulation No 1639/91. In his view, that provision, which entered into force on 28 March 1991, is applicable to him. He contends that it provides that a producer

should be definitively allocated the provisional reference quantity which he has actually milked.¹⁸

27. The HZA for its part considers that Article 3a(3) of Regulation No 1546/88, as amended, is valid because under Article 189 of the EC Treaty the Commission is authorised to adopt the regulations it requires to carry out its task. In this connection, the Commission is required, under Article 155 of the Treaty, to ensure that the measures taken by the Community institutions pursuant to that Treaty are applied. The defendant in the main proceedings adds that the Commission has received power delegated to it by the Council. It claims also that even if Article 3a(3) of Regulation No 1546/88, as amended, were to be declared invalid it would follow from Article 3a(3) of Regulation No 857/84, as amended, that the minimum period of 12 months is required in order to prevent abuse. Lastly, the HZA claims that the rules introduced by Regulation No 1639/91 are not relevant in this particular case.

18 — See, regarding the content of that reform, footnote 22 of this Opinion. Since 1 July 1991 was set as the starting point for the period of two years which the producers concerned by the 1991 reform were allowed for providing the evidence required for the allocation of a definitive reference quantity, Article 3a of Regulation No 1546/88 was amended accordingly in order to put back to 1 July 1993 the date by which a producer must prove that he has actually resumed direct sales and/or deliveries of milk for at least 12 months. Mr Vorderbrüggen's contention is apparently to defend the claim that by resuming production on 23 August 1990 he met the time-limit of 1 July 1992, after which he could no longer be granted a definitive reference quantity. It will be a matter for the national court to rule on that issue, which is one which can only be resolved once the documents in the case have been examined in order to establish whether the applicant in the main proceedings comes into the category of producers who are covered by the reform in question. At all events, the submission made in his application in the main proceedings is not likely to alter the terms of the inquiry by the national court as to the validity of a minimum period for resuming sales and/or deliveries laid down in the Commission Regulation, because the contested period will still apply.

28. It is apparent from the grounds of the order for reference that the Finanzgericht Düsseldorf is uncertain as to the validity of Article 3a(3) of the Commission Regulation because it considers that that provision adds to the conditions laid down by Article 3a(3) of the Council Regulation a further condition of a minimum period for the resumption of milk production. The national court considers that since the only legal basis for the contested Regulation is Article 5c(7) of Regulation No 804/68, as amended, which refers to the laying down of detailed rules of application according to the procedure contained in Article 30 of that Regulation, the imposition of a condition in respect of a period of time involves a broad interpretation of the concept of measures of application.

III — The question

29. In those circumstances, the Finanzgericht Düsseldorf has stayed the main proceedings and referred the following question to the Court of Justice:

‘Is the first subparagraph of Article 3a(3) of Regulation (EEC) No 1546/88, as amended by Regulation (EEC) No 1033/89, valid in so far as it requires, over and above the requirements laid down in the first sentence of Article 3a(3) of Regulation (EEC) No 857/84, as amended by Regulation (EEC) No 764/89 and by Regulation (EEC) No 1639/91, that the producer must actually have resumed direct sales and/or deliveries of milk for at least 12 months?’

IV — The answer to the question

30. By this question the national court seeks to ascertain whether the first subparagraph of Article 3a(3) of the Commission Regulation is valid in that it makes definitive allocation of a special reference quantity to a producer of milk or milk products coming within the category referred to in Article 3a(1) of the Council Regulation dependent on the condition that the producer has actually resumed direct sales and/or deliveries of milk for at least 12 months.¹⁹

31. It is thus necessary to determine whether the Commission, which drew up the contested Regulation, had the power to lay down a minimum period for the resumption of sales.

32. From the outset I must refute the Commission’s theory that the first subparagraph of Article 3a(3) of the contested Regulation only provides, in different terms, for the same period as that laid down in the first sentence of Article 3a(3) of the Council Regulation.²⁰

19 — I shall henceforth use the term ‘sales’ by way of simplification, given that this term is generally understood to cover ‘sales and/or deliveries’.

20 — Paragraph 27 of the written observations.

33. The Commission maintains that, by providing that the producer must prove that he has actually resumed sales and that they have over the preceding 12 months reached a level equal to or exceeding 80% of the provisional reference quantity in order to obtain definitive allocation of that quantity, the Council Regulation already requires that sales should have been resumed for at least 12 months, as laid down in the contested Regulation.²¹

34. Like the national court,²² I think on the contrary that the Commission Regulation adds a further condition to those already laid down in the Council Regulation.

35. This seems apparent to me from reading Article 3a(3) of the Council Regulation.

36. The first sentence lays down the condition that it must be proved that sales have been resumed and also that a minimum level of sales has been achieved, in this case 80%

of the provisional reference quantity. These two pre-conditions for the definitive allocation of a reference quantity reflect certain specific objectives of the Regulation concerned.

37. According to the second recital in the preamble to the Regulation, producers may claim reference quantities 'only if they comply with certain eligibility criteria thus making clear that they intend and are really able to resume milk production ...'. The requirement of evidence that they have actually resumed sales, and the condition that they must prove they have achieved the objective of 80% of the provisional reference quantity, are among the eligibility criteria because they guarantee both that production has actually been resumed and that the producer is probably capable of nearing the level of the reference quantity which has been laid down provisionally.

38. Laying down a period of 12 months merely provides a temporal framework within which both the intention to produce and the holding's actual capacity to produce, assessed by reference to 80%, can be measured specifically. Failure to achieve this objective within 12 months would indicate either incapacity or lack of a genuine desire on the part of the producer to resume milk production on an enduring basis and at the level fixed in advance. However, achieving this within a shorter period would in my view by no means indicate that there was no stated intention or

²¹ — *Ibid.*, paragraphs 31 and 32.

²² — The Finanzgericht Düsseldorf states that: 'In that regard, commencement of production within two years of 29 March 1989 and a particular volume of milk production during the previous 12 months does not suffice. Instead, the first subparagraph of Article 3a(3) of Regulation No 1546/88 ... requires milk production to be actually resumed in the 12 months preceding submission of the evidence' (fifth paragraph of Section II of the order for reference). The wording of the order for reference reflects the opinion of the German court that the requirement of a minimum period for the resumption of sales does not follow from the Council Regulation but results exclusively from the contested Regulation.

capacity to resume production of the specified quantities. Therefore, evidence that this objective has been attained, even within shorter periods, must be regarded as guaranteeing the objectives sought by the Council Regulation.

subparagraph of Article 3a(4) of the Council Regulation.²⁴

39. The period of 12 months is however the only period which provides an opportunity to compare the level of sales attained against the provisional special reference quantity, since that quantity is also calculated on that basis. Only if the level of sales were exceeded would the comparison be distorted. On the other hand, attainment of the predicted level of sales within a shorter period would not mean that the comparison had no relevance; it would simply provide more information on the productive capacity of the holding and confirm the producer's intention to resume production on an enduring basis.

41. None the less, the existence of that objective is not sufficient to prove that the Council Regulation imposes a minimum period for resumption of sales when such a period is not apparent from the wording of Article 3a(3) of that Regulation. The requirement that a certain level of sales must have been achieved 'during the previous 12 months' expresses the idea of a limited period of time but does not state that the first unit of goods must have been sold during the first month of that period. If a minimum period of production resulting from the fixing of a deadline for resumption of that production was provided for it would be expressed by the requirement to achieve the specified volume of sales 'for at least 12 months', which is precisely the wording used in the contested Regulation.

40. The existence of the objective of combating speculation, cited by the Commission in order to justify laying down a time-limit for resuming sales, cannot of course be disputed. Laying down eligibility criteria in order to establish the actual intention and capacity of producers to resume milk production²³ appears to be dictated by the Council's concern to prevent producers from regarding special reference quantities as negotiable financial assets, acquired solely in order to be sold once they have increased in value. The Court of Justice has moreover recognised the existence of this objective in relation to the second

42. Lastly, if in Article 3a(3) of the contested Regulation the Commission had repeated simply the rule set out in Article 3a(3) of the Council Regulation one might wonder why the preamble to the Commission Regulation did not make specific reference to that article

24 — Judgment in Case C-44/89 *Von Deetzen* [1991] ECR I-5119, paragraph 24. The second subparagraph of Article 3a(4) limits the possibility of transferring the special reference quantity by providing that in the event of the holding being sold or leased within a certain period the special reference quantity will return to the Community reserve. The Court ruled that that provision was '... Justified by the need to prevent [producers] from seeking the allocation of a special reference quantity in order, not to resume the marketing of milk on an enduring basis, but to derive from that allocation a purely financial advantage by realising the marketable value which the reference quantities have acquired in the meantime.'

23 — Second recital in the preamble to Regulation No 857/84.

of the Council Regulation, when other articles of that Regulation are expressly referred to, including the second subparagraph of Article 3a(4).

43. It does not seem to me therefore that Article 3a(3) of Regulation No 857/84, as amended, can be interpreted as requiring a producer to resume sales by a certain date, after which he will not be granted a definitive special reference quantity.

44. Similarly, I do not consider that article to be adequate to justify the adoption by the Commission of the first subparagraph of Article 3a(3) of the contested Regulation, the content of which seems to me to be wholly unambiguous in that it requires that sales must have been resumed for a minimum period in order for a definitive quota to be allocated.

45. The legal basis for the period concerned must be sought elsewhere.

46. In my view the Commission should not have laid down further conditions for the definitive allocation of a special reference quantity without being empowered to do so by the Council.

47. Under Article 5c(7) of Regulation No 804/68, as amended, the Commission, as we have seen, was charged with adopting detailed rules for the application of the additional levy introduced by Article 5c, under the procedure laid down in Article 30.

48. Article 5c(7) is moreover referred to in the contested Regulation, which mentions also that the Management Committee for Milk and Milk Products provided for in Article 30 has not delivered an opinion within the time-limit set by its chairman.²⁵

49. The Council has thus delegated power to the Commission, and the exact content of this power should be ascertained by clarifying the term 'detailed rules of application'. The question which arises therefore is whether that term includes the power to lay down a period such as the period in issue.

50. Let us look at the legal system established by the Treaty. The third subparagraph of Article 43(2) generally gives the Council the power to adopt, on a proposal from the Commission and after consulting the European Parliament, rules relating to a common organisation of the market. Articles 145 and 155 allow the Council to confer on the Commission, in the acts which it adopts, implementing powers in respect of the rules which it lays down. Article 145 provides however that the

25 — [Fourteenth] recital.

Council may also reserve the right, in specific cases, to exercise those powers itself.²⁶

53. However, it is clear that this was the way the Treaty laid down the rules on the division of powers and that the demarcation line between the powers of the Council and those of the Commission depends primarily on the extent of the powers conferred on the Commission.

51. The difficulty raised by the Commission Regulation seems to me to be one that is inherent in that institutional mechanism. By allowing the Council to delegate to the Commission any implementing powers it chooses, whilst retaining some of those powers in respect of the same basic regulation, the system which has been established in fact authorises both institutions to lay down provisions of the same type in order to implement a measure, a situation which may sometimes give the impression that the Commission is encroaching on the powers of the Council.

54. The Court of Justice traditionally gives a broad interpretation of provisions laying down measures of implementation or application.

55. In the *Germany v Commission* judgment cited above the Court stated that the Treaty draws a distinction 'between rules which, since they are essential to the subject-matter envisaged, must be reserved to the Council's power, and those which, being merely of an implementing nature, may be delegated to the Commission'.²⁷

52. In the present case, for example, one is entitled to wonder why the conditions for allocating the definitive reference quantity, requiring evidence of resumption of sales and the minimum level attained by such sales, are to be found in the Council Regulation whilst the condition requiring evidence that sales have been resumed for a minimum period appears in the Commission Regulation. We shall see that these conditions are in fact pursuing the same objective. Moreover, it is clear that they are not different. It may thus seem legitimate to pause when reading the relevant regulations and consider the inference that the Commission has wrongly imposed restrictions on the rules which were drawn up by the Council.

56. The Court added that only 'provisions which are intended to give concrete shape to the fundamental guidelines of Community policy' could be classified as essential to the common organisation of the market.²⁸

26 — Case C-240/90 *Germany v Commission* [1992] ECR I-5383, paragraph 35.

27 — *Ibid.*, paragraph 36.

28 — *Ibid.*, paragraph 37.

57. In that case the Commission had been empowered to adopt, according to the management committees' procedure provided for in a basic regulation, the detailed rules for the application of that regulation in the sheepmeat and goatmeat sector, in particular those concerning the submission of premium applications and payment of the premium.²⁹

58. The Court concluded that measures involving the imposition of penalties such as surcharges on payments improperly charged by a trader which should be refunded, and exclusion from benefiting under a scheme of aid where a trader gives false information to the administrative authorities, 'amount to no more than implementation of the principles established in the basic regulations and, since the Council did not reserve that power to itself, it was properly delegated to the Commission'.³⁰

59. Those penalties were regarded as being intended to underpin the options of Community policy by ensuring the proper financial management of the Community funds designated for their attainment.³¹ Their nature as rules of application was thus recognised despite the fact that their implementation led to the offending traders being deprived of their rights.

29 — *Ibid.*, paragraphs 3 to 5.

30 — *Ibid.*, paragraph 39.

31 — *Ibid.*, paragraph 37.

60. The Court ruled that delegation by the Council to the Commission of the general power to adopt rules of application was sufficient and did not require that the essential components of the implementing powers delegated to the Commission should be specified since the essential rules governing the matter in question had been laid down in the basic regulation.³²

61. In the *Hopermann* judgment,³³ the factual circumstances and the question are even closer to those presently referred to the Court, the issue being whether the detailed rules of application which were conferred on the Commission entailed the power for the Commission to lay down time-limits and punish failure to comply with those time-limits by loss of entitlement to aid.

62. As in the present case, the Commission Regulation laid down a time-limit, a period within which an application for aid must be lodged, but, unlike the present case, the penalty in the event of failure to comply with it was not specified by the regulation concerned.

32 — *Ibid.*, paragraphs 41 and 42. It is important to note that in that case the German Government cited the second sentence of the first paragraph of Article 1 of Council Decision 87/373/EEC of 13 July 1987 laying down the procedures for the exercise of implementing powers conferred on the Commission (OJ 1987 L 197, p. 33), under which the Council is to specify the essential elements of the implementing powers conferred on the Commission. In paragraph 42 of the judgment the Court clearly stated that: 'As a measure of secondary law ... [that decision] cannot add to the rules of the Treaty, which do not require the Council to specify the essential components of the implementing powers delegated to the Commission'.

33 — Case C-358/88 [1990] ECR I-1687.

63. The Court first pointed out that the Commission was 'authorised, in the exercise of the powers conferred on it by the Council with a view to implementing a common organisation of the markets in the agricultural sector, to adopt *all the detailed rules of application necessary for the proper functioning of the system of aid provided for*, so long as they are not contrary to the basic regulation or the implementing rules of the Council'.³⁴

by the Council, the Commission could impose requirements on the traders concerned in the form of specific time-limits and attach to those requirements penalties which could go so far as the total loss of entitlement to aid in order to ensure the proper functioning of the system of aid concerned.

67. I think that the same reasoning should apply in the present case.

64. The Court went on to rule that: 'The duty of management and supervision with which the Commission is thus entrusted entails the power to fix periods and to provide for appropriate penalties for their non-observance which may go as far as the total loss of the right to aid if observance of those periods is necessary for the proper functioning of the scheme in question'.³⁵

68. Article 5c(6) of Council Regulation No 804/68, as amended, authorises the Council to lay down, in accordance with the procedure laid down in Article 43(2) of the Treaty, the general rules for the application of that article, and in particular those relating to the determination of the reference quantities and the amount of the additional levies. Council Regulation No 857/84, as amended, was thus adopted in accordance with that provision.

65. Lastly the Court added that despite the absence of provisions with respect to the possibility of a penalty or the kind of penalty which might be imposed for failure to observe the period concerned, it was clear from the objective pursued by that obligation that the consequence of a failure to observe the period could only be loss of entitlement to the aid.³⁶

69. The contested Regulation, in turn, is based on Article 5c(7), which authorises the Commission to adopt the detailed rules for the application of that article.

66. In other words, it was acknowledged that, on the basis of a general delegation of powers

70. Following the *Mulder* and *Von Deetzen* judgments cited above,³⁷ Regulation No

34 — *Ibid.*, paragraph 8, emphasis added.

35 — *Ibid.*

36 — *Ibid.*, paragraph 11.

37 — See point 10 of this Opinion.

764/89 amended the Council Regulation in order to extend the additional levy scheme to SLOM producers by inserting Article 3a. The contested Regulation was itself amended for the same purpose by Regulation No 1033/89.

procedure, including the fixing of time-limits, should be laid down so that Article 3a of Regulation (EEC) No 857/84 can be implemented in circumstances that guarantee compliance with the rights and obligations of all the parties concerned³⁸.

71. It should be noted first of all that the contested time-limit provided for in the Commission Regulation does not appear to conflict with the Council Regulation. The time-limit of 29 March 1991, after which evidence can no longer be brought that sales have resumed, as provided for in the first subparagraph of Article 3a(3) of the Commission Regulation, is compatible with the period of two years from 29 March 1989 during which such resumption may be proved, as laid down in Article 3a(3) of the Council Regulation. Moreover there is no suggestion in the Council Regulation that the conditions for definitive allocation of the reference quantity which it lays down are exhaustive, so that the Commission is not a priori entitled to supplement them.

74. It therefore appears that the period of 12 months laid down in the first subparagraph of Article 3a(3) is justified by the concern to reconcile the legitimate extension of the additional levy scheme to SLOM producers whilst not jeopardising 'the fragile stability that currently obtains in the milk products sector'.³⁸

75. This restriction on entitlement under the scheme concerned is linked to the objective of combating speculation, mentioned above,³⁹ which justifies taking into account the length of the period during which sales have been resumed.

72. Secondly, it must be established that the additional requirement of a minimum period for the resumption of sales, without which no special reference quantity will be definitively allocated, is required for the proper functioning of the scheme.

76. Indeed, as the Commission points out, the requirement of a minimum date for the resumption of sales is intended to avoid speculative manoeuvres involving resumption of production in order to obtain a reference quantity solely in order to carry out a financial transaction by disposing of it for consideration.

73. The fourth recital in the preamble to [Regulation No 1033/89] states that 'rules of

³⁸ — Fifth recital in the preamble to Regulation No 764/89.

³⁹ — Point 40 of this Opinion.

77. In the absence of an explanation, too recent a resumption of sales, which is thus too long after the day on which a producer lodged his application for a special reference quantity,⁴⁰ makes it likely that the producer has a deliberate strategy to obtain a definitive special reference quantity without the actual intention and capacity to resume production being guaranteed.

by 29 March 1991 that they had actually resumed sales for at least 12 months the Regulation, which entered into force on 21 April 1989, left the producers concerned a period which was clearly inadequate for them to resume sales.

78. However, a short period of resumption demonstrates that the producer concerned has been slow in resuming milk production although he had demonstrated a willingness to carry out such resumption very early on.

81. The Commission's fixing of a time-limit for the resumption of sales is therefore not likely to prejudice the interests of the producers concerned by depriving them of special reference quantities for no valid reason.

79. The result is that the Commission's power to lay down time-limits is clearly conducive to the proper functioning of the scheme.

82. In view of these factors, I consider that the Commission has the power to lay down the minimum period for the resumption of sales provided for in the first subparagraph of Article 3a(3) of Regulation No 1546/88.

80. I would add that it does not appear that by requiring the producers concerned to prove

Conclusion

83. In the light of the foregoing I propose that the Court give the following answer to the question submitted by the Finanzgericht Düsseldorf:

40 — Under Article 3a(1) of the Council Regulation the application should be lodged within three months of 29 March 1989.

Consideration of the question referred for a preliminary ruling has revealed nothing capable of affecting the validity of the first subparagraph of Article 3a(3) of Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organisation of the market in milk and milk products, as amended by Commission Regulation (EEC) No 1033/89 of 20 April 1989.