

OPINION OF ADVOCATE GENERAL

LÉGER

delivered on 11 December 2003¹

1. This reference for a preliminary ruling relates to the interpretation of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests.² It is made in the context of proceedings concerning the determination of penalties to be applied to farmers under the integrated administration and control system established by Regulation (EEC) No 3508/92³ and Regulation No 3887/92.⁴

2. The issue is whether, in the case of an aid application which should be subject to a penalty under Regulation No 3887/92, Article 2(2) of Regulation No 2988/95 authorises the application of the provisions of a subsequent regulation on the ground that it provides for less severe penalties for the irregularity in question.

I — The main proceedings

3. The main proceedings were brought by Mrs Gisela Gerken against the Amt für Agrarstruktur (Office for Agriculture) Velden, (hereinafter 'the Amt'), which is one of the competent authorities in the Federal Republic of Germany responsible for the payment of the premiums for beef and veal producers provided for under Regulation (EEC) No 805/68 of the Council of 27 June 1968.⁵

4. On 21 December 1995 Mrs Gerken applied for a special premium for 12 male bovine animals of the first and second age brackets under Article 4b of Regulation No 805/68. Mrs Gerken's application was rejected in respect of seven of the 12 bovine animals on the ground that she had not

1 — Original language: French.

2 — OJ 1995 L 312, p. 1.

3 — Council Regulation of 27 November 1992 establishing an integrated administration and control system for certain Community aid schemes (OJ 1992 L 355, p. 1).

4 — Commission Regulation of 23 December 1992 laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes (OJ 1992 L 391, p. 36).

5 — Regulation on the common organisation of the market in beef and veal (OJ, English Special Edition 1968 (I), p. 187). The relevant version of this regulation is as amended by Council Regulation (EEC) No 2066/92 of 30 June 1992, amending Regulation No 805/68 and repealing both Regulation (EEC) No 468/87 laying down general rules applying to the special premium for beef producers and Regulation (EEC) No 1357/80 introducing a system of premiums for maintaining suckler cows (OJ 1992 L 215, p. 49), hereinafter 'Regulation No 805/68'.

provided proof of age for those animals as required under Community law. The Amt also refused to grant the premium for the five other animals, in application of the penalties prescribed under Article 10(2)(a) of Regulation No 3887/92.

II — Legal background

7. Regulation No 3508/92 established an integrated system of administration and control for certain Community aid schemes granted under the common agricultural policy.

8. Regulation No 3887/92 lays down the detailed rules for this system, in particular as regards the aid applications to be compiled by farmers, the checks to establish compliance with the conditions for grant of the aid and the penalties for non-compliance with those conditions.

9. These regulations apply to aid granted to beef and veal producers as laid down in Regulation No 805/68, including the special premium for male bovine animals provided for in Article 4b of the Regulation.

10. Article 10(2) of Regulation No 3887/92 describes the penalties applicable to a farmer whose aid application declares a number of animals which is greater than the number of

5. Mrs Gerken lodged a complaint without success and then brought an action before the Verwaltungsgericht (Administrative Court (Germany)). In the course of the proceedings she succeeded in providing the proof of age required for three of the seven bovine animals in question. The Amt therefore stated that it was prepared to grant premiums reduced in accordance with the penalties prescribed in Article 10(2)(a) of Regulation No 3887/92 for those three animals as well as for the five others for which proof of age had already been provided.

6. By judgment dated 17 February 2000, the Verwaltungsgericht rejected the proposal formulated by the Amt. It held that the Amt had been right to reject Mrs Gerken's application in respect of the four animals for which proof of age had not been provided. However, for the eight other animals, the court held that Mrs Gerken was entitled to receive full premiums and not premiums reduced in accordance with Article 10(2)(a) of Regulation No 3887/92. It held that the penalties prescribed under Regulation No 3887/92 did not apply in the case because Mrs Gerken had not made any fraudulent or erroneous declaration. The Amt then appealed against this decision to the Niedersächsisches Oberverwaltungsgericht (Higher Administrative Court) (Germany).

animals found during checks. It is worded as follows:⁶

If the difference is greater than four animals, no aid shall be granted;

(b) in other cases:

'If the number of animals declared in an aid application exceeds that found during checks the aid shall be calculated on the number of animals found. However, except in cases of *force majeure* and after paragraph 5 has been applied, the unit amount of the aid shall be reduced:

— by the percentage corresponding to the difference found if this is not more than 5%,

(a) in cases where an application concerns a maximum of 20 animals:

— by twice the percentage, if the difference is more than 5 % but not more than 20 %.

— by the percentage corresponding to the difference found if this is not more than two animals,

If the difference found is more than 20 % no aid shall be granted.

— by twice the percentage corresponding to the difference found if this is more than two but not more than four animals.

The percentages mentioned under (a) are calculated on the basis of the number declared, and those mentioned under (b) on the basis of the number found.

However, where it is found that a false declaration was made intentionally or as a result of serious negligence:

6 — As amended by Commission Regulation (EC) No 1648/95 of 6 July 1995 (OJ 1995 L 156, p. 27).

— the farmer in question shall be excluded from the aid scheme concerned for the calendar year in question,

and

— in the case of a false declaration made intentionally, from the same aid scheme for the following calendar year.

...'

11. Regulation No 3887/92 was repealed and replaced by Commission Regulation (EC) No 2419/2001 of 11 December 2001,⁷ which entered into force on 13 December 2001.

12. Article 44(1) of Regulation No 2419/2001 states that 'the reductions and exclusions provided for in [the Regulation] shall not apply where the farmer submitted factually correct information or where he can show otherwise that he is not at fault'.

13. In accordance with Article 53(1) of Regulation No 2419/2001,⁸ Regulation No 3887/92 continues to apply in respect of aid applications relating to marketing years or premium periods starting before 1 January 2002. On the other hand, Regulation No 2419/2001 applies to applications relating to marketing years or premium periods starting as of 1 January 2002.⁹

14. Regulation No 2988/95 establishes a common set of legal rules for all areas covered by Community policies in order to more effectively combat fraud against the financial interests of the Communities.¹⁰ It thus lays down general rules relating *inter alia* to penalties for irregularities committed with regard to Community law.¹¹

15. Article 1(2) of the Regulation defines 'irregularity' as 'any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the ... budget of the Communities'.

7 — Regulation laying down detailed rules for applying the integrated administration and control system for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 (OJ 2001 L 327, p. 11).

8 — Corrigendum in OJ 2002 L 7, p. 48.

9 — Article 54(2) of Regulation No 2419/2001.

10 — Fourth recital in the preamble.

11 — Article 1(1).

16. Article 2(2) of the Regulation states:

'No administrative penalty may be imposed unless a Community act prior to the irregularity has made provision for it. In the event of a subsequent amendment of the provisions which impose administrative penalties and are contained in Community rules, the less severe provisions shall apply retroactively.'

animals. Furthermore, the national court pointed out that in *Schilling and Nehring*¹² the Court of Justice held that the penalties provided for in Article 10(2) should apply even if the difference between the number of animals declared and the number of animals found is due not to a false declaration by the applicant, but merely to the fact that certain animals do not satisfy the conditions required for the grant of a premium. In principle the penalties prescribed under Article 10(2)(a) of Regulation No 3887/92 should therefore apply to Mrs Gerken.

19. However, the national court points out that Mrs Gerken is not at fault within the meaning of Article 44(1) of Regulation No 2419/2001.

III — The question referred for a preliminary ruling

17. Hearing the case on appeal, the Niedersächsisches Oberverwaltungsgericht found that the irregularity in the disputed aid application should be subject to a penalty under Article 10(2)(a) of Regulation No 3887/92.

18. It states that Mrs Gerken has failed to adduce the required proof of age for four of the 12 male bovine animals declared and that according to the second indent of Article 10(2)(a) of Regulation No 3887/92 the amount of the aid must be reduced by twice the percentage corresponding to the difference when the difference is not more than four

20. In fact, in support of her application for a premium, she produced a document issued by the veterinary officer for Landkreis Verden (Verden District) certifying that the animals were free of leucosis. It was established before the national court that as a general practice until the beginning of 1996 the Amt had accepted such certificates as valid proof of age for animals. It was also established, on the basis of two ministerial orders adopted in March and June 1996, that the Amt had altered its administrative practice for the first time after Mrs Gerken submitted her application. The national court decided accordingly that Mrs Gerken had provided 'factually correct information' within the meaning of Article 44(1) of Regulation No 2419/2001.

¹² — Case C-63/00 *Schilling and Nehring* [2002] ECR I-4183.

21. In these circumstances it is in doubt as to whether it should apply the penalties prescribed in Article 10(2)(a) of Regulation No 3887/92. According to Articles 53 and 54 of Regulation No 2419/2001, Regulation No 3887/92 applies since the application in dispute concerns a marketing year prior to 1 January 2002. Nevertheless, Article 2(2) of Regulation No 2988/95 expressly provides that in the case of a subsequent amendment of Community provisions establishing an administrative penalty, the less severe provisions must be applied retroactively. The Niedersächsisches Oberverwaltungsgericht, being uncertain in this case as to whether the principle of retroactive application of less severe penalties should prevail over the transitional provisions in Articles 53 and 54 of Regulation No 2419/2001, decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

IV — Analysis of the question

22. By this question the Niedersächsisches Oberverwaltungsgericht asks whether Article 2(2) of Regulation No 2988/95 is to be construed as meaning that where in an application for 'livestock' aid covered by Regulation No 3887/92 there is an irregularity giving rise to a penalty under that Regulation, the competent authorities may apply the provisions of Regulation No 2419/2001 retroactively even though they came into force after the facts of the dispute, on the ground that it prescribes less severe penalties for the conduct in question.

23. As stated by the national court, the point of departure for the analysis lies in *National Farmers' Union and Others [NFU]*.¹³

'Is the amount of aid also to be reduced under the second indent of Article 10(2)(a) of Regulation [(EEC)] No 3887/92 where the special premium for male bovine animals applied for when this provision of Community law was in force cannot for legal reasons be applied to the farmer but where, in the words of Article 44(1) of Regulation [(EC)] No 2419/2001, the farmer submitted factually correct information or can show otherwise that he was not at fault?'

24. In that case the Court considered the same question in relation to an 'area aid' application under Regulation No 3887/92. The issue was whether Article 2(2) of Regulation No 2988/95 made it possible, in the case of an 'area aid' application normally subject to a penalty under Article 9 of Regulation No 3887/92, to apply a subse-

¹³ — Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559.

quent regulation, namely Regulation No 1648/95, retroactively on the ground that the latter reduced to some extent the penalties prescribed in Article 9 of Regulation No 3887/92.

25. The Court replied in the affirmative, inter alia on the ground that:

‘one of the aims of Regulation No 2988/95, as stated in the 10th recital in its preamble, is to adopt “appropriate provisions ... while respecting the *acquis communautaire* and the provisions laid down in specific Community rules existing at the time of entry into force of this Regulation, to prevent any overlap of Community financial penalties and national criminal penalties imposed on the same persons for the same reasons”. Consequently, that Regulation clearly applies equally to Community regulations in existence when it entered into force, including Regulation No 3887/92.’¹⁴

26. Consequently it is a matter of principle that Regulation No 2988/95 applies to Regulation No 3887/92 and thus permits the retroactive application of the less severe penalties prescribed by subsequent regulations to aid applications made under the latter regulation.

27. However, it is apparent from Article 2(2) of Regulation No 2988/95¹⁵ that four conditions must be satisfied for retroactive application in a particular case. The conditions are as follows:

- the farmer must have committed an ‘irregularity’ within the meaning of Article 1(2) of Regulation No 2988/95;
- the irregularity must be subject to a ‘penalty’ within the meaning of Article 2 (2) of Regulation No 2988/95;
- the Community provisions establishing the penalty must have been subject to a ‘subsequent amendment’, and

¹⁴ — *NFI*, cited above, paragraph 39. The Court confirmed this analysis in Case C-304/00 *Strawson and Gagg & Sons* [2002] ECR I-10737, paragraph 46.

¹⁵ — See also *NFI*, paragraph 40, and *Strawson and Gagg & Sons*, paragraph 46.

- the measure laid down in the new provisions must be 'less severe' than the original penalty.

consideration stems from the ninth recital in the preamble to Regulation No 3887/92 and from the case-law of the Court,¹⁷ where precisely the term 'penalty' is used to designate the measures applicable under Articles 9 and 10(2) of Regulation No 3887/92.¹⁸

28. It is common ground that these four conditions are satisfied in this case.

29. First, as we are aware, the context of the integrated administration and control system, when a farmer submits an application for 'livestock' aid he is bound to declare only the animals which satisfy the various conditions imposed by Community law for the grant of such aid.¹⁶ In submitting an aid application for bovine animals for which she did not provide the required proof of age, Mrs Gerken therefore committed an irregularity within the meaning of Article 1(2) of Regulation No 2988/95, since she committed an 'infringement of a provision of Community law resulting from an act or omission ... which has, or would have, the effect of prejudicing the ... budget of the Communities ... by an unjustified item of expenditure'.

30. Secondly, it is established that a reduction in the unit amount of the aid, or even the entire loss of aid, constitutes an 'administrative penalty' within the meaning of Article 2(2) of Regulation No 2988/95. This

31. Thirdly, as we have seen, Article 10(2) of Regulation No 3887/92 was subject to a 'subsequent amendment' since it was repealed and replaced by Regulation No 2419/2001.

32. Finally, with regard to the fourth condition, it is not disputed that the new Community provisions are less severe than the original ones. Whereas under the second indent of Article 10(2)(a) of Regulation No 3887/92 the irregularity in question was subject to a reduction of the unit amount of aid, it is not subject to any reduction of or exclusion from aid under Article 44(1) of Regulation No 2419/2001. The penalty prescribed by Regulation No 3887/92 is thus simply precluded.

16 — See *Schilling and Nehring*, paragraph 33 and *Strawson and Gagg & Sons*, paragraph 38.

17 — See *NFLI*, paragraph 40, and *Strawson and Gagg & Sons*, paragraph 46, with regard to measures applicable to 'area' aid applications under Article 9 of Regulation No 3887/92. See *Schilling and Nehring*, paragraphs 26 and 27, with regard to the measures applicable to 'livestock' aid applications under Article 10(2) of Regulation No 3887/92.

18 — See also in support of this my Opinion in *Schilling and Nehring*, points 37 to 40.

33. In the light of these various considerations, Article 2(2) of Regulation No 2988/95 should therefore permit the national court to apply retroactively to Mrs Gerken's application for premium the more favourable provisions set out in Regulation No 2419/2001.

34. However, the national court expresses doubt as to the possibility of adopting such a solution.¹⁹ In its view the following points should also be taken into consideration.

35. The Niedersächsisches Oberverwaltungsgericht observes that Regulation No 2419/2001 contains express provisions governing the temporal application of Regulation No 3887/92 and Regulation No 2419/2001. Under Articles 53 and 54 of that Regulation, Regulation No 3887/92 applies to aid applications relating to marketing years starting before 1 January 2002, whereas Regulation No 2419/2001 applies to aid applications submitted for marketing years starting after 1 January 2002. The national court is in doubt therefore as to whether there is a conflict between those provisions and Article 2(2) of Regulation No 2988/95, the effect of which would be, on the contrary, that Regulation No 2419/2001 would apply to aid applications relating to marketing years before 1 January 2002.

36. It is true that Articles 53 and 54 of Regulation No 2419/2001 contain transitional provisions governing the temporal application of Regulation No 3887/92 and Regulation No 2419/2001. As we have seen, Article 53(1) of Regulation No 2419/2001 provides that Regulation No 3887/92 is repealed, but that it continues to apply to aid applications relating to marketing years or premium periods starting before 1 January 2002. Article 54 provides that Regulation No 2419/2001 is to enter into force on the day following that of its publication in the *Official Journal of the European Communities*²⁰ and is to apply to aid applications relating to marketing years or premium periods starting as of 1 January 2002.

37. However, unlike the national court, I do not consider that these provisions should prejudice the application of Article 44(1) of Regulation No 2419/2001 in the main proceedings.

38. It should be borne in mind that Regulation No 2988/95 is intended to counter acts detrimental to the financial interests of the Communities in all areas.²¹ It thus lays down a common set of rules and principles for all areas covered by Community policies,²² including the common agricultural policy.

²⁰ — That is, 13 December 2001.

²¹ — Third recital in the preamble.

²² — Fourth recital in the preamble.

¹⁹ — See the order of the national court, p. 10.

Furthermore, the preamble to Regulation No 2988/95 expressly states that the irregular conduct and the administrative measures and penalties concerned are provided for in the different sectoral rules *'in accordance with this Regulation [No 2988/95]'*.²³

Regulation No 2988/95. In the absence of any indication to the contrary, they must be construed so that their application is 'without prejudice' to the principle of retroactive application of the less severe penalties.

39. It follows that, in the area of checks and penalties for irregularities committed under Community law, the legislature has laid down a set of general legal principles and required that all sectoral rules adhere to those principles.

40. Regulation No 2419/2001, which was adopted after Regulation No 2988/95, contains no provision derogating from Article 2 (2) of that legislation. It contains no provision, whether express or implied, which might suggest that the Community legislature has derogated — or intended to derogate — from the principle of retroactive application of less severe penalties.

41. In those circumstances, it is my view that the transitional provisions of Articles 53 and 54 of Regulation No 2419/2001 must be interpreted in accordance with Article 2(2) of

42. As the Commission pointed out,²⁴ any solution to the contrary would deprive Article 2(2) of Regulation No 2988/95 of effect. In so far as most — if not all — Community regulations contain provisions relating to their temporal application, a contrary solution would result in the constant frustration of the principle of retroactive application of the less severe penalties. It is clear that such a solution would be diametrically opposed to the legislature's intention, which was precisely to give to the principle as wide an application as possible.

43. In the light of these various considerations, I therefore propose that the Court reply to the effect that Article 2(2) of Regulation No 2988/95 requires that the national court apply retroactively to Mrs Gerken's application for premium the more favourable provisions set out in Article 44(1) of Regulation No 2419/2001.

23 — Fifth recital in the preamble (emphasis added).

24 — Written observations (points 15 and 16).

V — Conclusion

44. I therefore propose that the Court should rule as follows:

Article 2(2) of Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the financial interests of the European Communities is to be construed as meaning that where in an 'animal' aid application which falls within the scope of Commission Regulation (EEC) No 3887/92 of 23 December 1992 laying down detailed rules for applying the integrated administrative and control system to certain Community aid schemes there is an irregularity subject to a penalty under the latter Regulation, the competent authorities are required to apply retroactively Commission Regulation (EC) No 2419/2001 of 11 December 2001 laying down detailed rules for the integrated system of administration and control for certain Community aid schemes established by Council Regulation (EEC) No 3508/92 when Regulation No 2419/2001 provides for less severe measures with regard to the conduct in question.