OPINION OF ADVOCATE GENERAL TIZZANO
delivered on 3 July 2003 [1]

1. By order of 19 December 2001 the Finanzgericht (Finance Court) Düsseldorf referred to the Court for a preliminary ruling a question on the validity of the second subparagraph of Article 3(2) of Regulation (EEC) No 536/93 [2] (hereinafter 'Regulation No 536/93') as amended by Regulation (EC) No 1001/98 [3] (hereinafter 'Regulation No 1001/98'). In particular, the referring court asks the Court whether the penalty imposed by that regulation in the event of late notification by purchasers of the information on the quantities of milk delivered to them by producers contravenes the principle of proportionality.

I — Legal background

2. As is well known, in view of increasing overproduction in the milk sector, in 1984 the European Community introduced the mechanism of the additional levy in the context of the common organisation of the market in milk and milk products. [4] This mechanism provides for an overall guaranteed milk quota to be allocated annually to each Member State, which the State itself then divides into individual quotas for each producer. Whenever a producer markets a quantity of milk over and above the quota allocated to him he must pay the so-called additional levy on the excess.

3. The rules applicable to the levy from 1 April 1993 onwards are dictated by Council Regulation (EEC) No 3950/92 [5] (hereinafter 'Regulation No 3950/92'). In order to avoid delays in payment of the levy, the regulation placed the responsibility for payment on the purchasers of milk.

4. The first subparagraph of Article 2(2) of Regulation No 3950/92 lays down that:

'As regards deliveries, before a date and in accordance with detailed rules to be laid

1 — Original language: Italian.

2 — Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1993 L 57, p. 12).

3 — Commission Regulation (EC) No 1001/98 of 13 May 1998 amending Regulation (EEC) No 536/93 laying down detailed rules on the application of the additional levy on milk and milk products (OJ 1998 L 142, p. 22).

4 — Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organisation of the market in milk and milk products (OJ 1984 L 90, p. 10).

5 — Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

down, the purchaser liable for the levy shall pay to the competent body of the Member State the amount payable, which he shall deduct from the price of milk paid to producers who owe the levy or, failing this, collect by any appropriate means.'

5. Article 10 of the same regulation provides that:

'The levy shall be considered as intervention to stabilise agricultural markets and shall be used to finance expenditure in the milk sector'.

6. Under Article 11 of Regulation No 3950/92, it was for the Commission to lay down the rules for the application of the regulation. It adopted Regulation No 536/93 for that purpose.

7. Under Article 3(4) of Regulation No 536/93:

'[b]efore 1 September each year, the purchaser liable for levies shall pay the competent body the amount due in accordance with rules laid down by the Member State'.

8. In order to permit that amount to be calculated, the original version of Article 3 (2) of the same regulation laid down that:

'Before [6] 15 May each year, the purchasers shall forward to the competent authority of the Member State a summary of the statements drawn up for each producer or, where appropriate, by decision of the Member State, the total quantity, the quantity corrected in accordance with Article 2(2) and average fat content of the milk and/or milk equivalent delivered to it by producers and the sum of the individual reference quantities and the average representative fat content of such producers' production.

Where that time-limit is not observed, the purchaser shall be liable to a penalty equal to the amount of the levy due for a 0.1% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not exceed ECU 20 000.'

9. However, the second subparagraph of that article was replaced under Article 1 of Regulation No 1001/98, which lays down that:

6 — See Commission Regulation (EC) No 1255/98 of 17 June 1998 (OJ 1998 L 173, p. 14) correcting the previous Italian version of Regulation No 536/93, which had erroneously stated 'by'.

'Where that time-limit is not observed, the purchaser shall be liable to a penalty calculated as follows:

— if the communication referred to in the first subparagraph is made before 1 June, the penalty shall be equal to the amount of the levy due for a 0.1% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not be less than ECU 500 nor more than ECU 20 000,

— if the communication referred to in the first subparagraph is made after 31 May but before 16 June, the penalty shall be equal to the amount of the levy due for a 0.2% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not be less than ECU 1 000 nor more than ECU 40 000,

— if the communication referred to in the first subparagraph is made after 15 June but before 1 July, the penalty shall be equal to the amount of the levy due for a 0.3% overrun on the quantities of milk and milk equivalent delivered to them by producers. Such penalty may not be less than ECU 1 500 nor more than ECU 60 000,

— if the communication referred to in the first subparagraph is not made before 1 July, the penalty shall be that referred to in the third indent plus an amount equal to 3% of that penalty for each calendar day of delay from 1 July. Such penalty may not exceed ECU 100 000.

However, if the quantities of milk or milk equivalent delivered to the purchaser per period of 12 months are less than 100 000 kilograms, the minimum penalties referred to in the first three indents shall be reduced to ECU 100, 200 and 300 respectively.'

10. Regulation No 536/93 was repealed with effect from 31 March 2002 by Regulation (EC) No 1392/2001 [7] (hereinafter 'Regulation No 1392/2001').

11. Article 5 of the latter regulation provides that:

'...

7 — Commission Regulation (EC) No 1392/2001 of 9 July 2001 laying down detailed rules for applying Council Regulation (EEC) No 3950/92 establishing an additional levy on milk and milk products (OJ 2001 L 187, p. 19).

2. Before[8] 15 May each year, purchasers shall forward to the competent authority of the Member State a summary of the producers' statements, showing at least the total quantity and the average fat content of the milk and/or milk equivalent delivered to them and, where so required by decision of the Member State, for each producer, the reference quantity and the representative fat content, the quantity corrected in accordance with Article 4(1), the sum of the individual reference quantities and the corrected quantities and the average representative fat content of those producers' production.

Where applicable, purchasers shall declare that they have received no deliveries during the period concerned.

3. Except in cases of *force majeure* duly recognised by the competent authority, purchasers who fail to comply with the time-limit referred to in paragraph 2 shall be required to pay an amount equal to the levy due for a 0.01% overrun of the quantities of milk and milk equivalent delivered to them by producers for each calendar day of delay. Where these quantities are not known because no declaration has been made, they shall be estimated by the competent authority. That amount may not be less than EUR 100 nor more than EUR 100 000.

4. Where no declaration is submitted before 1 July, the penalties provided for in Article 13(3) shall apply 30 days after the Member State has served notice, except in the cases provided for in the second subparagraph of paragraph 4 of that article. Paragraph 3 of this article shall continue to apply during the period of notice.'

12. Article 1 of Regulation (EC, Euratom) No 2988/95[9] (hereinafter 'Regulation No 2988/95') provides that:

'1. For the purposes of protecting the European Communities' financial interests, general rules are hereby adopted relating to homogenous checks and to administrative measures and penalties concerning irregularities with regard to Community law.

2. "Irregularity" shall mean 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 general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure'.

8 — See the Corrigendum to Regulation No 1392/01 (OJ 2002 L 133, p. 43), the previous Italian version of which had erroneously stated 'by'.

9 — Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities' financial interests (OJ 1995 L 312, p. 1).

13. Finally, under Article 2(2) of that regulation:

'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.'

II — Facts and question referred for a preliminary ruling

14. By letter of 10 April 2000 the Hauptzollamt (Principal Customs Office) Bochum (hereinafter 'the HZA'), whose place was taken by the Hauptzollamt Dortmund on 1 January 2002, asked Privat-Molkerei Borgmann GmbH & Co. KG (hereinafter 'the Borgmann dairy') to submit by 14 May 2000 the communication for the period 1999-2000 provided for in the first subparagraph of Article 3(2) of Regulation No 536/93 and Paragraph 11(3) of the Milchmengen-Garantie-Verordnung (Regulations on Guaranteed Milk Quantities) and reminded the dairy that a penalty would be imposed if the deadline was not met.

15. The communication, which was sent on 11 May 2000, did not, however, reach the HZA until 16 May 2000.

16. In view of the delay, by a decision of 29 May 2000 the HZA imposed on the Borgmann dairy, pursuant to the second subparagraph of Article 3(2) of Regulation No 536/93, as amended by Regulation No 1001/98, a penalty of DEM 39 311.60 (ECU 20 000),[10] equivalent to the maximum amount provided for in that article for a delay of this kind.

17. Its complaint against that decision having been rejected, the Borgmann dairy brought an action before the Finanzgericht Düsseldorf on 13 July 2001. As the Finanzgericht had doubts as to the validity of the cited provision, it decided to stay the proceedings and to submit the following question to the Court for a preliminary ruling:

'Does the system of penalties in the second subparagraph of Article 3(2) of Commission Regulation (EEC) No 536/93 of 9 March 1993, as amended pursuant to Commission Regulation (EC) No 1001/98, contravene the principle of proportionality in cases where the time-limit is exceeded only marginally and moreover without fault?'

10 — Exchange rate 1.95583.

III — Proceedings before the Court

18. The Borgmann dairy, the French Government and the Commission submitted written observations. The applicant in the main proceedings and the Commission also attended the hearing held on 9 April 2003.

IV — Legal analysis

A — *Considerations from the referring court*

19. The referring court questions whether the penalty provided for by the second subparagraph of Article 3(2) of Regulation No 536/93, as amended by Regulation No 1001/98, complies with the principle of proportionality.

20. In that regard, it recalls first and foremost that according to the case-law of the Court, and especially the *Wiedergeltingen* judgment, [11] in order to establish whether a penalty complies with the principle of proportionality it is necessary to examine whether it 'exceeds what is appropriate and necessary to attain the objective pursued by the rules which have been breached', and in particular whether it 'corresponds with the importance of that aim and whether the disadvantages caused are not disproportionate to the aims pursued'. [12] Because it found that these conditions were not met, the cited judgment declared invalid the penalty rules contained in the original version of the second subparagraph of Article 3(2) of Regulation No 536/93.

21. Although the original version of that article was subsequently amended by Regulation No 1001/98, in the opinion of the referring court the penalty regime resulting from that amendment also contravenes the principle of proportionality.

22. On the basis of that regime, notes the referring court, it is possible to impose the maximum penalty of EUR 20 000 for any delay — in relation to the deadline of 14 May — between 15 and 31 May, and hence also in cases such as the present one in which the delay is minimal. However, since the objective of the rules under Article 3(2) of Regulation No 536/93 is to ensure that delays in notification do not affect the administrative procedure for payment of the additional levy before 1 September, the penalty that can be imposed should be commensurate with the length of the delay.

11 — Judgment in Case C-356/97 *Molkereigenossenschaft Wiedergeltingen* [2000] ECR I-5461.

12 — Paragraphs 35 and 36 of the *Wiedergeltingen* judgment.

Indeed, Article 5(3) of Regulation No 1392/2001, which replaced the penalty rules of Article 3(2) of Regulation No 536/93, now makes provision in that sense.

23. According to the referring court, moreover, the rules in question are also disproportionate from other perspectives, above all because they set the amount of the penalty according to the quantities of milk delivered to the purchaser and not in proportion to the amount of the levy that the latter may be required to pay, with the consequence that it could also be imposed if the purchaser were not liable for the additional levy.

24. Secondly, the rules in question do not, in the opinion of the referring court, permit an assessment to be made whether late notification actually affects the administrative procedure aimed at ensuring that the additional levy is paid before 1 September each year. In the present case, for example, the referring court points out that the applicant's entire documentation was already available on 16 May 2000. Hence no harm appears to have been caused to the said procedure.

25. Finally, according to the referring court, the contested rules contravene the principle of proportionality to the extent that the penalty which they threaten can be imposed without there having been culpable behaviour on the part of the purchaser and even in cases of *force majeure*.

26. In the case in point, in fact, the delay was not the fault of the Borgmann dairy but due to exceptional circumstances that could not have been foreseen. The dairy had sent the notification sufficiently in advance of 15 May to be able to consider that, if the postal service were operating normally, it would arrive at its destination before that date.

27. However, as *force majeure* is foreseen as an extenuating circumstance only by Article 5(3) of Regulation No 1392/2001, which came into effect after the events in question, in the opinion of the referring court the Borgmann dairy could not rely on these circumstances in its defence.

B — *Summary of the arguments of the parties*

28. The Borgmann dairy shares and endorses the considerations of the Finanzgericht Düsseldorf that I have just described. In particular, it asserts that in the present case it could not be held responsible for the delay in communicating the information required by Article 3 of Regulation No 536/93 because the notification was delivered to the post office within the time-limit and normally should have arrived at its destination before 15 May. It was only because of exceptional circumstances that the notification arrived late; in any event, the dairy asserts that the delay

was insignificant and hence, in the absence of fault, not such as to justify a penalty comparable to the one imposed on it.

29. The French Government disagrees with the premiss on which the German court appears to have based its considerations, namely that the Borgmann dairy did not meet the deadline laid down in Article 3(2) of Regulation No 536/93. According to that Government, the deadline should be understood as the deadline for dispatch and not as the deadline for receipt of the notification specified in the contested provision.

30. However, if the Court does not concur with that suggestion, the French Government essentially endorses the arguments of the referring court in support of its contention that the rules in question contravene the principle of proportionality.

31. The Commission, for its part, states first its preference for interpreting the contested rules as meaning that the date of 15 May is a deadline for the receipt and not the despatch of the notification for which it provides. It concedes, however, that the interpretation suggested by the French Government would not be incompatible with the objectives of Regulation No 536/93.

32. The Commission also prefaces its remarks with the assertion that for reasons which I shall set out in greater detail below it is not the contested provision that is applicable to the case in point but Article 5 (3) of Regulation No 1392/2001, even though the latter came into force after the events in the case.

33. On that premiss, the Commission rebuts the claims that the principle of proportionality was contravened by contending first that by adopting the contested provision it did not manifestly exceed the limits of its discretion. In the Commission's opinion, in fact, the penalty rules contained in Article 3(2) of Regulation No 536/93, as amended by Regulation No 1001/98, were necessary to induce purchasers who had not complied with the initial deadline of 15 May to notify their information before expiry of the subsequent deadlines in order to avoid a far higher penalty.

34. The Commission then turns to the question whether, in order to justify imposition of the penalty if the deadline is missed, it is necessary to consider the impact that such delay had on the administrative procedure for determining the additional levy. In this regard, it points out first and foremost that as a matter of principle any delay on the part of purchasers reduces the time available to the national authorities to calculate the amount of the additional levy and therefore constitutes a risk for the smooth operation of the regime. Secondly, it points out that, if for the purposes of imposing the penalty it

were necessary on each occasion to prove that the failure to meet the deadline affected the administrative procedure, the dissuasive effect and practical effectiveness of the penalty rule would be jeopardised, especially in legal systems such as the German in which a number of authorities are involved during the course of the procedure.

35. As regards the method of calculating the penalty, the Commission refers to the considerations of Advocate General Saggio in the *Wiedergeltingen* case,[13] where the same question had already been debated, and contends that the criterion the Commission had chosen, based on the quantities of milk delivered, is in proportion to the objective pursued by the rule in question, in that, by making it possible to adjust the amount of the penalty according to the turnover of the dairy, it has the same persuasive effect on each of them to comply with the deadline of 15 May.

36. Finally, according to the Commission, in the present case there is no need to adopt a position on the question of whether the contested rules should have contained a derogation for late notification of the information due to *force majeure*. On the assumption that it is incumbent on the purchaser to ensure that the information reaches the competent authority before expiry of the time-limit, in the opinion of the Commission it must therefore be excluded, in accordance with the case-law of the Court,[14] that a slight delay attributable to the postal services constitutes *force majeure*.

C — *Assessment*

37. In the question under examination, the German court asks essentially whether, in the event of late notification by purchasers of information on the quantities of milk delivered to them by producers, the penalty provided for in the second subparagraph of Article 3(2) of Regulation No 536/93, as amended by Regulation No 1001/98, contravenes the principle of proportionality.

Introduction

38. I note first that, according to the information that can be deduced from the

13 — In this regard the Commission refers to point 45 of the Opinion of Advocate General Saggio in the *Wiedergeltingen* case, cited above.

14 — In this regard the Commission cites the order of the Court in Case C-239/97 *Ireland* v *Commission* [1998] ECR I-2655 and the order of the Court of First Instance in Case T-218/01 *Laboratoire Monique Rémy* v *Commission* [2002] ECR II-2139.

order for reference, the question I have just summarised is based on two assumptions.

39. First, it appears to assume that the time-limit of 15 May laid down in Regulation No 536/93 refers to the receipt and not the dispatch of the notification for which it provides.

40. Secondly, it appears to take it for granted that the system of penalties introduced by Regulation No 1392/01, which came into force after the events at issue, is not applicable to the present case.

41. Since these assumptions are contested by the French Government and the Commission respectively, as we have seen, and they are issues that have to be settled before resolving the present question, I shall begin by examining whether they are well founded.

42. Only after these questions have been resolved will I examine whether the penalty imposed by the second subparagraph of Article 3(2) of Regulation No 536/93 as amended by Regulation No 1001/98 is or is not compatible with the principle of proportionality.

(1) The expiry of the time-limit pursuant to the first subparagraph of Article 3(2) of Regulation No 536/93

43. I wish to state at the outset that neither the literal wording of the contested provision nor a comparison of the different language versions of Regulation No 536/93 makes it possible, in my view, to establish whether the date of 15 May is to be understood as a deadline before which the required information must be *sent* by the purchasers or must *reach* the national authority.

44. In the majority of the language versions of the first subparagraph of Article 3(2) of Regulation No 536/93 it is apparent that before 15 May each year the purchaser is required to 'transmit' or 'communicate' to the competent national authority a summary of the statements drawn up for each milk producer. [15] In other language versions the expressions used would appear to make the expiry of the time-limit coincide in some cases with the date of dispatch of the information [16] while in others with their receipt by the competent authority. [17]

15 — French 'communique', Portuguese 'comunicarà', Spanish 'transmitirá', Swedish 'skall inge', German 'übermittelt'.

16 — English 'shall forward'.

17 — Greek 'κοινοποιεί', Dutch 'bezorgt', Finnish 'antaa tiedoksi'.

45. In the absence of unequivocal indications that can be deduced from the literal wording of the abovementioned regulation, I consider that the interpretation most favourable to the person liable to penalty should be accepted. I therefore consider that, as the French Government maintains, the purchaser of milk cannot be subject to penalty if it can demonstrate (by means of the postmark, for example) that it *sent* the requested documentation by the deadline.

46. In my view, this interpretation of the contested rule is also more consistent with the principle of non-discrimination, in that, as the French Government rightly asserts, it makes it possible to ensure that purchasers situated in certain areas, particularly those furthest away from the office of the competent authority, are not placed at a disadvantage in relation to other purchasers in meeting the notification requirement imposed on them by that rule.

47. It does not seem to me that this interpretation seriously jeopardises the smooth operation of the system of milk quotas. Of course, it means that the information from some dairies may reach the competent authorities a few days after the 15 May deadline but, as the Commission conceded at the hearing, the setting of 1 September as the deadline for payment of the additional levy is sufficient in any case to ensure that the administrative process for determining the levy proceeds correctly. Moreover, this appears to me to be confirmed by the *Wiedergeltingen* judgment, in which the Court stated that 'although the 15 May deadline must be observed for the smooth operation of the scheme so as to ensure the punctual payment of those sums, it cannot be concluded that observance of that deadline is absolutely indispensable to its smooth operation, since a slight delay ... would not jeopardise payment of the additional levy on milk before 1 September'. [18]

48. Concluding on this point, I therefore consider that the first subparagraph of Article 3(2) of Regulation No 536/93 should be interpreted as meaning that the purchaser of milk meets the 15 May deadline if it can demonstrate with certainty that it sent the data requested of it to the competent authority before that date.

49. Since that conclusion precludes the very existence of an infringement of the deadline by the Borgmann dairy, it is in itself sufficient to resolve the dispute in the main proceedings, so that strictly speaking the consideration of any other question is superfluous. However, in case the Court is not inclined to this view, I shall examine below the other questions indicated above.

18 — The *Wiedergeltingen* judgment, paragraph 41.

(2) The rules applicable to the penalty regime

50. As we have seen, on this question the Commission maintains that the penalty applicable to the Borgmann dairy should be calculated not on the basis of Regulation No 536/93 but of Regulation No 1392/2001, even though this came into effect after the events in the case.

51. In this regard the Commission relies first on Article 2(2) of Regulation No 2988/95, which provides that in the event of subsequent amendment of legislation the provisions imposing the less severe penalty for the infringement of a provision of Community law which 'has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them' should be applied retroactively.

52. Failure to comply with the time-limit laid down in Article 3(2) of Regulation No 536/93 constitutes, in the view of the Commission, an infringement of this kind, in that it could, *at least potentially*, harm the EAGGF (European Agricultural Guidance and Guarantee Fund), for which the additional levy is a source of finance. Indeed, under Article 10 of Regulation No 3950/92 the additional levy is earmarked to finance expenditure in the milk sector, which is borne by the EAGGF.

53. In the Commission's opinion, on the basis of the information that can be derived from the file, the penalty regime which is less severe for the Borgmann dairy would not be that under Regulation No 536/93 but that introduced by Regulation No 1392/2001.

54. Nor, according to the Commission, can it be objected that in the present case the penalty laid down in Regulation No 536/93 has already been imposed on the dairy. Recalling in this regard the Opinion of Advocate General Léger in the *National Farmers' Union* case, [19] the Commission in fact maintains that the retroactive application of a more favourable rule is precluded only in the case of legal situations that have already been settled. In the present case, however, the penalty imposed does not constitute a settled legal situation, in that the decision regarding it is the subject of the challenge in the main proceedings.

19 — Opinion in Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, point 87.

55. The Borgmann dairy and the French Government do not contest the Commission's arguments that I have just described.

56. For my part, I agree with the Commission that in the present case the less severe of the penalties laid down in Regulation No 536/93 and Regulation No 1392/01 should be applied, in accordance with Article 2(2) of Regulation No 2988/95.

57. I do, however, consider that I must dissent from the Commission's view that it is for the Court to determine which penalty regime is actually applicable in the present case.

58. I recall that in accordance with settled case-law 'the role of the Court is limited to providing the national court with the guidance on interpretation necessary to resolve the case before it, while it is for the national court to apply the rules of Community law, as interpreted by the Court, to the facts of the case under consideration'. [20]

20 — See the judgments in Cases C-342/97 *Lloyd Schuhfabrik Meyer* [1999] ECR I-3819, paragraph 11, and C-253/99 *Bacardi* [2001] ECR I-6493, paragraph 58.

59. In the context of that division of functions it is therefore for the German court to calculate, on the basis of the quantities of milk delivered to the Borgmann dairy, the amount of the penalty that would result from the application of Regulation No 1392/01 and to compare it with that imposed on the basis of Regulation No 536/93 in order to identify in concrete terms which penalty regime is more favourable to the dairy.

(3) The proportionality of the penalty

60. Whatever assessment the referring court makes in this regard, it is still necessary to examine here whether the penalty provided for in Article 3(2) of Regulation No 536/93 is consistent with the principle of proportionality.

61. On this question, I wish to point out immediately that some of the objections raised in this regard by the referring court do not strike me as convincing. I am referring in particular to those about the method of calculating the penalty and the possibility of imposing the penalty even where there is no fault or in the event of *force majeure*.

62. As to the first point, I too consider, as does the Commission, that the criterion

based on the quantities of milk delivered to purchasers is in fact proportionate to the objective pursued by the contested provision, in that it not only induces all purchasers — including those who may not be liable for the additional levy — to forward the information necessary for calculating the levy to the competent authority within the prescribed time-limit but also makes it possible to adjust the amount of the penalty according to the turnover of the purchasers.

63. If, on the other hand, the penalty were calculated on the basis of the amount of the additional levy payable — as the referring court appears to suggest — dairies which, although late in forwarding their information, are not liable for the levy according to the statements would no longer be subject to penalty. This could lead some dairies not to submit the information in their possession in good time, seriously jeopardising the operation of the system of milk quotas. [21]

64. As to the question whether the contested provision is unlawful because it provides for the imposition of a penalty even in the absence of fault for a delay in forwarding the information, I do not believe that this question is relevant to resolving the dispute in the main proceedings.

65. Even if one were to work on the assumption that the information had to *reach* the competent authority before 15 May — an assumption which, as I have said, I do not share — the fact remains that the failure to comply with that deadline is, in my opinion, attributable solely to the Borgmann dairy, as it did not show the ordinary diligence incumbent on persons required to meet a final deadline and who, moreover, have only a few days in which to do so.

66. In order to be certain to achieve that outcome the Borgmann dairy should not have relied on the ordinary postal service, which — however efficient it may be — does not preclude the risk of delays, but should instead have used alternative means of communication that are more reliable in this respect, such as express courier or fax transmission.

67. Furthermore, I recall that the case-law of the Court has stated clearly that the concept of *force majeure* does not apply to a situation in which, 'objectively, a diligent and prudent person would have been able

21 — See to this effect the Opinion of Advocate General Saggio in the *Wiedergeltingen* case, point 45.

to take the necessary steps before the expiry of the period'.[22] In particular, the Court stated that it was not possible to 'plead an exceptional malfunctioning of [the postal] services' in order to avoid the consequences of failing to comply with a time-limit.[23]

68. In the same way, the Court of First Instance, holding that 'the party in question must pay close attention to the course of the procedure and, in particular, demonstrate diligence in order to comply with the prescribed time-limits', denied that 'the existence of an undertaking by [a postal operator] to the sender to deliver a letter within a certain period [may], by itself, render any delay in its delivery unforeseeable'.[24]

69. I am not persuaded by the objections I have just examined regarding the compatibility of the contested penalty rules with the principle of proportionality, whereas I find more convincing the claim that the said principle is contravened by these rules, for the same reasons for which it was contravened by the original version of the second subparagraph of Article 3(2) of Regulation No 536/93.

70. In that connection I recall that in the *Wiedergeltingen* judgment the Court struck down the penalty rules contained in the original version of the second subparagraph of Article 3(2) of Regulation No 536/93 in so far as it '[did] not allow the amount of the penalty to be adjusted according to the length of time by which the deadline for communication [was] exceeded and according to the resulting impact on the purchaser's obligation to pay, before 1 September each year, the sums payable by way of the additional levy on milk'.[25] As we have seen, the same criticism is now also directed at the new version of that article.

71. The Commission defends itself in this respect by pointing to the wide discretion it claims to have in agricultural policy. In particular, it maintains that it is not obliged to establish a system based on a daily increase in the amount of the penalty and that it can therefore legitimately institute a regime, such as the one introduced by the contested rules, under which the maximum amount of the penalty increases with successive time periods. Such a regime, while it may appear less fair in individual cases, is justified, in the opinion of the Commission, by the fact that purchasers who have not complied with the initial time-limit are induced to notify the information before the beginning of the subsequent period in order to avoid a far larger penalty.

22 — See the judgment in Case 209/83 *Ferriera Valsabbia* v *Commission* [1984] ECR 3089, paragraph 22. See also the order in Case T-218/01, cited above, paragraph 17.

23 — Order in Case C-239/97, cited above, paragraph 9.

24 — Order in Case T-218/01, cited above, paragraphs 16 and 17.

25 — *Wiedergeltingen* judgment, cited above, paragraph 44.

72. The Commission also maintains that the dissuasive effect of the penalty depends largely on the size and earning capacity of the operator. Hence, a penalty equal to the amount of the levy due for a 0.1% overrun on the quantities of milk delivered by the producers would not, according to the Commission, go beyond that which was necessary and appropriate to achieve the objective of inducing purchasers to forward the information in good time.

73. I note nevertheless that these arguments do not go to the heart of the question, and above all fail to get around the objections set out in the cited judgment.

74. In fact, no one contests the Commission's discretion to choose the system of penalties best suited to achieve the timely notification of the information on the quantities of milk delivered by producers, nor is there any doubt about the advisability of adjusting the amount of the penalty according to the turnover of the dairy. The aspect that attracts objections here, by contrast, is the fact that the contested penalty regime, like the one that preceded it, does not make it possible to adjust the amount of the penalty on the basis of the length of the delay on the part of dairies in forwarding the information required of them and according to the resulting impact on the obligation to pay the additional levy before 1 September.

75. In fact, although it is true that the penalty rules in the new version of the contested provision lay down that a purchaser who forwards the information to the competent authority between 15 and 31 May will pay a much lower penalty than if notification is made between 1 and 15 June, it remains the case that even these rules do not make it possible to adjust, within each of these periods, the amount of the penalty according to the actual length of the delay.

76. This is particularly apparent in the present case, in which a minor delay in relation to the 15 May deadline was punished by the same penalty (EUR 20 000) as would have been imposed if the delay had been a full 15 days.

77. Moreover, that the Commission itself doubts the compatibility of the contested provision with the principle of proportionality appears to be confirmed by the fact that in the wake of the *Wiedergeltingen* judgment it repealed Regulation No 536/93 and introduced, by means of Regulation No 1392/01, a system of sanctions based on a penalty that can be imposed for each day's delay after the deadline of 15 May, equal to the amount of the levy due for a 0.01% overrun on the quantities of milk delivered to the purchaser.

78. For the reasons set out above, I therefore propose that the Court reply to the Finanzgericht Düsseldorf that the second subparagraph of Article 3(2) of Regulation No 536/93, as amended by Regulation No 1001/98, contravenes the principle of proportionality in the part in which, in the event of non-compliance with the time-limit mentioned in the first subparagraph of Article 3(2), it imposes on a purchaser who forwarded the communication between 15 and 31 May a pecuniary penalty equal to the amount of the additional levy on milk due for a 0.1% overrun on the quantities of milk and milk equivalent delivered to them by producers, without there being scope within the period of time considered to take account of the length of time by which the time-limit was exceeded.

V — Conclusion

79. In the light of the considerations set out above, I propose that the Court reply as follows to the Finanzgericht Düsseldorf:

(1) The first subparagraph of Article 3(2) of Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products is to be interpreted as meaning that a purchaser of milk complies with the 15 May deadline if it can demonstrate with certainty that it sent the information required of it to the competent authority before that date.

(2) The second subparagraph of Article 3(2) of Commission Regulation (EEC) No 536/93 of 9 March 1993 laying down detailed rules on the application of the additional levy on milk and milk products, as amended by Commission Regulation (EC) No 1001/98 of 13 May 1998, contravenes the principle of proportionality in the part in which, in the event of non-compliance with the time-limit mentioned in the first subparagraph of Article 3(2), it imposes on a purchaser who forwarded the communication between 15 and 31 May a pecuniary penalty equal to the amount of the additional levy on milk due for a 0.1% overrun on the quantities of milk and milk equivalent delivered to them by producers, without there being scope within the period of time considered to take account of the length of time by which the time-limit was exceeded.