OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 18 March 1987 *

Mr President,
Members of the Court,

1. This case is a continuation of Case 299/84, which was also concerned with a request for a preliminary ruling made by the Verwaltungsgericht (Administrative Court) Frankfurt am Main in connection with the same proceedings between Firma Karl-Heinz Neumann and Bundesanstalt für landwirtschaftliche Marktordnung, hereinafter referred to as 'the intervention agency'.

2. As a result, the Court is fully cognizant with the facts and the relevant regulations.

3. In its judgment of 14 November 1985 in Case 299/84 ([1985] ECR 3663) the Court held, *inter alia*, that there was no general legal principle of objective unfairness ('sachliche Unbilligkeit') in Community law.

4. In reaching this finding the Court followed the opinion of its Advocate General who also, however, expressed the view that the principle of proportionality had been infringed.

5. The Verwaltungsgericht considered that the Court did not follow the Advocate General on that point only because the Verwaltungsgericht had not raised the question of the amount of the security in the context of the principle of proportionality or did not put an explicit question to the Court with regard to that aspect. Consequently, the Verwaltungsgericht has made a fresh request for a preliminary ruling on the very question whether, in the material circumstances, Article 16 (2) of Commission Regulation (EEC) No 2173/79 [1] must not be regarded as invalid owing to incompatibility with the principle of proportionality.

6. However, in view of the fact that the Verwaltungsgericht expressly described the principle of objective unfairness as a particular embodiment of the principle of proportionality, the Court considered at length in its judgment of 14 November 1985 whether that principle, in the form recognized in Community law, was capable of providing a solution to the dispute pending before the national court. However, the outcome of that examination was in the negative, as can be seen from paragraphs 27 to 33 of the judgment in question. By pointing out that the aim of the security was to guarantee the performance by the buyer of the contractual obligations arising from his purchase application and observance of the conditions of sale laid down in the regulations in question (paragraph 29), the Court, in particular, dismissed the idea that that part of the security which was forfeited had to be calculated on the basis of the damage suffered by the intervention agency concerned.

7. Contrary to what the applicant in the main proceedings maintains in its observations, the Court carried out that examination in the light of the actual circum-

* Translated from the French.

1 — Commission Regulation (EEC) No 2173/79 of 4 October 1979 on detailed rules of application for the disposal of beef bought in by intervention agencies and repealing Regulation (EEC) No 216/69 (OJ 1979, L 251, p. 12).

stances of the case, as witness in particular paragraphs 28 and 33 of the judgment.

8. Accordingly, as far as this case is concerned the Court is entitled to restrict itself to considering whether a new factor may have been raised by the second request for a preliminary ruling. In the event, that reference raises for the first time a question as to the validity of Article 16 (2) of Regulation No 2173/79.

9. Furthermore, the Verwaltungsgericht now stresses more especially the fact that even though the initial contract of sale was in fact not honoured by the purchaser (Neumann), new contracts for the same quantity of goods were concluded and performed in full by the same purchaser (or by a company belonging to the same group) instead ('stattdessen') and with the cooperation ('unter Mitwirkung') of the seller, the intervention agency.

10. If the intervention agency had given its formal agreement to the straightforward cancellation of the first contract and to its replacement after the critical date of 6 April 1981, the date on which the new green rates [2] came into effect, the question would arise as to whether the intervention agency was still entitled to go back on that agreement later by declaring forfeit the security lodged in respect of the first purchase application.

11. However, at the time of Case 299/84 the Court had no precise information as to how the contacts between the intervention agency and Neumann unfolded or as to the arrangements which might have been agreed as to the said 'substitution' operation. Consequently it had to take as its basis the brief indications given in the order for reference according to which Neumann simply notified the intervention agency that it refused to fulfil its obligations to take delivery of and pay for the meat purchased whereupon Neumann submitted a new purchase obligation (see paragraph 8 of the judgment of 14 November 1985). The national court even stated that 'that obligation [to take delivery of and to pay for the beef] was not discharged in any other way'.

12. Accordingly if 'substitution' took place it was a unilateral substitution.

13. The information set out in the reasons for the new order for reference are not such as to cast doubt on that conclusion. The order states that 'after discussing the matter by telephone with the defendant's officials, [Neumann] had the *contract cancelled* by Martin Lund GmbH by telex messages of 14 and 23 April 1981' and that Neumann 'submitted, together with the notification of cancellation, two new applications, which the defendant [the intervention agency] accepted on the new terms'. The arrangement which may thus have been agreed by telephone between the parties seems therefore to have consisted at the most of the unilateral termination by Neumann of the first contract and of a commitment on the part of the intervention agency to consider, if not to accept, the second purchase applications. In all evidence two successive and separate operations were involved. The expression used in the question put to the Court by the Verwaltungsgericht is, moreover, 'new contracts'.

14. Consequently, the concepts of 'substitution' and 'cooperation' cannot be construed as being equivalent to cancellation by mutual agreement. Also, the new contracts cannot be regarded as 'replacement contracts', as Neumann claims. Since the intervention agency was acting in this case pursuant to a provision of

2 — Council Regulation (EEC) No 850/81 of 1 April 1981 amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture (OJ 1981, L 90, p. 1).

Community law it would moreover have been unable to agree to the first contract's being replaced by a new contract and, at the same time, to the release of the security.

15. It appears from Article 16 (1) of Commission Regulation No 2173/79 that if, within the time-limit specified, 'the purchaser does not pay for the product . . . the contract shall be cancelled by the intervention agency in respect of the quantity not paid for'.

16. Furthermore, under Article 16 (2) 'the security shall be forfeit . . . in total, if the quantity paid for is less than 60% of the quantity covered by the contract'.

17. However, in this case Neumann took delivery pursuant to the first contract of 4 814 kilograms only out of a total of 40 000 kilograms. (There was therefore part performance of the first contract.)

18. However, Neumann stresses repeatedly that, by their purchases, it or its sister company enabled Community stocks of beef and veal to be reduced in the final analysis by 40 tonnes. Consequently the aim of the regulation should be regarded as having been attained and it would be unfair not to release the security.

19. That reasoning cannot be accepted. The disposal of stocks must take place in orderly conditions and the security is not designed to ensure only that delivery is taken of the quantities agreed but also that the price fixed is respected. That was not the case here.

20. It follows from the whole of the above that the failure to perform the first contract is tantamount to the non-performance, on the part of Neumann, of a contractual obligation with which it is precisely the aim of the security system to guarantee compliance (see paragraph 29 of the judgment of 14 November 1985).

21. I would observe moreover that it was not until 14 and 23 April 1981 respectively that the new purchase applications were definitively lodged. However, under Article 1 (1) of Commission Regulation (EEC) No 713/81,[3] the whole of the selling operation in question, which, as regards the German intervention agency, related to 4 000 tonnes of beef and veal, began on 30 March 1981 and ended on 30 April 1981. Since it was possible to lodge purchase applications as from the publication of the regulation, that is to say 20 March 1981 (Neumann's first purchase offer is dated 27 March 1981) and 'save in exceptional circumstances applications shall be accepted within five working days following their submission' (Article 3 (2) of Regulation No 2173/79), it is very probable that on the aforementioned dates the stocks were exhausted. The fact that, nevertheless, Neumann's new applications, made through Martin Lund GmbH, a company belonging to its group, were accepted, seems to indicate that the applications were given the priority attaching to the application of 27 March 1981. There was therefore 'cooperation' in the sense that the intervention agency earmarked and reserved for Neumann-Lund the quantities covered by the initial contract.

22. The combined effect of Articles 2, 3 and 4 of Regulation No 2173/79 is to cause the order of priority of purchase applications to be determined by the date on which they are submitted, provided that for an application to be admissible a security must also be lodged in favour of the intervention agency.

23. In its judgment of 14 November 1985 the Court correctly treated the resultant choice offered to the prudent trader

3 — Commission Regulation (EEC) No 713/81 of 19 March 1981 on the sale at a price fixed in advance of certain boned beef and veal held by certain intervention agencies (OJ 1981, L 74, p. 27).

between either lodging his purchase application at once and running the risk that the rate will be adjusted to the advantage of competitors subsequently, or of lodging the application later and running the risk that stocks might by that time be exhausted, as the keystone of its reasoning that in circumstances such as those involved in the present case the forfeiture of the security cannot be regarded as disproportionate.

24. Competitors of Neumann which, like it, lodged their applications and security before 6 April 1981 but performed their contract did indeed obtain priority but had to pay the higher price. Those who did not submit their applications until after 6 April 1981 indeed received a more favourable purchase price but only in so far as the meat was still available.

25. In contrast, Neumann not only obtained — thanks to its having lodged a new application after 6 April 1981 — a lower selling price but also benefited by priority which, in principle, it no longer deserved. Hence it had the advantages of the two applications without having to bear the risks.

26. Whilst, in the final analysis, Neumann did in fact assist in 'clearing' stocks of beef and veal held by the German intervention agency, it did so to the detriment of equal access to products and equal treatment of purchasers which the abovementioned provisions of Regulation No 2173/79 are designed to safeguard (see third recital in the preamble to the regulation).

27. In those circumstances, it would have been the release of the security that would have been unfair or disproportionate.

28. Moreover, it is correct to say, as the Commission points out, that Article 16 of Regulation No 2173/79 is drafted so as to respect the principle of proportionality and that the security laid down by the regulation can in no way be regarded as excessive. In view of the very specific situation to which the question put by the national court refers, however, those factors do not in my view play a rôle in this case.

29. For all the aforementioned reasons and in view, in particular, of the Court's judgment of 14 November 1985, I propose that the Court should answer the question referred for a preliminary ruling by the Verwaltungsgericht Frankfurt am Main, in the following terms:

'Consideration of the question has not disclosed factors such as to cast doubt, on account of infringement of the principle of proportionality, on the validity of Article 16 (2) of Commission Regulation No 2173/79 of 4 October 1979 on detailed rules of application for the disposal of beef bought in by intervention agencies and repealing Regulation (EEC) No 216/69.'