JUDGMENT OF THE COURT (Fourth Chamber)
23 May 1996 *

In Case C-326/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Rechtbank van Eerste Aanleg, Brussels, for a preliminary ruling in the proceedings pending before that court between

A. Maas & Co. NV

and

Belgische Dienst voor Bedrijfsleven en Landbouw, now the **Belgisch Interventie- en Restitutiebureau**

on the interpretation of Commission Regulation (EEC) No 1824/80 of 11 July 1980 opening an invitation to tender for the mobilization of common wheat as food aid for the Republic of Benin (OJ 1980 L 178, p. 5),

THE COURT (Fourth Chamber),

composed of: C. N. Kakouris, President of the Chamber, P. J. G. Kapteyn (Rapporteur) and H. Ragnemalm, Judges,

* Language of the case: Dutch.

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— A. Maas & Co. NV, by K. Maenhout and J. Tritsmans, of the Antwerp Bar,

— Belgische Dienst voor Bedrijfsleven en Landbouw, now known as the Belgisch Interventie-en Restitutiebureau, by M. Fruy and B. De Moor, of the Brussels Bar,

— the Commission of the European Communities, by T. van Rijn, Legal Adviser, and H. van Vliet, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the parties at the hearing on 29 February 1996,

after hearing the Opinion of the Advocate General at the sitting on 21 March 1996,

gives the following

Judgment

1 By judgment of 28 November 1994, received at the Court on 12 December 1994, the Rechtbank van Eerste Aanleg, Brussels, referred to the Court for a preliminary

ruling under Article 177 of the EC Treaty two questions on the interpretation of Commission Regulation (EEC) No 1824/80 of 11 July 1980 opening an invitation to tender for the mobilization of common wheat as food aid for the Republic of Benin (OJ 1980 L 178, p. 5).

2 Those questions were raised in proceedings between A. Maas & Co., established in Antwerp (hereinafter 'Maas'), and the Belgische Dienst voor Bedrijfsleven en Landbouw (Belgian office for the Economy and Agriculture, hereinafter 'the BDBL').

3 Article 1(1) of Regulation No 1824/80 provides: 'Tenders are hereby invited for the supply, by way of Community food-aid action to Benin, of 5 000 tonnes of common wheat'. The invitation to tender pursuant to that regulation was published in the *Official Journal of the European Communities* of 15 July 1980 (1980 C 176, p. 10).

4 Part III of the notice of the invitation to tender, entitled 'Obligations', is worded as follows:

'Tenders shall be valid only if accompanied by a declaration from the tenderer whereby he undertakes:

(a) to deliver in accordance with Article 1(3) the lot meeting the set requirements;

(b) to carry out the delivery operations between 1 and 31 August 1980.'

5 On 29 July 1980, Maas was declared successful tenderer. The price of the common wheat was fixed at BFR 7 300 per net metric tonne, that is a total price of BFR 36.5 million. Maas furnished security in the amount of BFR 1 217 853.

6 The agent for Benin (hereinafter 'the agent') initially made a vessel available for loading from 5 to 7 August 1980. However, Maas indicated that loading could not be carried out until the second half of August.

7 The agent then offered to make a vessel available for loading from 21 to 30 August 1980. Maas first replied by telex of 19 August 1980 that, because of bad weather, harvesting had not yet commenced. Thereupon the agent expressly reserved its position in relation to any additional costs which might be incurred by reason of late delivery. Maas then indicated by telex of 21 August 1980 that it hoped nevertheless to be able to deliver for loading on 22 August 1980. By telex of 29 August 1980 Maas requested the agent to specify a vessel for the purposes of loading by 1 September 1980 at the latest.

8 On 3 September 1980 Maas informed the BDBL that it was reserving its rights with regard to the additional costs incurred by the delay in taking up the goods.

9 On 12 September the agent issued a certificate stating that it had taken delivery on 6 September of 4 700 metric tonnes of common wheat. The moisture content of the common wheat was 16.32% and the percentage of matter other than basic cereals of unimpaired quality 5.78%.

10 On 25 September 1980 Maas informed the BDBL that the balance of 300 tonnes was, by agreement with the agent, to be loaded on board a barge bound for Rouen and then transshipped to an ocean-going vessel. The certificate of acceptance of delivery was issued by the agent on 1 October 1980. The moisture content of the consignment amounted to 16.36%.

11 Before the national court Maas is claiming payment of storage costs amounting to BFR 168 169 incurred through the alleged delay in taking up the goods by the agent. Maas also seeks the release of the security.

12 In their submissions before the national court, the parties have put forward arguments and raised questions concerning the interpretation of Regulation No 1824/80 which formed the basis of the tender procedure in question. Consequently, the Rechtbank van Eerste Aanleg, Brussels, considered it necessary to refer the following questions to the Court of Justice for a preliminary ruling:

'1. What is the precise nature of the operations to be performed by the tenderer within the prescribed time-limit pursuant to Article 6(1) of Regulation (EEC) No 1824/80 of 11 July 1980, on pain of forfeiture of the security provided?

Can liability attach to the tenderer where shipment on board is effected after expiry of the time-limit referred to, even though delivery, that is to say, the placing of the goods in the vicinity of the vessel, took place within that time-limit?

2. Should Articles 6 and 7 of Regulation (EEC) No 1824/80 of 11 July 1980 be read together? In other words, can the security be forfeited if there is a (slight) failure to comply with the quality standards, even where the consignee concerned makes no observations or reservations whatever in this regard?'

Obligations of the successful tenderer

13 By the first part of the first question and the first part of the second question, the national court essentially seeks to ascertain whether Article 6(1) of Regulation No 1824/80 is to be interpreted as meaning that observance of the quality standards referred to in Article 7 of that regulation constitutes an obligation which the successful tenderer must fulfil as regards carrying out the operations referred to in Article 6(1) in order for the security to be released.

14 Article 6(1) of Regulation No 1824/80 provides as follows:

'The tenderer shall give security in an amount of 6 ECU per tonne of goods.

It shall be released:

— ...

— in the case of the successful tenderer, when the operations concerned have been carried out within the prescribed time-limit and on submission of the original export licence duly granted and endorsed by the competent authorities of the Member State mentioned in the tender pursuant to Article 3(2),

— ...'.

15 According to the seventh recital in the preamble to Regulation No 1824/80, the purpose of furnishing security is to guarantee that the obligations arising by virtue of participation in the invitation to tender provided for in the regulation will be fulfilled.

16 Article 1(1) of Regulation No 1824/80 states that the invitation to tender concerns the supply to Benin of 5 000 tonnes of common wheat.

17 According to Article 1(3) of Regulation No 1824/80, the product 'is to be delivered in bulk to the port of shipment in the vicinity of the vessel. The goods must be set down at the place nominated by the recipient country or its agent, the timing of delivery being settled by the tenderer and the recipient body's agent.'

18 Article 7 of Regulation No 1824/80 provides that: 'The common wheat referred to in Article 1 must be of fair and sound merchantable quality for which the reference price is fixed.'

19 The obligation to supply common wheat which meets the criteria listed in Article 7 thus forms part of the obligations which arise through participation in the invitation to tender and which must be fulfilled by the tenderer in order for the security to be released.

20 Article 6(1) of Regulation No 1824/80 is therefore to be interpreted as meaning that observance of the quality standards referred to in Article 7 of that regulation constitutes an obligation which the successful tenderer must fulfil as regards the carrying out of the operations referred to in Article 6(1) in order for the security to be released.

Delivery

21 By the second part of the first question the national court asks essentially whether, in circumstances such as those described in the order for reference, the successful tenderer may incur liability where shipment on board takes place after expiry of the prescribed time-limit even though delivery in the vicinity of the vessel took place within that time-limit.

22 In this regard, Article 5 of Regulation No 1824/80 provides that: 'If the tenderer is unable to deliver the goods in compliance with Article 1(3) on the date given in the notice of invitation to tender as a result of the late availability of the vessels to be used for sea transportation, the resulting costs shall be borne by the intervention agency.'

23 According to the notice of invitation to tender, delivery was to be carried out between 1 and 31 August 1980.

24 It is apparent from the documents before the Court that the successful tenderer did not fix the timing of delivery with the agent, that it twice refused vessels which

the agent had offered and that it advised the agent on 29 August that the latter should make a vessel available for loading by 1 September at the latest. It follows that shipment on board after the expiry of the prescribed time-limit was not the result of the agent's late naming of a vessel for transportation.

25 In those circumstances, the storage costs should not be borne by the intervention agency.

26 Consequently, Article 5 of Regulation No 1824/80 is to be interpreted as meaning that the successful tenderer incurs liability for shipment on board which takes place after expiry of the prescribed time-limit where he did not fix the timing of delivery with the agent, twice refused vessels which the agent offered and advised the agent on 29 August 1980 that the latter should make a vessel available for loading by 1 September 1980 at the latest.

Quality standards

27 Next, the national court seeks to ascertain whether the security can be forfeited where the quality standards referred to in Article 7 of Regulation No 1824/80 have been slightly infringed, even where the consignee makes no observations in this regard.

28 It is apparent from the documents before the Court that the quality standards were infringed in this case since the moisture content of the first delivery of 4 700 tonnes of the common wheat was 16.32% and the total percentage of matter other than basic cereals of unimpaired quality was 5.78%. The moisture content of the remaining 300 tonnes was 16.36%.

29 In order to answer the question submitted by the national court, it is necessary to establish, in accordance with well-established case-law (Case 122/78 *Buitoni* [1979] ECR 677; Case 240/78 *Atalanta* [1979] ECR 2137; Case 272/81 *RU-MI* [1982] ECR 4167; Case 66/82 *Fromançais* [1983] ECR 395; Case 15/83 *Denkavit* [1984] ECR 2171; and Case 21/85 *Maas* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1986] ECR 3537), whether the obligations breached in this case must be regarded as principal obligations whose observance is of fundamental importance to the proper functioning of a Community system and whose infringement may be punished by total forfeiture of the security, without there being any breach of the principle of proportionality, or whether they are secondary obligations whose infringement should not be punished with the same rigour as non-fulfilment of a principal obligation.

30 Article 1 of Regulation (EEC) No 2731/75 of the Council of 29 October 1975 fixing standard qualities for common wheat, rye, barley, maize and durum wheat (OJ 1975 L 281, p. 22), defined the standard quality for common wheat for which the target price and the intervention prices are fixed as follows:

'(a) ...

(b) moisture content: 16%;

(c) total percentage of matter other than basic cereals of unimpaired quality: 5% ...'.

31 According to Article 7 of Regulation No 1824/80, the common wheat to be supplied to Benin had to correspond at least to the standard quality for which the reference price is fixed.

32 According to the second indent of Article 3(1) of Council Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals (OJ 1975 L 281, p. 1), as amended by Council Regulation (EEC) No 1143/76 of

17 May 1976 (OJ 1976 L 130, p. 1), a reference price for common wheat of breadmaking quality is to be fixed. According to Article 3(4), the reference price is to be higher than the intervention price for common wheat of non-breadmaking quality.

33 It follows that the requirements concerning moisture content and the total percentage of matter other than basic cereals of unimpaired quality are minimum requirements for common wheat intended for breadmaking.

34 Therefore, by requiring that the common wheat correspond at least to the standard quality for which the reference price is fixed, Article 7 of Regulation No 1824/80 sets as a condition that the minimum requirements for standard quality common wheat for which the reference price is fixed must be met.

35 The importance of that condition cannot be underestimated either as regards the inherent requirements of food aid or as regards equality of conditions as between tenderers.

36 It follows that observance of Article 7 of Regulation No 1824/80 constitutes an essential condition for the successful tenderer infringement of which may be punished by total forfeiture of the security without this entailing a breach of the principle of proportionality.

37 As regards the agent's failure to make observations or reservations, it is sufficient to state that, as far as the successful tenderer is concerned, his legal relations are not with the recipient country or its agent, but with the national intervention

agency of the exporting Member State and those relations are governed by Community law (see Case 56/86 *Société pour l'Exportation des Sucres* v *OBEA* [1987] ECR 1423, paragraph 14).

38 It follows that failure by the consignee's agent to make observations or reservations on the quality of the goods supplied by way of Community action under the food aid provided for in Regulation No 1824/80 cannot exempt the successful tenderer from the obligation laid down in Article 7 of that regulation.

39 The reply to the question must therefore be that Article 6(1) of Regulation No 1824/80 is to be interpreted as meaning that the security is forfeited where the quality standards referred to in Article 7 of the abovementioned regulation have been slightly infringed, even where the consignee has not made any observations in that regard.

The application for legal aid and costs

40 In its observations, Maas applied for legal aid in the amount of BFR 25 000 pursuant to the second subparagraph of Article 104(5) of the Rules of Procedure of the Court of Justice.

41 However, during the proceedings no factor has become apparent to justify the grant, by way of legal aid, of assistance for the purpose of facilitating the representation or appearance of the applicant.

42 Accordingly, that application cannot be granted.

Costs

43 Maas claims that the defendant should be ordered to pay the costs.

44 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fourth Chamber),

in answer to the questions referred to it by the Rechtbank van Eerste Aanleg, Brussels, by judgment of 28 November 1994, hereby rules:

1. **Article 6(1) of Commission Regulation (EEC) No 1824/80 of 11 July 1980 opening an invitation to tender for the mobilization of common wheat as food aid for the Republic of Benin is to be interpreted as meaning that observance of the quality standards referred to in Article 7 of that regulation constitutes an obligation which the successful tenderer must fulfil as regards the carrying out of the operations referred to in Article 6(1) in order for the security to be released.**

2. **Article 5 of Regulation No 1824/80 is to be interpreted as meaning that the successful tenderer incurs liability for shipment on board which takes place**

after expiry of the prescribed time-limit where he did not fix the timing of delivery with the agent, twice refused vessels which the agent offered and advised the agent on 29 August 1980 that the latter should make a vessel available for loading by 1 September 1980 at the latest.

3. Article 6(1) of Regulation No 1824/80 is to be interpreted as meaning that the security is forfeited where the quality standards referred to in Article 7 of the abovementioned regulation have been slightly infringed, even where the consignee has not made any observations in that regard.

Kakouris Kapteyn Ragnemalm

Delivered in open court in Luxembourg on 23 May 1996.

R. Grass C. N. Kakouris

Registrar President of the Fourth Chamber