OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 19 January 1988 *

Mr President,
Members of the Court,

1. The three questions submitted by the High Court of Ireland arise from a dispute about the legality of a decision taken by the Irish authorities to forfeit part of the security lodged by the plaintiff companies in the main proceedings upon the sale to them of boneless beef held in storage by the Irish intervention agency and intended for export outside the Community.

2. 20 tonnes of the 166 tonnes purchased by the plaintiffs could not be exported because they were stolen in the United Kingdom whilst in the custody of a road-haulage company.

3. The *first question* submitted for a preliminary ruling is, in essence, whether Article 16 (3) 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 (Official Journal L 251 of 5 October 1979, p. 12) should be interpreted as including the exception in cases of *force majeure* contained in Article 16 (2) of the same regulation.

4. However, it appears from the observations submitted by the Commission that the sales of meat in question were probably effected under Commission Regulations (EEC) Nos 1929/82 and 2534/82, of 13 July 1982 and 15 September 1982 respectively. [1]

5. Those two regulations provided that the meat was to be 'sold for export' and that the sale should take place in accordance with the provisions of Commission Regulation (EEC) No 985/81 of 9 April 1981 laying down detailed rules on the sale of frozen beef and veal for export from intervention stocks and amending Regulation (EEC) No 1687/76 (Official Journal L 99 of 10 April 1981, p. 38).

6. Article 1 (2) of Regulation (EEC) No 985/81 provides that: 'Subject to the provisions of this regulation, sales shall take place pursuant to the provisions of Regulation (EEC) No 2173/79, and in particular Articles 2 to 5 thereof, and of Regulation (EEC) No 1687/76.'

7. According to Article 3 (2) of Regulation (EEC) No 985/81, the security lodged to guarantee exportation may be released only if proof is furnished in accordance with Article 12 of Commission Regulation (EEC) No 1687/76 of 30 June 1976 laying down common detailed rules for verifying the use and/or destination of products from intervention (Official Journal L 190 of 14 July 1976, p. 1).

* Translated from the French.

1 — Commission Regulation (EEC) No 1929/82 of 13 July 1982 on the sale at a price fixed at a standard rate in advance of boned beef held by the French and Irish intervention agencies and intended for export (Official Journal L 209 of 17 July 1982, p. 34), and Commission Regulation (EEC) No 2534/82 of 15 September 1982 having the same title (Official Journal L 271 of 21 September 1982, p. 6).

8. It follows from that article, read in conjunction with Article 2 (1) and Article 3 (1) (a) (as amended by Regulation (EEC) No 2675/80) [2], that that proof must show that the products to be exported have actually left the geographical territory of the Community.

9. If that condition is fulfilled, Article 13 (4) of Regulation (EEC) No 1687/76 provides, and Article 3 (2) of Regulation (EEC) No 985/81 confirms, that the security must be released. Article 13 (5) of the first named regulation further provides: 'On application by the person concerned, Member States may release the security by instalments in proportion to the quantities of products in respect of which the proofs referred to in paragraph 4 have been provided'.

10. The case of products which, *as a result of force majeure*, have not been put to their intended use or reached their intended destination is expressly governed by Article 11 of Regulation (EEC) No 1687/76.

11. Article 11 (1) provides as follows:

'(1) Where the prescribed provisions on the use and/or destination cannot be complied with as a result of *force majeure*, the authorities of the Member State in which the security has been lodged or, if no security has been lodged, the authorities in the Member State in which the removal from intervention stock took place, shall, at the request of the person concerned, decide:

(a) that the time-limit prescribed for transaction shall be extended for such period as may be considered necessary in view of the circumstances invoked,

or

(b) if the products have been irretrievably lost, that control shall be deemed to have been carried out.

However, in those cases of *force majeure* where the measures referred to in (a) and (b) are not appropriate, the competent authorities shall inform the Commission, which may provide for the necessary measures under the procedure laid down in Article 38 of Regulation No 136/66/EEC and in the corresponding rticles of the other regulations on the common organization of markets.'

12. There is therefore no doubt that a clear Community provision allows cases of *force majeure* to be taken into consideration when meat purchased from an intervention agency for exportation outside the Community has failed to reach its destination within the period allowed.

13. Recognition of *force majeure* does not, however, lead automatically to the release of a security. Depending on the circumstances, other measures may be adopted (for example, an extension of the period allowed for the operation), or proof may be furnished that a *further condition* has been fulfilled, namely that the goods have been irretrievably lost.

2 — Commission Regulation (EEC) No 2675/80 of 17 October 1980 amending Regulation (EEC) No 1687/76 laying down common detailed rules for verifying the use and/or destination of products from intervention (Official Journal L 274 of 18 October 1980, p. 14).

14. In view of the foregoing observations, made in order to set the point raised by the first preliminary question in the precise legislative context indicated by all the evidence supplied by the High Court in its judgment, I propose that the Court should reply to that question as follows:

'The situation of a trader who, pursuant to a sale governed by Commission Regulations (EEC) Nos 2173/79 and 985/81, has purchased beef or veal from intervention stocks but has failed to comply with the obligation to export the meat outside the territory of the Community must be appraised in the light of Commission Regulation (EEC) No 1687/76. Under Article 11 of that regulation, the existence of a case of *force majeure* constitutes in such a case a necessary but not a sufficient condition for the release of the security lodged as a guarantee of exportation.'

15. Turning to the *second question* submitted for a preliminary ruling, which is whether the circumstances of this case, as set forth by the High Court of Ireland, constitute such a case of *force majeure* for the purpose of Article 11 of Regulation (EEC) No 1687/76, I would first like to refer, as the Irish Government and the Commission have done, to the judgment of the Court of 13 December 1979 in Case 42/79 (*Milch-, Fett- und Eierkontor* v *BALM* [1979] ECR 3703), the facts of which were quite similar to the facts of the present case. In Case 42/79 the plaintiff in the main proceedings bought butter at a reduced price from intervention stocks on condition that it was exported outside the Community within 30 days but resold it to a third party who in the end did not export it.

16. The Court held that:

'If, in spite of the background of those provisions, the first purchaser of the butter from storage decides to resell it to a third party for the purposes of exportation he thereby undertakes, with regard to the agricultural intervention agency, all the risks which a diligent trader can and should reasonably foresee in the context of that transaction, including that of misappropriation of the butter through the fraudulent conduct of a duly authorized agent of the subsequent purchaser. The possibility of such conduct was not a risk which could in no way have been foreseen by the reseller, especially in the circumstances described by the national court. Consequently, the fact that, as a result of the said misappropriation, the reseller was unable to ensure that the goods were actually exported cannot be considered as an exceptional and abnormal circumstance fulfilling the conditions for a case of *force majeure* . . .' (paragraph 10).

17. Admittedly, the Court has consistently held (see most recently its judgment of 27 October 1987 in Case 109/86 (*Theodorakis* v *Greece* [1987] ECR 4319), that 'the precise meaning of this concept [of *force majeure*] must be determined by reference to the legal context in which it is intended to operate' (paragraph 6).

18. However, in the case now before the Court, as in Case 42/79, the legal position was characterized precisely by the obligation which the relevant Community regulations impose on the purchaser of the agricultural products to export them outside the Community. As in Case 42/79, the performance of that obligation is guaranteed by the lodging of a security which may not be released, except in a case of *force majeure*, unless the products have actually been exported.

19. In my opinion, therefore, it may reasonably be concluded in the present case that, if the purchaser of the beef in question, instead of carrying out the required exportation himself, instructs a third party to do so, he is not thereby released from his obligation to export; he continues to bear, with regard to the intervention agency, all the risks which a diligent trader can and should reasonably foresee and consequently he must be responsible for any misconduct or negligence on the part of that third party.

20. I would go so far as to say that the above principle is all the more valid in this case in which the purchaser has not resold the products in question but has merely instructed a transport undertaking to take charge of their exportation.

21. It can hardly be doubted that, if the meat had been misappropriated by an employee of the plaintiff companies while it was in the warehouses or on a lorry belonging to them, there would have been no question of *force majeure*. Such a possibility is not entirely unforeseeable nor wholly unpreventable.

22. Furthermore, an event which could not constitute a case of *force majeure* if it had happened to the purchaser of the meat himself cannot be treated as an abnormal and unforeseeable circumstance, whose consequences could not have been avoided despite all the care taken, if it happens to a haulage contractor, even if the contractor is not associated with the purchaser and the transportation was subcontracted to him without the purchaser's knowledge.

23. According to the judgment in *Reich* v *Hauptzollamt Landau*, [3] the trader must also display vigilance in his dealings with the carrier, for there are acts of:

'negligence of which a prudent importer would not be guilty, either when entering into a contract to buy or to carry, or in asserting his rights against the carrier' (paragraph 4).

In that connection the Commission is right to point out that 'if Terrytrans (the carrier engaged directly by the plaintiffs) acted within its authority in concluding the subcontract, then the plaintiffs must bear indirect liability for the acts of Mr Charles Ward and his "partner". If, on the other hand, Terrytrans exceeded its authority by subcontracting the work, then the plaintiffs probably have a remedy against that company'.

3 — Judgment of 20 February 1975 in Case 64/74 *Reich* v *Hauptzollamt Landau* [1975] ECR 261, at p. 267.

24. I therefore propose that the Court should answer the second question in the negative and rule as follows:

'An inability on the part of a purchaser of beef from intervention stocks for exportation to fulfil his obligation to export the beef on account of the fraud and/or negligence of an independent haulage contractor, to whom the task of carrying the goods was subcontracted without the purchaser's knowledge, does not constitute a case of *force majeure* for the purposes of Article 11 of Commission Regulation No 1687/76.'

25. In its *third preliminary question* the national court asks in substance whether the principle of proportionality, as a general principle of Community law, simply requires the intervention agency to determine the amount of the security to be forfeited solely on the basis of the tonnage which has not been exported or whether, on the other hand, that principle requires it to take account of other factors as well, such as those set out in paragraph (c) of the question.

26. According to consistent case-law, referred to most recently in the judgment of 30 June 1987 in Case 47/86 (*Roquette frères* v *Office national interprofessionnel des céréales* [1987] ECR 2889),

'In order to establish whether a provision of Community law is in conformity with the principle of proportionality it is necessary to ascertain whether the means which it employs are suitable for attaining the objective sought, and whether they do not exceed what is necessary for achieving it' (paragraph 19).

27. That principle therefore requires that the penalty for failure to comply with a Community obligation should not exceed what is appropriate and necessary to attain the objective sought.

28. In this instance, as is shown by the second recital of the preambles to Commission Regulations (EEC) Nos 1929/82 and 2534/82, the objective sought was to dispose of meat held in substantial quantities by the French and Irish intervention agencies in certain non-member countries where outlets existed in order to avoid extending the period of its storage on account of the ensuing high costs. The meat offered for sale for that purpose was expressly intended for exportation, and it was precisely in order to ensure compliance with the obligation to export that provision was made for the furnishing of a security.

29. As the Irish Government rightly points out, if a quantity of such meat — purchased at a favourable price — is not exported, it usually finds its way back on to the Community market where it displaces an equivalent quantity of meat which must in turn find its way into intervention.

30. However, it is also settled case-law, to which the Court referred in its judgment of 27 November 1986 in Case 21/85 (*Maas* v

BALM [1986] ECR 3537), that '[if] the obligations at issue ... must be regarded as principal obligations whose observance is of fundamental importance to the proper functioning of a Community system ..., infringement [of them] may be punished by total forfeiture of the security, without there being any breach of the principle of proportionality ...' (paragraph 15).

31. In the context of the regulations at issue in this case, forfeiture of the security in proportion to the quantity not exported is therefore by no means disproportionate to the objective sought.

32. Indeed, Article 13 (5) of Regulation (EEC) No 1687/76 expressly envisaged that possibility.

33. On the other hand, given the fundamental importance of the obligation to export, the principle of proportionality does not require other considerations to be taken into account, except of course cases of *force majeure* involving the irretrievable loss of the goods in which, strictly speaking, no question of proportionality arises since the entire security should be released in any case.

34. In view of the foregoing I propose that the Court should give the following reply to the third preliminary question:

'Where a trader has undertaken to export a given quantity of beef or veal but fails to export part of it, the principle of proportionality is properly applied if the security is released in proportion to the quantity exported. In the absence of *force majeure*, the remainder of the security should not be released, regardless of any other consideration.'