On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Tribunal Administratif, Paris, by judgment of 26 January 1982, hereby rules:

Consideration of the question referred to the Court has disclosed no factor of such a kind as to affect the validity of Article 18 (2) of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 or of Articles 18 (2) and 19 of Regulation (EEC) No 232/75 of the Commission of 30 January 1975.

O'Keeffe Bosco Koopmans

Delivered in open court in Luxembourg on 23 February 1983.

P. Heim
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 11 NOVEMBER 1982 [1]

Mr President,
Members of the Court,

Article 6 of Regulation (EEC) No 804/68 of the Council on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) provides that special measures may be taken for butter held in public storage which cannot be marketed on normal terms during a milk year. According to Article 7 (a) of Regulation (EEC) No 985/68 of the Council (Official Journal, English Special Edition 1968 (I), p. 256), which was inserted in that regulation by Regulation (EEC) No 750/69 of the Council (Official Journal, English Special Edition 1969 (I), p. 204) such measures are to be adopted in accordance with the so-called Management Committee procedure laid down in Article 30 of Regulation (EEC) No 804/68.

1 — Translated from the German.

As a result of those provisions the Commission adopted on 16 June 1972 Regulation (EEC) No 1259/72 on the disposal of butter at a reduced price to certain Community processing undertakings (Official Journal, English Special Edition 1972 (II), p. 559), which was subsequently amended a number of times. Article 6 of that regulation provided that those taking part in the invitation to tender — the means whereby butter from intervention stocks is disposed of — are to give a written undertaking to process the butter which has been made available into concentrated butter and to incorporate certain substances into it, in addition to having the results processed into specified products. Processing in the Community was initially to be completed within a period of 120 days from the removal of the butter from storage (four months under Regulation (EEC) No 2815/72 of the Commission (Official Journal, English Special Edition 1972 (30-31 December), p. 5); that period was extended to six months by Regulation (EEC) No 677/73 (Official Journal, 1973, L 65, p. 16)). Article 18 of Regulation No 1259/72 provided that the security lodged by the prospective buyer, which represented the difference between the market price of butter and the minimum price (all that is paid initially) fixed by the Commission on the basis of the prices of competing fats was to be released only for the quantities in respect of which the successful tenderer had furnished proof that the conditions referred to in Article 6 had been met.

That legislation was replaced with effect from 1 February 1975 by Regulation (EEC) No 232/75 of the Commission on the sale of butter at reduced prices for use in the manufacture of pastry products and ice-cream (Official Journal, 1975, L 24, p. 45). Article 6 of that regulation, in so far as it is relevant to this case, was broadly the same as Article 6 of Regulation No 1259/72. Similarly, the provisions on the release of the security was reproduced in Article 18 (2), which specified, in addition, the nature of the proof to be furnished. Article 19 (2), which is referred to in Article 18 (2), provided further that:

"In all cases which cannot be regarded as cases of *force majeure* where:

The aggregate of the periods prescribed in Article 6 (1) (d) or the period prescribed in the first subparagraph of Article 6 (2) for processing has been exceeded by no more than 30 days, and

The period or periods were exceeded for reasons other than serious negligence on the part of the person concerned, the amount of the processing security to be retained shall, if the person concerned submits a reasoned application to that effect, be only two units of account per metric ton for each day by which the prescribed period or periods have been exceeded.

Such application shall be considered only if it is lodged with the intervention agency concerned within 30 days of the day on which the period or periods in question expire."

That article was repealed by Regulation (EEC) No 1687/76 laying down common detailed rules for verifying the use and/or destination of products from intervention (Official Journal, 1976, L 190, p. 1). Article 2 of that regulation provides that the products are to be subject to customs or equivalent

administrative control from the time of their removal from intervention stock until the use or the destination specified has been verified. Article 3 stipulates that the products are to be considered as having complied with the prescribed use or destination when it is established that the products which are to be processed or to have other products incorporated in them have been processed and that the prescribed time-limits have been observed. Under Article 12 proof that the requirements of control laid down in Article 2 have been complied with is to be furnished by the production of specified documents, and according to Article 13 (4) the security lodged before the removal of the butter from the intervention stocks is to be released subject to the production of the proof referred to in Article 12.

Finally, since it is not clear which period of time is the relevant one for the purposes of the main proceedings (reference is made on the one hand to invitations to tender issued between September 1973 and September 1977 and on the other hand to the sale of butter by the applicant in the main proceedings to a French purchaser between March and June 1980), it should be noted that Regulation (EEC) No 262/79 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (Official Journal, 1979, L 41, p. 1) has been in force since 5 March 1979. Article 8 of that regulation provides that according to the type of processing operation concerned, the periods within which the butter must be processed are respectively three months and eight months calculated from the final day for submission of tenders. Under Article 22 the processing security is to be forfeited if the proof required by Regulation No 1687/76 is not provided within a specified period and if all the conditions laid down in Article 5, which specifies the details of processing, have not been complied with in their entirety. In addition it is stated in Article 23 (2) that:

"In other cases which cannot be regarded as cases of *force majeure* and where

The periods for processing referred to in Article 8 or the period for processing referred to in Article 10 (2) (a) have been exceeded by no more than 60 days in total; and

The delay has not been due to serious negligence on the part of the party concerned,

the amount of the processing security to be forfeit shall, if the party concerned submits a properly reasoned application to that effect, be only three units of account per tonne for each day by which the prescribed periods have been exceeded.

Such application shall be admissible only if it is lodged with the intervention agency concerned within 60 days from the day on which the period in question expired."

Between 1973 and 1980, after having taken part in tendering procedures the applicant in the main proceedings acquired butter for processing from French intervention stocks at reduced prices and lodged the required securities. Some of the butter purchased and apparently denatured by the applicant itself was re-sold to Italian purchasers, and some was re-sold to buyers in France. The securities were forfeit when the processing took place *after the expiry* of the period prescribed for the purpose by Community law, when the precise *date* on which the butter was processed was *uncertain* and when the butter was not processed because it had gone astray after it had been dispatched by the

applicant. Those facts were noted in a letter from the French intervention agency of 21 January 1981 rejecting an application submitted by Fromançais for the release of the securities.

The applicant challenged the decision before the Tribunal Administratif, Paris. It claimed that the securities should be released at least in those cases where the date of the processing could not be established by the Italian authorities and where the butter which had been purchased had gone astray after it had been dispatched by the applicant. Those circumstances must be regarded as cases of *force majeure.* In addition, as the purpose of the security was to ensure that the processing took place, and because observance of the processing *time-limit* was not a *decisive* element in achieving that aim, it must be contrary to the principle of proportionality for the same penalty to be applicable when the time-limit has not been observed as when the processing has not been carried out. The relevant Community provisions should therefore be declared void inasmuch as they provide that the security is forfeit even when the processing has taken place after the expiry of the prescribed period.

As regards the first point, the Tribunal Administratif refused to accept the argument of *force majeure* when the precise time of processing was uncertain or when the butter to be processed had gone astray. The Tribunal Administratif found, however, that a genuine question arose as to the validity of the relevant Community provisions in relation to the principle of proportionality in cases where the entire security was forfeit despite the fact that the processing, although late, was actually carried out. In the view of the Tribunal, that question was not dealt with by the judgment in Joined Cases 99 and 100/76, [1] on which the defendant French intervention agency relied. By its judgment of 26 January 1982 the Tribunal stayed its proceedings and requested a ruling on the validity of Article 18 (2) of Regulation No 1259/72, Articles 18 (2) and 19 of Regulation No 232/75 and Article 13 (4) of Regulation No 1687/76 with regard to the principle of proportionality.

My opinion on that question is as follows.

1. As regards the reference in the question to Article 13 (4) of Regulation No 1687/76, the Commission has expressed the opinion that the provision is not directly concerned with the subject-matter of these proceedings, namely the rule that the security should not be released when the processing period is exceeded, and that therefore the above-mentioned provision should not have been included in the discussion of validity.

If that is indeed the substance of their submission, it is difficult to accept.

As already stated, Article 15 (17) of Regulation No 1687/76 repeated *inter alia* Article 18 (2) of Regulation No 232/75. However, Article 19 (2) of Regulation No 232/75, that is to say, the provision under which only a part of the security was forfeit where the processing period was exceeded by very little, was not altered. It follows that even after the adoption of Regulation No 1687/76 the principle of the forfeiture of the security where the processing period had been exceeded continued to apply. It must also be assumed therefore, that the

1 — Judgment of 11 May 1977 in Joined Cases 99 and 100/76 *NV Roomboterfabriek "De Beste Boter" and Firma Josef Hoche, Butterschmelzwerk* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1977] ECR 861.

principle is to be found in other provisions of Regulation No 1687/76, and in that respect the only relevant provision is in fact Article 13 (4), as mentioned in the reference for a preliminary ruling. That article is to be interpreted in conjunction with Articles 12, 2 and the article also referred to at the beginning, Article 3.

In consequence, it is in my view clear that Article 13 (4) of Regulation No 1687/76 must be included in the examination of the validity of the Community provisions.

2. The Commission submits further that the problem raised in this case has already been dealt with in Cases 99 and 100/76 with the result that there is now no need for special discussion of the issue. Those proceedings, too, were concerned with the question of the compatibility of Article 18 (2) of Regulation No 1259/72 with the principle of proportionality. The Commission submits that as the conditions contained in that provision include the proceessing time-limit and as it may be inferred from the facts of the earlier proceedings that they were concerned with the forfeiture of the security where the processing period had been exceeded, that is sufficient to indicate that the affirmative answer given on that occasion applies equally to the present case. Nevertheless, on that point too, I hesitate to follow the Commission's opinion.

It is true that the interpretation of Article 18 (2) of Regulation No 1259/72 sought in those proceedings also concerned observance of the processing time-limit and as a result the question as to the conformity of Article 18 (2) with the principle of proportionality was raised in general terms. However, it may be seen from the discussion in those proceedings that no examination was made of the specific problem as to whether the forfeiture of the *whole* security *when the processing period was exceeded* was appropriate in view of the fact that the same legal consequences were attached to the *complete failure to carry out the processing.* In particular the plaintiffs in the main proceedings in that case expressed their reservations in respect of the principle of proportionality only in so far as it related to the forfeiture of the security where processing was transferred to a third party, so that the initial purchaser of the butter was liable for the acts of third parties, although, in practice, it was impossible for him to impose relevant contractual safeguards. Accordingly, it was emphasized even in the judgment that the question to be examined was whether the requirement as to the lodging of a processing deposit "which is forfeit even where the failure of a successful tenderer to fulfil his undertakings is due to the default of the subsequent purchaser exceeds the limits which are appropriate and necessary for attaining the objective desired." (Paragraph 11 of the decision).

It may be concluded correctly that the special problem with which we are concerned here was not in any case, the focal point of those proceedings and that it is therefore entirely appropriate to comment on it now.

3. When a question arises on the principle of proportionality and the observance thereof the object which the

measure seeks to attain must first be ascertained, as the applicants rightly submit, in order to establish whether the means which are used to ensure its attainment are excessive or not.

Even though the preamble to Regulation No 1259/72 refers in connection with the lodging of the security merely to the processing of the butter and not to the processing within a specified period, it seems clear to me not only that it is concerned with achieving the relevant aim, that is, to relieve pressure on the butter market definitively, but also that observance of the processing time-limit represents an essential element of the system; the meaning and the purpose of the provision and its general structure make that clear.

In that respect I refer to my Opinion in Joined Cases 99 and 100/76, from which I do not wish to depart in the present proceedings. The processing periods provided for are principally designed to ensure that only such quantity is purchased as the tenderer can in fact process or have processed. In that way as many of the interested parties as possible have access to the products, and therefore effective competition exists, while the laying-up of speculative stocks in anticipation of price increases in the market of competing fats by a few who are in a strong financial position is prevented. In addition the processing time-limits enable checks to be made within a convenient period so that they may be easily reviewed and any necessary adjustments made. A further not insignificant consideration is that the processing periods help to keep within the limits the administrative burden imposed on national authorities by the necessity of carrying out such checks.

It is thus established that the fixing of time-limits for processing is clearly linked with certain fundamental aspects of market organization policy, in particular the need to ensure that the processing is carried out under the same conditions as those under which the price was fixed by the Commission. In that respect it must be noted that the sale price is based both on the market price of butter, which is subject to variations according to the volume of stocks, and on the price of those fats with which the processor is competing; that price is similarly subject to variations according to the state of the world market. It follows that in principle, if the above-mentioned requirement is to be enforced, effective penalties must be imposed. In the absence of other grounds, importance may be attached to the observance of the processing periods because they facilitate administrative tasks. However, it does not seem appropriate to apply to the penalties imposed in that connection the principle expressed in the judgment in Case 122/78, [1] according to which a time-limit which was said to have been imposed merely in the interests of administrative efficiency, namely the time-limit for the production of *proof* that the obligation to import had been fulfilled, may not be enforced by means of severe penalties.

However (and here I agree with the applicant), another aspect of that judgment may be noted. It shows that in connection with the principle of proportionality, it is necessary to establish not only whether the means employed to attain an end are appropriate, but also —

1 — Judgment of 20 February 1979 in Case 122/78 *SA Buitoni* v *Fonds d'Orientation et de Régularisation des Marchés Agricoles* [1979] ECR 677.

a consideration which is of much greater importance in this case — whether the penalties imposed in order to achieve *one* aim are appropriate in comparison with the penalties which are provided to ensure the attainment of another more important goal. In that case the disputed provision was intended, on the one hand, to ensure that the obligation to import was fulfilled during the period of validity of a licence and, on the other, to ensure that the *proof* was furnished, merely for information purposes, within a specified period. As a result it was established that to apply exactly the same penalty for infringements of widely differing gravity was incompatible with the principle of proportionality. The failure to furnish proof of importation within a specified period appeared to warrant only a penalty which was more suited to the practical consequences of the infringement and which imposed on the importer a significantly lighter penalty than that which applied for the non-performance of the main obligation.

In the present case it may safely be stated that the essential purpose of the provision on the sale of intervention butter at reduced prices is the *processing of that product* because that relieves the pressure of the butter market. The observance of a fixed time-limit for the processing would not seem to carry the same weight as regards the achievement of that aim. In that respect it is not necessarily significant that the processing periods may vary considerably. The Commission might argue that the variations result from the necessary initial process of trial and error and from the need to extend the period in order to increase the incentive to buy because of the quantity of stocks. It should be noted, moreover, that the provisions of Regulation No 262/79 introduced an *intermediate period* for the first processing operation. It is also significant in that respect, however, that Regulation No 232/75 provided for an additional period of grace for the processing, during which only a much smaller part of the security is forfeit and that the period was extended in Regulation No 262/79. On the other hand, it is undeniable that the uniform penalty has very different effects according to which obligation is not discharged. Where the processing itself is not done at all, and the butter is brought on to the market, all that must be paid in principle is the difference between the sale price and the market price, in the form of security. That is not really a disadvantage if the statements in the judgment in Joined Cases 99 and 100/76, are to be followed; there it is said that the forfeiture of the security cannot be regarded as being in the nature of a penalty, because in fact only the market price for butter must be paid. It is possible that a case may arise where the minimum price together with the security amounts to a sum which is *higher* than the intervention price and therefore the market price, but it may be assumed that the resulting disadvantage would be comparatively small.

On the other hand, when the processing is completed *after the expiry* of the prescribed period, the forfeiture of the *whole* security undoubtedly produces different, more serious consequences. As the applicant has rightly pointed out, the payment of the market price for the butter under such circumstances places a considerable burden on the purchaser, because after the processing has been completed the value of the goods is considerably diminished and because, it must also be acknowledged, where such processed butter is used for the manufacture of the products listed in the provision — ice-cream and pastry products — it is not possible to absorb

such a cost factor since those products are generally manufactured by the addition of other, cheaper fats, on the value of which the minimum selling price of butter is based.

In view of that circumstance, it is clear that there is an evident disproportion between the penalty which is imposed when the processing is not done at all and that which applies where the processing is in fact completed but the processing time-limit has not been observed. It must also be conceded that in practice the state of affairs must frequently frustrate the primary purpose of the provision — the relief of pressure on the butter market — as, in situations where there is a risk of exceeding the processing period, the difference between the penalties encourages purchasers not to complete the processing at all and to re-sell the butter as unprocessed butter.

Consequently, there are in fact grounds on which the regulations cited in the question submitted by the national court may be held to be invalid in so far as they provide for the forfeiture of the whole processing security even where the processing is completed after the expiry of the prescribed period.

4. Some additional comments are necessary with reference to Article 19 of Regulation No 232/75, which is likewise cited in the question referred to the Court by the Tribunal Administratif, Paris. That article relaxed the penalties to a certain extent.

Since, as the Commission has rightly noted, the article made certain concessions to the principle of proportionality and since the penalties which apply under it are, as the applicant itself has conceded, generally appropriate to the infringement envisaged, it must seem surprising that doubts are expressed as to the validity of that provision, too, in connection with the maintenance of the principle of proportionality. As that is the case, however, there are, if I am right, only two relevant considerations to be extracted from the case-file and the applicant's observations and submissions. In the first place the applicant considers extraordinary the fact that even where the additional period provided for in Article 19 (2) of Regulation No 232/75 is exceeded by very little, a much more severe penalty is immediately imposed. In addition, the applicant suggests that there is a breach of the principle of proportionality in the requirement that application of Article 19 depends on the lodging of the requisite application within a period of 30 days.

Let me say immediately that those two considerations do not provide sufficient grounds for questioning the validity of the above-mentioned provision.

As regards the first point it should be stated that the argument relates in fact to the appropriateness of the *normal* penalty when processing of the butter is not completed within the time-limit and therefore is not concerned with the actual contents of the said provision. As to the suggestion that the period provided for in Article 19 (2) is too short or that the time-limit should have been removed altogether, it should be observed that if, as it appears, the time-limit for the processing is indispensable, it is difficult to object to the introduction of the additional period, and further that the length of that period, which is of course discretionary, cannot be criticized on the ground of a breach of the principle of proportionality.

On the second point, moreover, it should be noted that the requirement of lodging an application within a specified period may not be criticized if the principle on which Article 19 is based, namely to establish under certain conditions lighter penalties for those cases in which the processing period is exceeded by very little, is considered to be justified. Because the *subjective factors* must also be taken into account (and there can be no objection to that), they must naturally be stated and it is surely also justifiable to impose a time-limit, in order to avoid unreasonable delay.

There are thus no recognizable grounds on which the validity of Article 19 (2) of Regulation No 232/75 may be questioned.

5. In conclusion I propose that the question referred to the Court by the Tribunal Administratif, Paris, should be answered as follows:

Article 18 (2) of Regulation No 1259/72, 18 (2) of Regulation No 232/75 and 13 (4) of Regulation No 1687/76 are to be regarded as invalid inasmuch as they impose the same penalties when there is a complete failure to carry out the processing of the butter acquired at reduced prices and when processing is carried out after the expiry of the prescribed period.