JUDGMENT OF THE COURT (SECOND CHAMBER)
11 MAY 1977 [1]

N.V. Roomboterfabriek 'De Beste Boter' and Firma Josef Hoche, Butterschmelzwerk v Bundesanstalt für landwirtschaftliche Marktordnung (preliminary ruling requested by the Verwaltungsgericht Frankfurt am Main)

Joined Cases 99 and 100/76

1. *Agriculture — Butter — Disposal at reduced price — Invitation to tender — Processing of butter — Deposit — Release — Conditions — Successful tenderer not carrying out processing himself — Obligations*
   (Regulation No 1259/72 of the Commission, Articles 6 (1) (c) and 18; Regulation No 1237/73 of the Commission)

2. *Agriculture — Butter — Disposal at reduced price — Invitation to tender — Processing of butter — Deposit — System — Validity*
   (Regulation No 1259/72 of the Commission, Article 18 (2) (a))

1. Article 18 of Regulation No 1259/72 as amended by Regulation No 1237/73 must be interpreted as meaning that even where the successful tenderer does not himself carry out processing it is necessary to establish that the processed products comply with the conditions laid down in Article 6 (1) (c) of the regulation and that they have been produced within the period prescribed before the deposit may be released.

2. The system regarding the processing deposit laid down by Regulation No 1259/72 rests on a proper legal basis and was adopted in accordance with the opinion of the Management Committee concerned; as the forfeiture of the deposit is not in the nature of a penalty for non-fulfilment of an independent obligation, the system does not exceed what is appropriate and necessary to attain the objective desired.

In Joined Cases 99 and 100/76

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht (Administrative Court) Frankfurt am Main, for a preliminary ruling in the action pending before that court between

N.V. ROOMBOTERFABRIEK 'DE BESTE BOTER', having its registered office in Best (Netherlands),

1 — Language of the Case: German.

FIRMA JOSEF HOCHE, BUTTERSCHMELZWERK, having its registered office in Speikern (Federal Republic of Germany)

and

THE BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG (Federal Office for Market Organization), Frankfurt am Main,

on the interpretation and validity of Article 18 of Regulation No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price to certain Community processing undertakings,

THE COURT (Second Chamber)

composed of: M. Sørensen, Judge, acting President of Chamber, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, procedure and observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The intervention system laid down by Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) provides for the possibility of recourse to special measures for the sale of butter which is held in public storage and which cannot be marketed on normal terms during the current milk marketing year.

By Regulation No 985/68 of 15 July 1968 (OJ, English Special Edition 1968 (I), p. 256) the Council laid down general rules for intervention on the market in butter and cream in particular public storage and the disposal of stored butter. By Regulation No 750/69 of 22 April 1969 amending Regulation No 985/68 (OJ, English Special Edition 1969 (I),

p. 204) the Council empowered the Commission, after consulting the Management Committee for Milk and Milk Products, to adopt special measures for the sale of butter from public storage.

In view of the fact that a feature of the Community butter market was the existence of large stocks as a result of intervention on the market by national intervention agencies and it did not appear possible to dispose of these stocks on normal terms during the current milk marketing year, on 16 June 1972 the Commission adopted Regulation No 1259/72 on the disposal of butter at a reduced price to certain Community processing undertakings (OJ, English Special Edition 1972 (II), p. 559); this regulation was amended during 1972 by Regulations No 1716/72 of 8 August 1972 (OJ, English Special Edition 1972 (III), p. 848), No 2161/72 of 10 October 1972 (OJ, English Special Edition 1972 (10-31 October, p. 5) and No 2815/72 of 22 December 1972 (OJ, English Special Edition 1972 (30 and 31 December), p. 5).

Regulation No 1259/72 basically adopts the provisions of Regulations No 198/69 of the Commission of 31 January 1969 and No 1390/69 of 18 July 1969 repealed by Regulation No 2216/70 of 30 October 1970.

To avoid prolonged storage because of the high cost involved and to facilitate the disposal of surplus butter it lays down the conditions of sale of this butter at a price competitive with that of other fats and oils to manufacturers of pastry, biscuits, cakes and other fine bakers' wares (coming under heading 19.08 of the Common Customs Tariff), ice-cream (coming under subheadings 18.06 B and 21.07 C) or ice-cream powder (coming under subheadings 18.06 D or 21.07 F). It provides that butter shall be sold by means of a standing invitation to tender opened by each intervention agency for the quantities of butter concerned held by it. It provides that the Commission shall fix a minimum selling price having regard to the price of other fats and oils competing with butter.

To prevent butter from being diverted from its destination it appeared necessary to the Commission to set up a system of control operating from the time the butter is removed from storage until it is processed. Accordingly, Article 6 (1) of Regulation No 1259/72 as amended by Regulation No 677/73 of the Commission of 7 March 1973 (OJ L 65, p. 16) provides that a tenderer may not take part in the invitation to tender unless he gives a written undertaking:

(a) to have all the butter awarded processed into concentrated butter of a specified minimum fat content in an establishment approved by the Member State in whose territory the processing is carried out;
(b) in the course of this processing and in the same establishment, to have incorporated certain quantities of a specific identifying agent to the exclusion of all other products and in such a way as to ensure uniform diffusion of the constituents;
(c) to have the concentrated butter so treated only into the products prescribed by the regulation and to have such processing carried out in the Community within six months of the removal of the butter from store, which must itself be effected within 30 days of the receipt by the tenderer of the notification by the intervention agency of the result of his participation in the invitation to tender;
(d) to keep stock accounts for all stages of marketing;
(e) to lay down that, for any subsequent resale of the treated concentrated butter, the same obligations which he himself has undertaken with regard to the destination of the product, the period for processing and the keeping of stock accounts shall form part of the contract of sale.

Article 10 (5) of Regulation No 1259/72 provides that rights and obligations

arising out of the invitation to tender shall not be transferable.

Under Articles 8, 9 and 12 of the regulation, at the same time as the minimum selling price is fixed and by the same procedure, the amount of a processing deposit is to be fixed to cover the difference between the market price of butter and the minimum price. Before removal from store of each quantity, the successful tenderer has to lodge the processing deposit which is paid, according to the preference of the Member State, either in the form of a cheque drawn in favour of the intervention agency, or in the form of a guarantee meeting the criteria fixed by the Member State concerned.

Article 18 (2) of Regulation No 1259/72, as amended by Commission Regulations No 2161/72 of 10 October 1972 and No 1237/73 of 10 May 1973 (OJ L 128, p.l) provides that save in cases of *force majeure* the processing deposit shall be released only for quantities in respect of which the succesful tenderer has supplied proof that the conditions referred to in Article 6 of Regulation No 1259/72 have been met.

Article 18 (2) (a) provides that where all the butter processing operations have been carried out in the selling Member State the proof shall be furnished by the production of a document drawn up by the selling Member State.

In 1974 the undertaking N.V. Roomboterfabriek 'De Beste Boter', the registered office of which is in Best (Netherlands), bought from the Einfuhr- und Vorratsstelle für Fette (Fats Import and Supply Office), to which the Bundesanstalt für landwirtschaftliche Marktordnung is the successor in title, butter at a reduced price from intervention stocks and lodged the necessary processing deposit. The butter was processed into concentrated butter by Firma Josef Hoche, Butterschmelzwerk, the registered office of which is at Speikern (Federal Republic of Germany) and then resold by the latter to undertakings which were to carry out the processing into the products laid down by Regulation No 1259/72.

Since Josef Hoche gave incorrect particulars with regard to the date when the butter was taken over, 1 059 kg and again 48 kg of the concentrated butter was not processed by the purchasers within the requisite period of six months. Accordingly the Einfuhr- und Vorratsstelle für Fette by notices dated 24 November 1975 and 2 January 1976 declared that the processing deposit amounting to 6 754·70 DM was forfeit. Objections dated 11 December 1975 and 13 January 1976 were dismissed by the Einfuhr- und Vorratsstelle für Fette by decision dated 27 January 1976, and N.V. Roomboterfabriek 'De Beste Boter' and Josef Hoche brought the matter before the Verwaltungsgericht Frankfurt am Main on 26 February 1976.

Another processing undertaking which was to manufacture from the concentrated butter various powders for the manufacture of 'soft ice' did not process 4 692·24 kg of butter representing 3 830·4 kg of concentrated butter into the products laid down by Regulation No 1259/72. Accordingly the Einfuhr- und Vorratsstelle für Fette by notice dated 6 January 1976 declared the processing deposit of 19 386·42 DM forfeit. By notice dated 4 May 1976 the Einfuhr- und Vorratsstelle für Fette in part accepted an objection by Roomboterfabriek 'De Beste Boter' of 23 January and revoked the notice of 6 January in so far as it declared the deposit for 3 321·6 kg of concentrated butter forfeit; although this quantity had not been processed in accordance with Regulation No 1259/72, it had nevertheless been processed in accordance with the provisions of Regulation No 232/75 of the Commission of 30 January 1975 on the sale of butter at reduced prices for use in the manufacture of pastry products and

ice-cream (OJ L 24, p. 45). By a further notice dated 21 May 1976 the Einfuhr- und Vorratsstelle für Fette dismissed the objection in so far as it related to the deposit in respect of 508·8 kg of concentrated butter the processing of which was still contested. Roomboterfabriek 'De Beste Boter' and Josef Hoche brought an action against this decision on 21 June 1976 before the Verwaltungsgericht Frankfurt am Main.

In both cases before it the Verwaltungsgericht Frankfurt am Main (First Chamber) took the view that its decision depended at least partly on the interpretation of Article 18 of Regulation No 1259/72.

Accordingly by two orders dated 9 September 1976 it decided to stay the proceedings under Article 177 of the EEC Treaty until the Court of Justice had given a preliminary ruling on the following questions:

(a) In the first case (registered at the Court Registry under number 99/76):
Are the first subparagraph and second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price to certain Community processing undertakings (OJ, English Special Edition 1972 (II), p. 559) as amended by Regulation (EEC) No 1237/73 of the Commission of 10 May 1973 (OJ L 128/1 of 15. 5. 1973) to be interpreted as meaning that the proof required to enable the deposit to be released is only regarded as having been furnished if it is clear from the document to be issued by the national authority under the second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation No 1259/72 that the successful tenderer — who does not himself carry out processing within the meaning of Article 6 (1) (c) of Regulation No 1259/72 — has fulfilled his obligations under Article 6 (1) (a), (b), (d) and (e) of the regulation mentioned above, or is the release also in such a case always conditional upon the processed goods, as evidenced by the beforementioned document, complying with the conditions laid down in Article 6 (1) (c), in particular with the condition that they must have been produced within the time limit of six months prescribed in the last three lines of Article 6 (1) (c)?

(b) In the second case (registered at the Court as Case No 100/76):
Are the first subparagraph and second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price to certain Community processing undertakings (OJ, English Special Edition 1972 (II), p. 559) as amended by Regulation (EEC) No 1237/73 of the Commission of 10 May 1973 (OJ L 128/1 of 15. 5. 1973) to be interpreted as meaning that the proof required to enable the deposit to be released is only regarded as having been furnished if it is clear from the document to be issued by the national authority under the second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation No 1259/72 that the successful tenderer — who does not himself carry out processing within the meaning of Article 6 (1) (c) of Regulation No 1259/72 — has fulfilled his obligations under Article 6 (1) (a), (b), (d) and (e) of the regulation mentioned above, or is the release also in such a case always conditional upon the processed goods, as evidenced by the beforementioned document, complying with the conditions prescribed in Article 6 (1) (c)?

(c) In both cases:
If the second alternative mentioned in (a) above is accepted is the first subparagraph of Article 18 (2) and the second subparagraph thereof down to

the end of indent (a) of the beforementioned regulation compatible with superior rules of Community law and in particular with the principle of proportionality?

The two orders of the Verwaltungsgericht Frankfurt am Main were registered at the Court Registry on 18 October 1976.

By order dated 10 November 1976, the Court found that the subject-matter of the two cases was related and that they should be joined for the purposes of the written and oral procedure.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 13 December 1976 by the Commission of the European Communities and on 29 December by the Bundesanstalt für landwirtschaftliche Marktordnung, the defendant in the main action.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without holding any preparatory inquiry. By letter of 3 February 1977 the Bundesanstalt für landwirtschaftliche Marktordnung was however invited to reply in writing to a question raised by the Court; this answer was lodged on 2 March 1977.

By order dated 26 January 1977, the Court decided under Article 95 (1) of the Rules of Procedure to refer the case to the Second Chamber.

II — Written observations submitted to the Court

The *Bundesanstalt für landwirtschaftliche Marktordnung*, the defendant in the main action, is of the opinion that in both cases the processing deposit was rightly forfeited under the first subparagraph and second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation No 1259/72. This provides that the processing deposit shall be released only for quantities in respect of which the successful tenderer has furnished proof that the conditions referred to in Article 6 have been met.

(a) The essential factor is not the forwarding by the successful tenderer of the quantities intended for processing to the undertaking concerned nor the proper processing of the butter into concentrated butter but the production of proof of proper processing of the butter sold at a reduced price into concentrated butter.

The objective of Regulation No 1259/72 is to encourage the disposal of surplus stocks by the sale of butter at a reduced price for the purpose of processing. The deposit is a guarantee that the processing of the butter will be carried out and there is no reduction in price when this condition is not fulfilled. The successful tenderer is then in exactly the same position as the purchaser of butter at a non-reduced price and is free to use it as he pleases; he is then bound to pay the difference between the normal market price and the minimum purchasing price in accordance with the guarantee referred to as the processing deposit. Where the butter is properly used the successful tenderer has the benefit of the reduction in price provided for; otherwise he pays only the market price by losing the processing deposit. The same results follow where the time-limits for processing are not respected.

(b) Article 18 (2) of Regulation No 1259/72 does not infringe the principle of proportionality.

By paying the purchase price corresponding to the market situation as a result of the loss of the processing deposit where the butter bought at a reduced price is not duly processed, undertakings simply pay the equivalent of the non-reduced price of butter in accordance with market conditions.

There is no question of any penalty in this respect: the deposit is only a guarantee of the performance of an obligation freely entered into.

Since they know the terms of the contract, undertakings are presumed to obtain contractual guarantees from their purchasers or other contracting parties requiring them to indemnify the undertakings in the event of refund of the processing deposit being refused.

The *Commission of the European Communities* states that Regulation No 232/75, cited by the plaintiffs in the main action, does not apply in the present case: the applicable regulation is therefore Regulation No 1259/72 as consolidated by Regulation No 2815/72.

With regard to the questions raised the Commission has the following observations on the interpretation of the applicable provisions of Regulation No 1259/72 taking account of its objectives:

(a) The interpretation of Article 18 (2) of Regulation No 1259/72

Article 18 (2) of the regulation gives an unequivocal answer to the question whether the processing deposit must be refunded to the successful tenderer even where, although all the other requisite conditions have been fulfilled, the butter has not been processed into the products provided for within the period laid down: release of the product is subject in all cases to the butter being processed into the prescribed products within the periods provided for.

The first sentence of Article 18 (2) provides that except in cases of *force majeure* the processing deposit shall be released 'only for quantities in respect of which the successful tenderer has furnished the proof that the conditions referred to in Article 6 have been met.' There is no exception to this; the terms which it imposes thus include processing into the products referred to in Article 6 (1) (c) within the periods specified.

In the same way the provisions of Article 18 (2) (a), (b), (c) and (d) relating to the proof to be furnished to obtain the release of the deposit leave no doubt: whatever the manner of processing the controls relate always to the question whether the butter purchased and the intermediary products obtained from it have been finally processed into the products prescribed by Article 6 (1) (c) within the periods specified. The certificates supplied by the Member States do not bring about the release of the processing deposit unless they confirm that the processing has in fact taken place.

Contrary to the opinion of the plaintiffs in the main action the definitive processing within the periods stipulated and in accordance with the provisions of Article 6 (1) (c) is imperative.

This processing is the objective of the whole action of price reduction. The obligation imposed on the successful tenderer for the purpose of achieving this objective is the main obligation provided for by the contracts entered into between him and the intervention agency and he cannot escape this obligation.

It is an obligation which every successful tenderer must undertake whether he does the processing himself in accordance with Article 6 (2) or whether the processing is carried out in several stages in accordance with Article 6 (1). The terms referred to in Article 6 (1) (a), (b), (d) and (e) are only secondary obligations affecting the successful tenderer only if he wishes to use the processing facilities offered him by the provisions of Article 6 (1).

If the condition provided for in Article 6 (1) (c) is not fulfilled the action undertaken cannot attain its objective and there is no reason to grant the tenderer the reduction of price requested by releasing the deposit.

(b) The validity of Article 18 (2) of Regulation No 1259/72

Article 6 of Regulation No 804/68 and Article 7a of Regulation No 985/68 constitute the legal basis of the rules established by Regulation No 1259/72. The fact that these provisions do not expressly refer to the processing deposit is irrelevant: it is true that the processing deposit is in the nature of a financial guarantee but it is not an independent guarantee of performance in addition to the other obligations entered into by the successful tenderer. On the contrary it is part of the conditions agreed for payment of the selling price: the butter obtained by the successful tenderer represents consideration exactly in accordance with the market situation. The purchase price to be paid is thus the market price less a reduction if the purchaser fulfils the conditions laid down in Article 6 of Regulation No 1259/72. When taking over the butter the purchaser pays the minimum part of the purchase price which he will in any event have to pay. He provides a guarantee to cover the difference between this minimum price and the agreed market price and this allows the intervention agency to obtain the part of the selling price not yet paid if the processing operations agreed upon are not carried out.

The rules provided by Article 18 (2) of Regulation No 1259/72 are not incompatible with superior rules of law and in particular with the principle of proportionality.

In declaring the processing deposit forfeit the intervention agency claims from the successful tenderer no more than the price in accordance with the market situation; there is nothing inequitable in this.

The successful tenderer is not penalized by the loss of the deposit; the intervention agency is simply insisting on its contractual rights to payment of the whole purchase price. The plaintiffs in the main action are claiming a considerable price-reduction representing the consideration for processing within the agreed period whereas this processing has not taken place. It is not unjust but in accordance with the principles of the law of contract that the intervention agency should refuse the consideration due from it whilst the successful tenderer does not fulfil his own obligations.

In accordance with the rules of commercial and civil law generally applied the successful tenderer is responsible for the acts of his agents in breach of contract.

The plaintiffs in the main action and not the purchasers from them contracted with the intervention agency duly to process the butter within the specified period; it is *vis-à-vis* them that the purchasers from them are contractually bound to carry out the processing. The intervention agency is not in a position to require the various purchasers to do the processing which the plaintiffs in the main action have contracted to do; only the plaintiffs themselves are able to do this. As regards the reduction of price claimed it is therefore just that the plaintiffs should also bear *vis-à-vis* the intervention agency the risk of non-fulfilment by their agents.

(c) The questions referred to the Court for a preliminary ruling should therefore be answered as follows:

(a) The processing deposit lodged in accordance with Regulation No 1259/72 may in any event be released only if the successful tenderer produces evidence that the butter has been duly processed in accordance with the purpose for which he bought it and that this has been done within the prescribed period.

(b) The provisions of the first subparagraph and the second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation No 1259/72 are

compatible with the superior rules of Community law and in particular with the principle of proportionality.

III — Oral procedure

N.V. Roomboterfabriek 'De Beste Boter' and Firma Josef Hoche, the plaintiffs in the main action, represented by Klaus-Dieter Schneider, Rechtsanwalt of the Oberlandesgericht Nürnberg, the Bundesanstalt für landwirtschaftliche Marktordnung, the defendant in the main action, represented by the Director of its Legal Department, Erdmann Schaller, and the Commission of the European Communities, represented by its Legal Adviser, Peter Kalbe, submitted oral observations at the hearing on 17 March 1977.

At this hearing the plaintiff companies in the main action, *Roomboterfabriek 'De Beste Boter' and Josef Hoche* made the following observations in particular:

(a) The successful tenderer who does not himself carry out the processing of the butter satisfies his obligations when in accordance with Article 6 (1) (e) of Regulation No 1259/72 he lays down that, for any subsequent resale, the same requirements as those referred to under Article 6 (1) (c) and (d) shall form part of the contract of sale. The obligations of the successful tenderer do not extend beyond the undertaking which he has entrusted with the processing; in particular they do not concern the ultimate user. The fourth recital in the preamble to Regulation No 1259/72 shows clearly that the system of supervision, intended to ensure that the butter is not diverted from its destination, applies only until the processing. The deposit can therefore relate only to the processing stage referred to in Article 6 (1) (c) and not to the cases of subsequent resale.

(b) Article 18 of Regulation No 1259/72 cannot be regarded as valid: it disregards the principle of proportionality. It makes the successful tenderer liable not for his own acts or omissions or for those of an agent but for the acts of a third party with whom he has no direct commercial relationship, whom he is not able to control and against whom, as experience shows, it is in fact impossible to guarantee himself contractually or by legal proceedings.

(c) The deposit is in no way equal to the difference between the market price and the minimum purchase price; on the contrary the minimum price, plus the deposit, is always higher than the intervention price which is itself almost invariably higher than the market price. Concrete examples prove this. The loss of the deposit does not mean therefore that the successful tenderer pays the normal market price for the butter. In such case the successful tenderer is penalized in a way not provided for by the relevant Community law.

The Advocate-General delivered his opinion at the hearing on 28 April 1977.

Decision

1 By two orders of 9 September 1976, received at the Court on 18 October 1976, the Verwaltungsgericht Frankfurt am Main referred to the Court under Article 177 of the EEC Treaty questions on the interpretation and validity of Article 18 of Regulation No 1259/72 of the Commission of 16 June 1972 on

the disposal of butter at a reduced price to certain Community processing undertakings (OJ, English Special Edition 1972 (II), p. 559) as amended by Article 3 of Regulation No 1237/73 of the Commission of 10 May 1973 (OJ L 128, p. 1).

2 Since the subject-matter of the questions raised by the two orders is the same it is appropriate to join the cases for the purposes of judgment.

3 The questions have been raised in the context of cases relating to decisions under which the competent national intervention agency declared part of the processing deposit lodged by an undertaking which had purchased intervention butter at a reduced price forfeit, on the ground that the undertaking had not fulfilled its obligation to have the butter processed in accordance with the Community rules.

4 For the purpose of creating fresh opportunities for disposing of surplus butter the Commission established by Regulation No 1259/72 a system involving the sale by tender of butter at a reduced price to certain processing undertakings in the Community. Article 6 of that regulation provides that a tenderer may not take part in the invitation to tender unless he gives certain undertakings consisting mainly of having the butter processed into concentrated butter (Article 6 (1) (a)), of incorporating certain substances therein (Article 6 (1) (b)), having this product processed only into certain specific products, such as fine bakers' wares and doing this within a period of six months (Article 6 (1) (c)), keeping stock accounts (Article 6 (1) (d)) and laying down that, for any subsequent resale of the concentrated butter, the same requirements as those referred to under (c) and (d) should form part of the contract of sale (Article 6 (1) (e)). To ensure performance of the obligation to process, the successful tenderer must lodge a deposit, the amount of which is fixed at a level intended to cover the difference between the market price of the butter and the minimum sale price (Article 9 in conjunction with Article 12). Article 18 (2) provides that except in cases of *force majeure* the processing deposit shall be released only for quantities in respect of which the successful tenderer has furnished proof in a specific manner that the conditions referred to in Article 6 have been met.

5 The first question put by the Verwaltungsgericht is basically whether the successful tenderer who does not himself manufacture the processed products has furnished the proof necessary to have the deposit released by showing

that he has satisfied the obligations which he has under Articles 6 (1) (a), (b), (d) and (e) or whether he must prove that the conditions laid down in subparagraph (c) have been met as regards the nature of the products and the period for processing.

6 In this respect the plaintiffs in the main action have claimed that it would not be lawful to make the successful tenderer for the butter liable for the failure by the ultimate user of the product to fulfil the undertakings with regard to the processing in view of the fact that this default is not that of the successful tenderer; further, that it appears from Article 6 (1) (e) that where the ultimate processing is not done by the successful tenderer himself he will have satisfied his obligations in respect of processing by laying down that, for any subsequent resale, the same requirements shall form part of the contract of sale.

7 Such an interpretation cannot be upheld. Article 10 (5) provides that rights and obligations arising out of the invitation to tender shall not be transferable. The third paragraph of Article 18 (2) stipulates that the Member States may provide for the proof to be considered as furnished if the seller submits a statement from the final user in which the latter confirms his undertaking to process the products and states that he is aware of the sanctions he may incur, determined by the Member State concerned, and it must be concluded from these provisions that in the absence of any such right under national law the successful tenderer cannot escape his obligations by relying on the undertaking entered into by the purchaser under the terms of the contract of sale. Consideration of the objective of the provision in question confirms this conclusion. The system established by Regulation No 1259/72 is a special measure intended to dispose of surplus butter to the food industry on particularly favourable conditions. It was therefore necessary to take appropriate precautions to ensure that the butter sold on these conditions did not reach the normal market but was in fact processed within a period allowing the regularity of the operation to be checked. The effectiveness of the system of checking would be seriously compromised if the acceptance of an obligation to process by a subsequent purchaser who was not himself under any legal obligation to the competent authority were regarded as sufficiently discharging an undertaking entered into by the successful tenderer against a deposit.

8 It is therefore appropriate to reply to the first question that Article 18 of Regulation No 1259/72 as amended by Regulation No 1237/73 must be

interpreted as meaning that even where the successful tenderer does not himself carry out processing it is necessary to establish that the processed products comply with the conditions laid down in Article 6 (1) (c) of the regulation and that they have been produced within the period therein prescribed before the deposit may be released.

9 The second question put by the Verwaltungsgericht is whether Article 18 so interpreted is compatible with superior rules of Community law and in particular with the principle of proportionality.

10 The legal basis of the system established by Regulation No 1259/72 is, *inter alia,* Regulation No 985/68 of the Council of 15 July 1968 (OJ, English Special Edition, 1968 (I), p. 256) and in particular Article 7a inserted by Regulation No 750/69 of the Council of 22 April 1969 (OJ, English Special Edition 1969 (I), p. 204). This provides that the Commission shall examine the situation and adopt appropriate measures as regards products in public storage which cannot be marketed on normal terms during a milk year. There is no reason for thinking that the system established by Regulation No 1259/72, taken as a whole and more particularly providing for the lodging of a processing deposit, is not an appropriate measure within the meaning of Article 7a. This article is therefore the proper legal basis for Regulation No 1259/72 the adoption of which is in accordance with the opinion of the Management Committee for Milk and Milk Products.

11 As regards the question of proportionality it is appropriate to consider whether the lodging of a processing deposit which is forfeit even where the failure of the successful tenderer to fulfil his undertakings is due to the default of a subsequent purchaser, exceeds the limits which are appropriate and necessary for attaining the objective desired. In this respect it is necessary to take into account the characteristics of the processing deposit provided for by Regulation No 1259/72. Article 9 (2) shows that the deposit is intended to cover the difference between the market price of butter and the minimum selling price fixed for each tender. The effect of forfeiture of the deposit where the obligation to process is not fulfilled is therefore in principle to make the successful tenderer pay a total amount equivalent to the market price of the butter in accordance with the contractual obligation which he has freely entered into. In these circumstances the forfeiture of the deposit cannot be regarded as in the nature of a penalty for not fulfilling an independent obligation. It must therefore be concluded that the system of the processing

deposit established by Regulation No 1259/72 does not exceed what is appropriate and necessary to attain the objective desired.

12 The plaintiffs in the main action have claimed that the deposit is fixed at a level higher than the difference between the market price of butter and the minimum price and that they suffer a financial disadvantage as a result. This question concerns the correct application of Article 9 of Regulation No 1259/72 and not the questions which are before the Court on the interpretation and validity of Article 18.

13 It must therefore be concluded that consideration of the second question raised by the Verwaltungsgericht has disclosed no factor of such a kind as to affect the validity of the second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation No 1259/72.

Costs

14 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action before the Verwaltungsgericht Frankfurt am Main, the decision as to costs is a matter for that court.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main by orders dated 9 September 1976, hereby rules:

1. **Article 18 of Regulation No 1259/72 as amended by Regulation No 1237/73 must be interpreted as meaning that even where the successful tenderer does not himself carry out processing it is necessary to establish that the processed products comply with the conditions laid down in Article 6 (1) (c) of the regulation and that they have been produced within the period prescribed before the deposit may be released.**

2. Consideration of the second question raised by the Verwaltungsgericht has disclosed no factor of such a kind as to affect the validity of the second subparagraph down to the end of indent (a) of Article 18 (2) of Regulation No 1259/72.

Sørensen Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 11 May 1977.

A. Van Houtte
Registrar

M. Sørensen
President of the Second Chamber

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 28 APRIL 1977 [1]

Mr President,
Members of the Court,

Article 6 of Regulation No 804/68 of the Council on the common organization of the market in milk and milk products (OJ, English Special Edition 1968 (I), p. 176) provides that 'special measures may be taken for butter held in public storage' (that is, intervention butter) 'which cannot be marketed on normal terms during a milk year'. A similar provision is contained in Article 7a of Regulation No 985/68 of the Council laying down general rules for intervention on the market in butter and cream (OJ, English Special Edition 1968 (I), p. 256) as amended by Regulation No 750/69 of the Council (OJ, English Special Edition 1969 (I), p. 204).

This was the basis for Regulation No 1259/72 of the Commission on the disposal of butter at a reduced price to certain Community processing undertakings (OJ, English Special Edition 1972 (II), p. 559). It is aimed at encouraging the use of butter in the food industry, namely in the production of bakers' wares and ice-cream where for price reasons it is not usually used. The regulation, as amended, in so far as is relevant for the present proceedings, by Regulations No 2815/72 of the Commission (OJ, English Special Edition 1972, 30-31 December, p. 5), No 677/73 (OJ L 65 of 10. 3. 1973, p. 16), No 1237/73 (OJ L 128 of 15. 5. 1973, p. 1) and No 576/74 (OJ L 70 of 13. 3. 1974, p. 24) provides as follows:

The butter is to be sold by means of a standing invitation to tender; during the period of validity of that invitation, individual invitations to tender are to be issued to which interested parties may respond with tenders. On the basis of this a minimum selling price is to be

1 – Translated from the German.