OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 26 September 1991 *

Mr President,
Members of the Court,

1. In order to support the wine market, Council Regulation (EEC) No 337/79 of 5 February 1979 [1] introduced aid for preventive distillation enabling certain quantities of wine to be withdrawn from the market and purchased by distilleries at a price sufficiently attractive for producers. This aid is paid by the national intervention agency to the distillers which pass it on to the producer when they purchase the wine to be distilled at a minimum price.

2. During 1983/84 wine-growing season, the distilleries were able to obtain an *advance* on this Community aid, provided that they furnished security. The general provisions governing this advance were laid down in Council Regulation (EEC) No 2179/83 of 25 July 1983, [2] Article 9 of which provides that a distiller may 'request that *an amount equal to* the lesser sum of distillation *aid* fixed for the distillation operation in question in accordance with Article 8 (should) be advanced to him on condition that he has lodged for the benefit of the intervention agency *security equal to 110% of the aid*,' [3] and the security is not released unless proof is submitted within periods to be laid down that all the wine has been distilled and the purchase price paid to the producer within the period laid down.

3. The conditions for release of the security were laid down in Article 8 of Commission Regulation (EEC) No 2373/83. [4] Article 8(2) provides:

'For the purposes of the release of the security referred to in paragraph 1, proof that the total quantity of wine has been distilled and, where appropriate, proof of payment of the buying-in price for the wine within the period set, shall be provided by 31 October 1984.

However, if the proofs referred to in the first subparagraph are provided after the deadline set in that subparagraph but before 1 February 1985, the amount to be released shall be 80% of the security, the difference being forfeit.

If these proofs are not provided before 1 February 1985, the entire security shall be forfeit.'

4. Since many distilleries were unable to fulfil the requirements within the time-limits laid down, the latter two time-limits were extended by two months, to 31 December 1984 and 1 April 1985 respectively, by Commission Regulation (EEC) No 3501/83 of 12 December 1983. [5]

* Original language: French.

1 — On the common organization of the market in wine (OJ L 54, p. 1).

2 — Laying down general rules for distillation operations involving wine and the by-products of wine-making (OJ L 212, p. 1).

3 — My emphasis.

4 — Regulation of 22 August 1983 laying down, for the 1983/84 wine-growing year, detailed implementing rules concerning the distillation provided for in Article 11 of Regulation (EEC) No 337/79 (OJ L 232, p. 5).

5 — Regulation amending Regulation (EEC) No 2373/83 (OJ L 350, p. 5).

5. During the 1984 season, Italtrade bought and distilled large quantities of wine. It applied for an advance on the Community aid and furnished the security required in favour of the Azienda di Stato per gli Interventi nel Mercato Agricolo (the 'AIMA'), the Italian intervention agency, through Assicurazioni Generali. That the producers were paid and the wine actually distilled is not in dispute in the Italian proceedings.

6. Italtrade submitted the documents proving payment of the price to the producer to the AIMA two days late, on 2 April 1985, in respect of a proportion of the contracts representing about 28 000 hectolitres of wine. In view of the delay the AIMA retained the entire amount of the security relating to the contracts in question, in accordance with the third paragraph of Article 8(2) of Regulation No 2373/83.

7. In the context of proceedings instituted by Italtrade to obtain the repayment of the security[6] the Tribunale Civile, Rome, has asked the Court, first, whether the forfeiture of the entire security entails the loss of the right to apply for the aid (first question), and secondly whether the penalty laid down in Article 8 of Regulation No 2373/83 is compatible with the principle of proportionality (second and third questions).

8. I shall first examine Italtrade's argument that unless the Commission was expressly authorized to do so by the Council, it was not empowered to prescribe a penalty for delay in the submission of proof entailing loss of the Community aid.

9. The combined effect of Articles 11(4) and 67(3) of Regulation No 337/79 is that the Commission received from the Council the power to establish the procedure for preventive distillation, after receiving the views of a wine management committee.

10. Article 7(3) of Council Regulation No 2179/83 provides that '... the measures to be taken in the event of default on the payment of the minimum buying-in price or of *lack of proof* of payment thereof shall be adopted under the implementing rules'.[7]

11. With regard specifically to the question of advances, Article 9(2) of the same regulation provides that the security furnished by the distiller must not be released unless he submits proof of payment of the price to the producer and of completion of the distillation operations within periods to be determined.

12. Having been expressly authorized to prescribe penalties for failure to submit proof, the Commission was necessarily empowered to prescribe penalties for delay in the submission of proof, since such delay constitutes failure to provide proof before the expiry of the period laid down for this purpose.

13. Moreover, the twentieth recital in the preamble to Regulation No 2179/83 stated that it was advisable to make proportional

6 — And other amounts retained not related to the questions submitted for a preliminary ruling.

7 — My emphasis.

allowance for distillers who, although they had fulfilled their main obligations, *submitted proof late.*

14. These regulations of the Council therefore authorized the Commission to prescribe a penalty for failure to observe the time-limits for the submission of proofs.

15. Do the provisions of Article 8(2) of Regulation No 2373/83 merely create a penalty which may involve the forfeiture of the entire security or do they also entail the loss of their right to aid? That is, in essence, the first question posed by the Italian court.

16. An initial distinction must be drawn. Firstly, Regulations Nos 2179/83 and 2373/83 determine the conditions for entitlement to the subsidy: the distiller must adduce proof of the distillation, and the aid is paid within three months of submission of such proof.[8] *Proof* of payment of the price to the producer must be submitted within four months of submission of proof of distillation; if the distiller fails to do so, the aid is lost partly or entirely, depending on the length of the delay in the presentation of proof.[9] I should call these the *aid provisions.* Secondly, the distiller may obtain an advance equal to the lowest amount of the aid, the only condition being that he must furnish security.[10] Both proof of distillation and proof of payment to the producer had to be submitted before 31 December 1984. The penalty for submission of proof after that date was the partial or entire loss of the aid depending on the length of the delay.[11] I should call these the *advance provisions.* The main difference between these two groups of provisions relates to *proof of distillation*, which may be furnished after payment of the advance, whereas it is a condition for payment of the aid.

17. Quite naturally, the advance provisions require the constitution of security 'to ensure that the intervention agency is not exposed to unjustified risks'.[12]

18. The security is therefore *inherent in the advance* and is merely part of the procedure of prefinancing. Thus, it is stated in the ninth recital in the preamble to Regulation No 2373/83 that 'provision should be made for the minimum price guaranteed to producers to be paid to them, as a general rule, within a period which will enable them to obtain a profit comparable to that which they would have obtained from a commercial sale; . . . in these circumstances, it is essential to pay the aids due to them for the distillation in question at the earliest opportunity, while guaranteeing that *operations are correctly carried out* by means of an appropriate system of security'.[13]

19. Consequently, the sole purpose of the security is to ensure repayment of the advance if it subsequently emerges that the aid was not payable.

8 — Article 7(3) of Regulation No 2179/83.
9 — Article 7(1) of Regulation No 2373/83.
10 — Article 9(1) of Regulation No 2179/83.
11 — Article 8(2) of Regulation No 2373/83, as amended.
12 — Eighth recital in the preamble to Regulation No 2179/83.
13 — My emphasis.

20. The advance and the aid are therefore governed by different provisions with regard to proof. However, no provision expressly excludes a recipient of an advance who has suffered the penalty of complete loss of the security from the benefit of the aid. Nevertheless, mere failure to observe time-limits may deprive him of access to it.

21. In fact, distillation could not have taken place after 31 August 1984,[14] since the producer had to be paid within three months of entry into the distillery, that is to say, by 30 November 1984. Proof of this payment of the price to the producer had to be submitted within four months of proof of distillation and in any event by 28 February 1985.[15] *Thereafter, the entire aid was recovered by the intervention agency.*[16] This is expressly provided by Article 7(2) of Regulation No 2373/83, as amended by Regulation No 3501/83.

22. Consequently, a recipient of an advance who furnished the proofs required after 28 February 1985 lost the security (or at least part of it) and was precluded from applying for aid. It should be remembered that Italtrade did not furnish proof of payment to the producer until 2 April 1985.

23. I therefore suggest that the answer to the first question should be that forfeiture of the security as mentioned in Article 8(2) of Regulation No 2373/83, as amended, does not *per se* entail the loss of the right to apply for the aid, but that the aid cannot be requested after the expiry of the periods laid down in Article 7(2) of that regulation, as amended.

24. Both the second and the third questions require the Court to verify the compatibility of Article 8(2) of Regulation No 2373/83 with the principle of proportionality. I shall examine them together and suggest a single reply.

25. It should be observed that in accordance with the provisions of Council Regulation No 2179/83, the twentieth recital in the preamble to which states that 'it is . . . advisable to make proportional allowance for distillers who, although they have met their principal obligations, are late in furnishing proof thereof', Article 8(2) of Commission Regulation No 2373/83 provides that in the event of delay not exceeding three months in submitting proof of payment to the producers, only 20% of the security is forfeit, whereas the entire amount is lost in the event of longer delay.

26. Correspondingly, a distiller who has not used the mechanism of the advance with security and has received aid loses 20% or 100% of it, depending on the length of the delay in presenting proof of payment to the producer.[17]

27. The Court has held that with regard to a penalty such as forfeiture of the security for failure to observe a time-limit for the submission of proof, it must be determined

14 — Article 3 of Regulation No 2373/83, as amended.

15 — Article 7(2) of Regulation No 2373/83, as amended by Article 1(2), first indent, of Regulation No 3501/83.

16 — Ibidem.

17 — Article 7(2) of Regulation No 2373/83.

whether it 'exceeds what is appropriate and necessary to attain the objective sought'.[18]

28. The Court considered this question in *Fromançais SA* v *FORMA* (the intervention agency).[19] In order to reduce the surplus of butter, Regulation (EEC) No 1259/72 permitted certain processing undertakings in the Community to purchase butter at a reduced price by means of a tendering procedure. In return for the price reduction the successful tenderer undertook to convert the butter into particular products. It had to pay the reduced price and furnish security in respect of the processing, covering the difference between the market price of the butter and the minimum selling price. Since some of the butter purchased by Fromançais had not been converted within the periods allowed, the agency refused to release a portion of the security furnished. The Court held that:

'In order to establish whether a provision of Community law is consonant with the principle of proportionality, it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement.

The provisions which require forfeiture of the security in full when the processing period is exceeded seek to prevent tenderers who acquire butter at a reduced price from accumulating stocks for speculative purposes.'[20]

The Court concluded that forfeiture of the entire security for exceeding the time-limit was proportionate to that aim.

29. Its approach has been the same with regard to export refunds. Thus in *Man (Sugar)*[21] the exporters, whose tender for the export of sugar to non-Member States had been successful, had furnished security in order to obtain export refunds. The penalty for delay in the submission of applications for export licences was the forfeiture of the entire security. Having found that the only purpose of these licences was to monitor exports and that they did not provide any important new information, the Court held that:

'Although the Commission was entitled, in the interests of sound administration, to impose a time-limit for the submission of applications for export licences, the penalty imposed for failure to comply with that time-limit should have been significantly less severe for the traders concerned than forfeiture of the entire security and it should have been more consonant with the *practical effects* of such a failure.'[22]

30. In the present case, the objective of setting a mandatory time-limit for submission of proof of distillation and of payment of the price to the producers is stated in the twentieth recital in the preamble to Regulation No 2179/83, according to which '... to qualify for the aid, the parties concerned must lodge an application accompanied by a number of supporting documents; ... to ensure that the

18 — Case 122/78 *Buitoni* [1979] ECR 677, paragraph 16.

19 — Case 66/82 [1983] ECR 395.

20 — Paragraphs 8 and 9.

21 — Case 181/84 [1985] ECR 2889.

22 — Paragraph 30, my emphasis.

system operates uniformly in all Member States, time-limits for the lodging of applications and for the payment of aid to distillers should be laid down'.[23] The reason specified for setting mandatory time-limits for the submission of proof of completion of the operations are therefore good administrative management of the system of advances and observance of the principle of equal treatment among traders. There is a further *raison d'être* for the time-limits. During the relevant periods the security is immobilized in the hands of the guarantor and the intervention agency has paid an advance the justification for which it cannot yet verify and which it cannot recover. If the advance proves to have been unjustified, the intervention agency cannot recover the security until the period for the submission of proof has expired. In order to protect the financial interests of the Community it was therefore necessary to prescribe a reasonable period for the submission of proof and to impose for delay a penalty sufficiently dissuasive to prevent the distiller from seeking to obtain an advance that he would be unable to justify or which he would justify only after excessive delay, in which case the security would not cover the advance and the costs incurred by the Community.

31. Is loss of the security appropriate for these objectives, taking into account the nature of the obligation infringed (failure to observe time-limits for the submission of proof)?

32. In *Buitoni*,[24] the Court made an important distinction on the basis of the nature of the obligations in question. Article 3 of Commission Regulation (EEC) No 499/76[25] made the loss of the entire security furnished to cover the obligation to export the penalty for failure to observe the time-limits specified for the submission of import licences, imposed for the purposes of good administrative management, whereas the penalty for failure to fulfil the main obligation to export was merely proportional to such failure. *Buitoni* had obtained import licences and had completed the import operations within the period allowed, but had submitted proof late. The intervention agency had refused to release the security. The Court held that:

'... that *fixed* penalty, which is applied to an infringement which is considerably less serious than that of failure to fulfil the obligation which the security itself is intended to guarantee, and which is sanctioned by an essentially proportionate penalty, must therefore be held to be *excessively severe in relation to the objective* of administrative efficiency in the context of the system of import and export licences.'[26]

It stated the consequences of this distinction between main obligations and secondary obligations very clearly in the *Man (Sugar)* case:

'Where Community legislation makes a distinction between a primary obligation, compliance with which is necessary in order to obtain the objective sought, and a secondary obligation, essentially of an administrative nature, it cannot, without

23 — My emphasis.

24 — Case 122/78, above.

25 — Regulation of 5 March 1976 amending Regulation (EEC) No 193/75 laying down common detailed rules for the application of the system of import and export licences and advance-fixing certificates for agricultural products (OJ L 59, p. 18).

26 — Paragraph 20, my emphasis.

breaching the principle of proportionality, penalize failure to comply with the secondary obligation as severely as failure to comply with a primary obligation.' [27]

33. The Court will observe in this respect that Regulation No 2373/83, the validity of certain provisions of which is challenged by Italtrade, prescribes progressive penalties solely in the case of failure to fulfil obligations with regard to the submission of proof, which the Court regards as secondary obligations.

34. However, the Court has reduced the scope of the distinction originally drawn between main obligations and secondary obligations. In particular, it has held that complete forfeiture (of aid or of a security) cannot be regarded automatically as an appropriate penalty for failure to fulfil main obligations. Thus in *Lingenfelser*, [28] regarding the Commission's regulation governing the preventive distillation of wine for the 1982/83 season, it was held that complete forfeiture of the aid granted to the distiller as a penalty for a small delay in paying the producer, beyond the period of three months allowed, was disproportionate *in view of the purpose specified*, even though it was for the distiller's failure to fulfil his main obligation:

'It must be borne in mind, in this regard, that the purpose of prescribing a period for payment by the distiller of the buying-in price to the producer is . . . to ensure that the minimum price guaranteed to the producer is paid to him, as a general rule, within a period which will enable him to obtain a profit comparable to that which he would have obtained from a commercial sale. The fixing of a period within which the distiller must pay the buying-in price to the producer is therefore designed to encourage the latter to offer for distillation wines which may adversely affect the high qualitative level of wines placed on the market.

In those circumstances, any period by which the time-limit for payment is exceeded, which does not result in the transactions being carried out under conditions which are appreciably different from those of normal commercial transactions, to the extent of discouraging the producer from offering his wine for distillation, cannot be regarded as jeopardizing the very objective of the distillation scheme.' [29]

It should be observed that in that case the penalty for any delay beyond the period specified was *complete* forfeiture of the aid, without any intermediate period during which only part of the aid was lost, and therefore there was no element of proportionality.

35. Conversely, in *Philipp Brothers*, [30] the Court held that complete forfeiture of an export refund received in advance could be a valid penalty for a breach of a secondary obligation. Commission Regulation (EEC) No 2730/79 of 21 November 1979 authorized the Member States to advance to the exporter all or part of the amount of the refund upon completion of clearance of the export through customs, provided that security was furnished to cover the amount of the advance plus 15%. Philipp Brothers had obtained export licences for wheat, exported the wheat, furnished security and received advances in respect of the refund.

27 — Paragraph 20.

28 — Case C-118/89 [1990] ECR I-2637.

29 — Paragraphs 13 and 14.

30 — Case C-155/89 [1990] ECR I-3265.

When they presented the proof required (in particular, the customs clearance documents) late, proceedings were instituted against them to recover the amount of the security wrongly released. The Court held that 'the setting of a mandatory time-limit for the submission of the requisite documents as proof of exportation is a measure which is necessary to prevent the exporter from enjoying an undue advantage' [31] and that 'if the documents required under the regulation are not submitted within six months, the penalty prescribed, namely loss of the security or payment of a corresponding amount where the security has been released, is not disproportionate to the objectives of the rules in question or to the requirements relating to the processing of documents concerning refunds paid in advance'. [32] The Court therefore accepted, in that case, that for failure to observe a time-limit for the submission of proof the exporters had to repay the refund plus 15%, and therefore to suffer a loss.

36. That case has a number of points in common with the present case. Both concern a system of advances in respect of Community aid of which the distiller or the exporter is not the sole ultimate beneficiary. In fact, the advance paid to the distiller enables him to purchase wine at a price sufficiently attractive to the *producer.* Similarly, the export refund enables the exporter of wheat to recover the difference between the Community price and the (lower) price on the world market and to reduce his selling price to the level of that of competing non-EEC countries, which indirectly benefits producers in the Community.

37. The security furnished by Philipp Brothers covered the advance obtained plus 15%. That provided by Italtrade covered 110% of the amount of the aid, since the advance is always equal to the amount of the lowest aid. In both cases, in the event of failure to submit proof, the penalty of forfeiture of the security is thus based directly on the amount of the advance obtained.

38. Philipp Brothers could have obtained additional time, beyond the six-month period, in which to prove completion of the customs formalities, by showing that they had acted with all due diligence to obtain the relevant documents within the period prescribed. [33]

39. The distillers covered by Regulation No 2373/83 have not really benefited from any extension of time. In fact, although Commission Regulation No 3501/83 postponed the deadlines originally specified for the submission of proof, it also postponed the time-limit for distilling. Consequently, all the operations were postponed by two months.

31 — Paragraph 38.

32 — Paragraph 40.

33 — Article 31 of Regulation 2730/79/EEC.

40. On the other hand, like all the distillers concerned, Italtrade automatically had a period of eight months within which to present proof, without having to take any special steps. Regulation No 2373/83 therefore instituted a system more favourable for distillers than that to which Philipp Brothers were subjected, which favoured only exporters who asked for additional time and who had showed diligence.

41. In *Philipp Brothers* the Court considered the connection between the amount of the security and that of the advance and the mitigation of the stringency of the time-limit by the possibility of applying for an extension as elements of proportionality sufficient to enable the Court to hold that the penalty was valid.

42. In Article 8(2) of Regulation No 2373/83 we have a different type of penalty and a different form of proportionality. Here the penalty is not only based on the amount of the advance, but is also proportionate to the delay, with a penalty of the loss of part of the security for failure to observe an initial time-limit and a penalty of the loss of the entire security for failure to fulfil a second time-limit. Thus a slight delay (which might be due to a mere oversight) incurs a small penalty. There is no *fixed* penalty like that which the Court condemned in *Buitoni*.[34]

43. The penalty of forfeiture of the entire security seems to me to reflect the particularly long period granted to the distillers within which to submit proof. Until 31 December 1984 a distiller was not exposed to any penalty. Until 1 April 1985 the penalty was only partial forfeiture. It was solely thereafter that the entire security was forfeited.

44. The distiller had merely to present simple documentary proof (in particular, he did not have to produce any customs documents) and Regulation No 2179/83 made allowance for cases of *force majeure*.[35]

45. Finally, the general scheme of the regulation in question was intended to bring the procedure for the granting of Community aid (and in particular the periods involved) into line with normal commercial practices.[36] In this respect, it does not seem that a period of eight months for proving distillation and payment of the producers is less than the period generally required for such operations.

46. One crucial point should be borne in mind. In obtaining an advance in respect of the distillation aid the distiller obtained an additional *financial benefit*, since he was able to obtain an amount corresponding to aid that had not yet become payable merely by furnishing security. He was thus able to pay the producers without having to use his

34 — Case 122/78, above.

35 — Article 23.

36 — See the ninth recital in the preamble to Regulation No 2373/83.

own funds. Moreover, advances were a *voluntary* system, the conditions, advantages and constraints of which were known to the distiller and freely accepted by him.

47. I think therefore that the penalty laid down in Article 8(2), even though it may amount to forfeiture of the entire security, is not disproportionate to the main objective envisaged, which is to ensure the satisfactory operation of the specific system of advances, while preserving the principle of equal treatment for traders and protecting the financial interests of the Community.

48. I therefore suggest that the Court reply as follows:

(1) Forfeiture of the security as laid down in Article 8(2) of Commission Regulation (EEC) No 2373/83 of 22 August 1983, as amended by Article 1(3) of Commission Regulation (EEC) No 3501/83 of 12 December 1983, does not *per se* entail the loss of the right to apply for the aid, but the aid cannot be requested after the expiry of the period laid down in Article 7(2) of Regulation No 2373/83, as amended by Article 1(2) of Regulation No 3501/83.

(2) Consideration of the second and third questions has disclosed no factor capable of affecting the validity of Article 8 of Commission Regulation (EEC) No 2373/83 of 22 August 1983, as amended by Article 1 of Regulation No 3501/83.