OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 18 MARCH 1982 [1]

Mr President,
Members of the Court,

I. Introduction

On 31 January 1973 the Commission adopted Regulation No 349/73 (Official Journal 1973, L 40, p. 1). That regulation concerned the sale at reduced prices of intervention butter as concentrated butter for direct consumption. The main purpose of the regulation was to dispose of stocks of butter arising as a result of intervention on the butter market under Article 6 of Regulation 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). The Commission regulation made provision for the sale of butter in concentrated form at a reduced price at the request of a "Member State which considers itself in a position to lead it to a successful conclusion". Judging by the previous passage in the recitals in the preamble to the regulation that phrase means by preventing the concentrated butter from being diverted from the intended use of direct consumption and by avoiding disturbances on the market in butter.

Article 6 of Regulation No 349/73 of the Commission reads as follows:

"(1) Any person who holds the butter or the concentrated butter must keep records showing for each delivery the name and address of buyers of the butter or the concentrated butter and the quantities purchased.

(2) Where the butter is resold, the obligations concerning processing, putting up and the final intended use of the butter shall be mentioned in the contract of sale.

Such contract must be made in writing and specify that the buyer is aware of the penalties imposed by the Member State in question, for breaches of the aforesaid obligations.

(3) As regards retail trade, only the quantities bought need be recorded."

Pursuant to a previous regulation (No 2561/72, Journal Officiel 1972, L 274, p. 12), which was replaced by Regulation No 349/73, the Commission had authorized the Federal Republic of Germany by decision of 22 December 1972 to sell 6 000 tonnes of concentrated butter at a reduced price. By decision of 8 February 1973 that quantity was reduced to 4 000 tonnes.

According to the summary of facts contained in the Report for the Hearing, the Einfuhr- und Vorratsstelle für Fette, which was subsequently succeeded by the Bundesanstalt für landwirtschaftliche Marktordnung (hereinafter referred to as "the Bundesanstalt"), undertook, as intervention agency, the sale of the concentrated butter and to that end issued directives on 23 February 1973. In those directives it required its buyers to sell concentrated butter only on the basis of a written contract. That written contract had to contain a penalty clause in the event of breach of the obligations

1 — Translated from the Dutch.

entered into with regard to the intended use of the concentrated butter. In addition the buyer had to ensure by means of a binding undertaking that his obligations were passed on to subsequent sellers. For a full account of those directives I refer to the text thereof submitted during the proceedings.

In Case 66/81 Mr Pommerehnke, then the proprietor of the firm Albrecht, Schütze & Co., bought from various dealers 71 740 kg of concentrated butter at a low price in the manner described in the Report for the Hearing. In twelve out of seventeen cases the representatives of that undertaking had signed documents headed "Contract of sale and undertaking". Each of those documents stated the quantity purchased but not the sale price. In two other cases the documents did not state the quantity purchased and in the remaining three cases no written undertakings were given. In the written undertakings the firm undertook to observe the directives issued by the intervention agency. In addition it undertook that in the event of infringement of the directives it would pay the difference between the intervention price and the reduced sale price fixed by the Commission. However, the concentrated butter so acquired was resold by the firm to a third party without the obligations attached thereto being set down in writing and was used by that third party in its business, thus for a purpose different from that for which the concentrated butter was intended.

As explained in the Report for the Hearing, in Case 99/81 the undertaking Franzen signed the above-mentioned written document only on its first payment; quantity and price were not given but it was stated that the obligations entered into would also apply to all subsequent orders made by telephone. 2 900 kg of the concentrated butter so acquired was resold without a written contract, the buyer not being subsequently asked for his written acceptance of the relevant obligations. In this case, too, the butter was used by the ultimate buyer for a purpose other than direct consumption.

The appellants in the main proceedings have appealed on a point of law from an earlier judgment ordering them to pay a penalty on the ground that they were not liable to pay that penalty because they had not entered into any written contract of sale with their suppliers. The Bundesgerichtshof thereupon decided that the outcome of two actions turned on the question whether the undertaking to pay a contractual penalty had been given in the required written form. In order to resolve that question the Bundesgerichtshof considers that an interpretation of Article 6 (2) of Regulation No 349/73 cited above is necessary. After first giving its own opinion on that interpretation the Bundesgerichtshof puts the following questions to the Court:

"1. Does Article 6 (2) of Regulation (EEC) No 349/73 of the Commission of 31 January 1973 (Official Journal, L 40, 13 February 1973, p. 1) apply only to the resale of butter in its natural state, or does it also apply to the resale of concentrated butter?

2. If that provision covers concentrated butter:

(a) what are the conditions to be imposed as to the observance of the requirement of writing under Community law? In particular, if only the buyer's declaration and not the seller's, is put in writing does that suffice to meet the requirement of writing, or are such conditions to be determined according to the laws of the Member States?

(b) If Community law regards an order which is signed only by the buyer as sufficient to meet the requirement of writing, is it adequate for only the first order to be set out in writing whilst subsequent contracts of sale are made orally by reference to the first order?

(c) If the requirement of writing has not been met under Community law, is the contract of sale, including the buyer's undertaking therein to pay a penalty for non-compliance, void under Community law or are the legal consequences left to be determined according to the laws of the Member States?"

I shall now examine each of those questions in turn.

2. The first question

As regards the first question, it is easy to see that the problem of interpretation which it raises arose solely because Article 6 (2) of Regulation No 349/73, unlike Article 6 (1) thereof, mentions only butter and not concentrated butter. The slovenly drafting apparent in that provision is all the more regrettable because the obligations to which it refers could reinforce the impression that it relates only to butter in its original state and not to concentrated butter as well. For by their nature and in view of the foregoing provisions of the regulation the obligations referred to relating to processing clearly relate to the obligations contained in the preceding provisions relating to the processing of refrigerated butter into concentrated butter. To a slightly lesser extent the same applies to the obligations contained in Article 7 of the regulation on the matter of packing. By their nature those obligations, too, have particular significance for processors of refrigerated butter into concentrated butter and not for persons who resell concentrated butter. For those persons the obligations relating in particular to the guaranteeing of the intended use for direct consumption of the concentrated butter appear to be relevant. It was certainly desirable for the Commission to make this clear by drafting Article 6 (2) more carefully.

Nevertheless, in my opinion it is so clear from the title, the recitals and the provisions of the regulation as a whole that the guarantees that the concentrated butter is put to proper use also constitute, in the result, the main purpose of Article 6, that the answer which the Commission proposes to the first question should still be accepted. I therefore fully endorse the Commission's detailed argument on this point on pages 8 to 12 of its written observations and propose to answer the first question in the same sense as the Commission as follows:

"Article 6 (2) of Regulation (EEC) No 349/73 of the Commission of 31 January

1973 also applies to the resale of concentrated butter."

3. The second question

Answering the three parts of the second question presents considerably greater difficulties. They arise not only as a result of the drafting of the relevant provision of the regulation, which is not very precise in this respect either. The breathtaking intellectual acrobatics to which the Commission had to resort at the hearing in order to argue that, in order to achieve its clear purpose, the provision must have intended something entirely different by the term "contract of resale" from what most lawyers would normally take it to mean underlined the impreciseness of the drafting. On the other hand the national court makes it clear in the grounds of its order for reference that in German civil law such a requirement that a contract of sale containing a penalty clause must be made in writing can mean only that in order for the contract to be valid both parties to the contract must sign it. In my view particular difficulties of interpretation arise here because it may be doubted whether the Court's extensive case-law on the division of functions between the institutions of the Community and the national authorities as regards the implementation of the common agricultural policy can be applied without qualification in this situation. Unlike the situation in the majority of cases considered in the Court's previous decisions, this case does not concern a common organization of the market which must be established in all the Member States. On the contrary, the case concerns a measure for the disposal of butter for direct consumption at reduced prices which, in the words of the preamble to the regulation, may be taken "at the request of a Member State which considers itself in a position to lead it to a successful conclusion". Although according to the previous passage that means *inter alia* that the Member State concerned must consider itself to be in a position to prevent the cheap butter concerned from being diverted from the use referred to, it might be inferred from the passage cited from the recitals in the preamble and the corresponding Article 1 of the regulation that in this case the national implementing measures are governed by national law alone. On that view, after receiving a reasoned request from a Member State mentioning the national implementing measures adopted the Commission would grant the authorization referred to in Article 1 of the regulation once it found in those measures a satisfactory guarantee against improper use of the cheap butter. However, it appears from Article 6 (2) of the regulation and the related passage in the recitals in the preamble that the Commission itself nevertheless considered it necessary that "a control system should be set up to ensure that the butter is not used for any purpose other than that for which it was intended". In contrast to the passage cited earlier, from the recitals in the preamble, the passage just quoted could lead precisely to the conclusion that the commodity in question is governed by Community law alone. To support a submission to that effect one of the appellants in the main proceedings referred at the hearing to the Court's judgments in Cases 24/76 *Colzani* v *Ruwa* [1976] ECR 1831 and 25/76 *Segoura* v *Bonakdarian* [1976] ECR 1851

Those cases concerned the intepretation of Article 17 of the Brussels Convention concerning the so-called jurisdiction clause. Article 17 lays down a requirement as to form that the condition concerned must be contained in a written agreement or an oral agreement evidenced in writing. Since, according to the reasoning of the Court in those judgments, the aim of the condition concerned is to exclude both the general and special rules on jurisdiction contained in the Convention, the national court is, by virtue of those judgments, under the duty in such cases to examine first whether there is in fact an agreement conferring jurisdiction upon it.

Therefore the purpose of the requirements as to form imposed by the Brussels Convention is to ensure that consensus between the parties is established and they must be construed in that light. In my opinion, however, in view of the link thus established by the Court between the interpretation of those requirements as to form and the specific function of Article 17 in the Brussels Convention, all that may be inferred from those judgments for the purposes of the present cases is that Article 6 of Regulation No 349/73 must likewise be construed in the light of the purpose of that article and the place which it occupies in the entire scheme of the regulation. On the other hand, it is not, in my view, to be inferred that both parties to the sale must sign the contract of sale in the present case as well.

In consider the reference by one of the appellants in the main proceedings to the Court's judgment in Case 1251/79 [1981] ECR 205 to be of more importance for the purpose of the present cases. Case 1251/78 concerned the conclusion of long-term storage contracts for wine in the context of measures to eliminate the effect of surpluses on that market. Article 3 of Regulation No 816/70 (Official Journal, English Special Edition 1970 (I), p. 234) provides for the conclusion of written contracts between private individuals and intervention agencies. Those contracts could be entered into and attract aid only during the period from 16 December to 15 February of the relevant wine-growing year. However, Italy entered into contracts after 15 February. Italy argued that the agreements were actually entered into before that date but not put into writing until later. The Court took the view at that time that the requirement as to form meant that the agreement did not come into being until it was put into writing. In that respect the consensus which may have been established earlier was not regarded as decisive. In that case as well the requirement as to form was however construed on the basis of the scheme and aim of the relevant provisions of Community law and any provisions of national contract law which may have provided otherwise were simply disregarded.

In my opinion it therefore follows from each of the three judgments which I have cited that also for the purpose of interpreting Article 6 (2) of Regulation No 349/73 regard must be had in the first instance to the scheme and aim of the regulation as a whole in addition to the text of Article 6 (2). However, the complicating factor which I mentioned previously, namely that this case does not relate to generally binding rules but rules which are applied at the request of the Member States concerned, must in my view also be brought into consideration.

The Commission begins its written observations on the second question by stating that the second subparagraph of Article 6 (2) clearly does not contain any detailed rules on compulsory requirements as to form. It believes that it must be inferred from the meaning and aim of the provision that it contains a minimum requirement that the relevant obligations, including the penalties for breaches of them, must be set out in writing in the first contract of sale entered into by a person reselling the butter and must be signed by him. It goes on to state that precisely because only individual Member States were empowered to carry out the butter sales and were responsible for conducting them in the proper manner, Community law could allow a greater degree of discretion to the Member States concerned in the elaboration of the administrative procedures including the rules governing their control. The precise stipulation of the requirements as to form and determination of the legal consequences was therefore left to the Member States authorized.

In the proceedings before the Court the appellants in the main proceedings differ in their opinion as to whether national or Community law must be applied in these cases. Both appellants ruled out the possibility that national law and Community law might both apply, which is the Commission's submission. Both appellants were also of the opinion that a contract of sale should in any event be signed by both parties. A contract of sale not signed by both parties would be invalid. I refer here in particular to the hearing. In its written and oral observations the Bundesanstalt submitted that in view of the meaning and aim of the rule requiring the written form no excessive requirements should be imposed and that a written undertaking given by the buyer alone at the time of his first order should be regarded as sufficient, provided that it is referred to when subsequent contracts of sale, including oral ones, are made.

At the hearing the Commission agreed with that submission of the Bundesanstalt. It was during the oral proceedings in particular that its representative accomplished the astounding intellectual feat which I mentioned earlier, with the object of making it clear that by the expression "contract of sale" Article 6 (2) of Regulation No 349/73 does not mean what most lawyers normally understand by that term and that as far as the Commission is concerned the only essential matter was the laying down of the requirement that the buyer acknowledged in writing that he was aware of the undertakings which he had signed and the penalties attaching to them. The elaboration of the guarantees to be established to ensure that the butter sold at a reduced price is not put to improper use is left to the Member States.

For three reasons I have finally arrived at the view, although after some hesitation, that in its essentials the Commission's interpretation can be accepted, albeit in a somewhat different form, for the purpose of answering the questions put to the Court.

In the first place it is commonly known, and Counsel for the Bundesanstalt also alluded to this at the hearing, that concepts which appear to belong to private law often have a meaning in public economic law, revenue law and criminal law which is different from that

which they have in civil law. However, in my view any different meaning of such a term must be clearly apparent from the scheme and aim of the relevant provisions of public law. In the present case that aim can be derived from the scheme of the regulation as a whole. The interpretation of Article 6 (2) then turns on the buyer's written acknowledgement that he was aware of the obligations referred to in that paragraph and enacted by the national authorities by way of rules of administrative, criminal or private law.

Secondly, it follows from the Court's case-law cited in the Opinion which I delivered on 21 January this year in the *Fromme* case that, if the Member States are not required to do so by Article 5 of the EEC Treaty, then in so far as the competent Community legislature has not clearly provided otherwise, they have the power to adopt the appropriate measures, whether general or particular, to ensure compliance with the regulations in the field of the common agricultural policy.

So far as is here material, the Court has merely stated in its previous relevant decisions that such national implementing measures may not interfere with, alter or extend the scope of the Community regulation. Judging by the wording of the second subparagraph of Article 6 (2) of Regulation No 349/73 and in particular by the nature of the penalties applicable in the event of non-compliance with the obligations referred to therein, that subparagraph clearly leaves the elaboration of more detailed rules to the competent national authorities. As I have previously observed, it is in principle possible for more detailed rules to be enacted in the form of rules of administrative, criminal or private law. The more specific guarantees that the cheap butter is put to the use intended are regulated in precise detail by the directives of the Bundesanstalt of 13 February 1973 which were produced to the Court at its request in the course of the procedure. Whether those directives truly guarantee a perfected system of obligations is a question which must be answered primarily by national law, it being understood that the directives may not be construed in such a way as to interfere with the stated scope of the provision in question of the regulation.

Thirdly, it may be assumed from the general supervisory role of the Commission and the passage in the recitals in the preamble to Regulation No 349/73 which states that the measure is "to be taken at the request of a Member State which considers itself in a position to lead it to a successful conclusion" that the Commission does regard the aforesaid directives of the Bundesanstalt as putting the Member State concerned in a position to bring the measure in question to a successful conclusion in accordance with Article 6.

For these reasons I propose that the second question should be answered as follows:

(a) By virtue of Article 6 (1) of Regulation No 349/73 of the Commission it is sufficient for the purpose of the requirement of written form for the

buyer to acknowledge in writing that he is aware of the penalties specified by the Member State concerned for which he is liable if he does not fulfil the obligations referred to in that provision. Since the legal basis, not necessarily contractual, the nature and amount of the penalties must be determined by the Member State concerned, that Member State is also required to lay down the further requirements to be attached to the sale transactions in order to ensure the proper implementation of the said provision of Community law and in particular to bind the buyers concerned. Those further requirements must therefore be appraised in accordance with the relevant national law, it being understood that the national law may not be construed in such a way as to interfere with the stated scope of the provision in question of the regulation.

(b) Under Community law if a first order is in written form that is sufficient only if, under the national implementing provisions and the detailed rules which they lay down for subsequent orders, it is guaranteed that the penalties prescribed by national law may also be applied in the event of non-fulfilment of the obligations in question in the case of such subsequent orders.

(c) As regards Question 2 (c) I refer to my answer to Question 2 (a) and (b).