In Case 117/83

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 proceedings pending before that court between

KARL KÖNECKE GMBH & CO. KG, FLEISCHWARENFABRIK, Bremen,

and

BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG [Federal Office for the Organization of Agricultural Markets]

on the interpretation and validity of Regulation No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal (Official Journal, English Special Edition 1968 (II), p. 354) as regards the possibility of declaring forfeit and recovering a deposit after it has been wrongly released,

THE COURT (Fifth Chamber)

composed of: Lord Mackenzie Stuart, President, Y. Galmot (President of Chamber), O. Due, U. Everling and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the 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 plaintiff in the main action, Karl Könecke GmbH & Co. KG (hereinafter referred to as "the plaintiff"), undertook

with the defendant in the main action, the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as "the defendant"], to store for four months 150 tonnes of fresh beef originating in the Community and falling within tariff heading 02.01 A II (a) 1 (bb) II of the Common Customs Tariff. In fact the plaintiff had put into storage frozen boned forequarters of beef which had been imported into the Community from the People's Republic of China. On discovering the true position the defendant, by decisions of 26 May 1976, revoked both the aid amounting to DM 290 067.51 granted pursuant to Regulation No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal (Official Journal, English Special Edition 1968 (II), p. 354) and the release already granted of the deposit lodged in accordance with Article 4 of the aforesaid regulation. It claimed repayment of the aid and declared the deposit forfeit. It stated that the amount of the deposit would be set off against a claim for the same amount held by the plaintiff.

The plaintiff appealed against the defendant's decisions to the Verwaltungsgericht Frankfurt am Main and at the same time claimed that the defendant should be ordered to pay it DM 115 290 (the amount of the deposit).

A final judgment of the Landgericht [Regional Court] Bremen sentenced the partners and employees of Karl Könecke GmbH & Co. KG who were responsible to imprisonment and fines for the said acts.

The Verwaltungsgericht Frankfurt am Main is in considerable doubt as to the nature of the deposit in question. After observing that Regulation No 1071/68 provides no authority for revoking decisions releasing deposits and that there is no other source of such authority in Community law, the national court proceeds to consider whether there is any authority in German law for revoking a decision to release a deposit. In the present case the national court considers that the legal nature of the deposit is such as to exclude the application of Article 48 of the German Verwaltungsverfahrensgesetz [Law on administrative procedure]; moreover it is apparent from the very nature of the deposit that once it is released it cannot be recovered.

Next, the national court considers the possibility that the defendant may be entitled to claim a sum equivalent to the amount of the deposit released if the provisions concerning deposits in Regulation No 1071/68 establish a right to enforce a pecuniary obligation which is to be guaranteed by the deposit, and if the relevant conditions are satisfied. After excluding the possibility of a contractual penalty since the storer has no right to renounce his obligations except in the event of *force majeure*, the national court concludes that since the loss of the deposit is the result of an irregularity committed previously the case is really concerned with the imposition of a fine. There is a right to impose a penalty, which is guaranteed by the deposit. In such a case the defendant can no longer obtain satisfaction from the deposit since it no longer exists but it may exercise its right to impose a penalty and require the plaintiff to pay the fine.

If in fact it is a fine, the national court queries whether such a provision is compatible with superior rules of Community law. If so, it is not

compatible with the general principles of law which are applicable in the criminal laws of the Member States of the Community and which, pursuant to the judgment of the Court of Justice of 14 May 1974 in Case 4/73 *(Nold* v *Commission* [1974] ECR 491), also obtain in Community law. There are four main principles, which in the Federal Republic of Germany have the status of constitutional law:

(a) *in dubio pro reo,*

(b) *nulla poena sine culpa,*

(c) the principle of proportionality,

(d) *ne bis in idem.*

In the light of those considerations the national court has referred the following questions to the Court of Justice for a preliminary ruling:

"1. Does Article 4 of Regulation (EEC) No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal (Official Journal, English Special Edition 1968 (II), p. 354) enable the national intervention agencies, after the period of storage has been completed, to recover a deposit which has been wrongly released?

2. If the first question is answered in the negative: Are national rules under which it is possible to revoke a wrongful decision releasing a deposit and to reclaim the amount of the deposit after the period of storage has expired compatible with Community law?

3. If the second question is answered in the affirmative: Are national rules such as those described in the second question which make revocation of a decision releasing a deposit and hence recovery of that deposit subject to the discretion of the intervention agency compatible with Community law?

4. If either the first or the second question is answered in the affirmative: What is the nature of the claim secured by the deposit referred to in Article 4 of Regulation (EEC) No 1071/68?

5. If the answer to the fourth question is that the claim secured by the deposit is a claim for a penalty: Do Article 4 of Regulation (EEC) No 1071/68 and the penalty provided for therein infringe superior rules of Community law?"

The request for a preliminary ruling was received at the Court Registry on 27 June 1983.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged at the Court by the Government of the Federal Republic of Germany, represented by M. Seidel, Ministerialrat in the Federal Ministry for Economic Affairs, and E. Röder, Regierungsdirektor in the same Ministry; and by the Commission, represented by J. Sack, a member of its Legal Department, acting as Agent.

By order of 7 December 1983 the Court decided to assign the case to the Fifth Chamber.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it requested the Commission to provide written replies to a number of questions before 21 January 1984.

II — Written observations lodged with the Court

In its written observations the *Government of the Federal Republic of Germany* proposes that the first question

should be answered in the negative and observes that Article 4 of Regulation No 1071/68 does not deal with the case of a security which has been wrongly released. In its view there are no other relevant provisions of Community law.

It proposes that the second question should be answered in the affirmative and on that issue refers to the decisions of the Court of Justice (see the judgment of 21 September 1983 in Joined Cases 205 to 215/82 *Deutsche Milchkontor* [1983] ECR 2633). The power of the Member States extends not only to the adoption of procedural provisions relating to the recovery of sums wrongly paid but also to the adoption of substantive rules. On that issue the German Government refers to the judgment of 12 June 1980 in Joined Cases 119 and 126/79 *Lippische Hauptgenossenschaft* [1980] ECR 1863), especially paragraph 10 (at p. 1879) and the Opinion of the Advocate General (at p. 1884).

It considers that the principles laid down in those decisions in relation to the recovery of sums wrongly paid may be extended to the case of a deposit wrongly released. The nature of the deposit is no obstacle. The Government also refers to the judgment of 17 December 1970 in Case 11/70 *(Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125), especially paragraph 18 (at. p. 1136) according to which a deposit is merely a guarantee that an undertaking voluntarily assumed will be carried out. The German Government maintains that the deposit in the present case is intended to guarantee not only "any future (pecuniary) right", as the national court considers, but also observance of Community law which is an integral part of the contract and whose applicability does not lose its *raison d'être* by reason of the release of the deposit. It is to that end that the fifth recital to Regulation No 1071/68 treats the deposit as a guarantee.

Accordingly, the German Government considers that breaches must be taken into account even after release of the deposit, for otherwise there would be disregard of the principles of equal treatment and uniform application of Community law if only breaches discovered during the period of storage were penalized. Thus Community law not only allows, but indeed requires, Member States to reclaim a deposit wrongly released.

The German Government proposes that the third question should be answered in the negative. As in its answer to the second question, it observes that the principles of equal treatment and uniform application of Community law do not permit repayment of the amount of the deposit to be left to the discretion of the national intervention agencies. On that issue it refers to the judgment of 6 May 1982 in Joined Cases 146, 192 and 193/81 *(BayWa AG* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1503), in particular paragraph 30 of the decision (at p. 1535).

As regards the fourth question the German Government observes that the deposit provided for in Article 4 of Regulation No 1071/68 is intended to ensure that the storer performs his contractual obligations in order that the purpose of the aid for storage, which is

an instrument for regulating the market, may be achieved. In its view neither repayment of the aid nor claims for damages are measures sufficient to guard against infringements in this field. If, for example, the storer prematurely sold the beef and veal stored he would not have to pay damages in the absence of quantifiable damage. The deposit is therefore a necessary sanction to prevent speculative transactions in respect of stored meat; see in that respect paragraph 12 of the judgment of 23 February 1983 in Case 66/82 *(Fromançais* [1983] ECR 395).

The German Government observes further that the right secured by the deposit, which may most easily be compared with the right secured by a contractual penalty, is not a sanction of criminal law (see the aforementioned judgment in *Internationale Handelsgesellschaft).*

The German Government proposes that the fifth question should be answered in the negative. It states that the sanction represented by the deposit is not a penal sanction. The principle of proportionality must be observed, however, even in the absence of a penal sanction, and in order to do so it is necessary to consider whether the means adopted are necessary for and commensurate with the purpose to be achieved. On that issue it refers to the judgments of the Court of 11 May 1977 in Joined Cases 99 and 100/76 *(De Beste Boter* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1977] ECR 861, in particular paragraph 11 at p. 872), 29 April 1982 in Case 147/81 *(Merkur Fleisch-Import* v *Hauptzollamt Hamburg-Ericus* [1982] ECR 1389, in particular paragraph 12 at p. 1397) and the aforementioned judgment in *Fromançais* (especially paragraph 7 *et seq.).*

The German Government maintians that the deposit is necesary to prevent speculation in stored beef and veal and according to the aforementioned judgments the argument that the means are disproportionate to the ends is not valid. Furthermore, it must be observed in the present case that breach of the storer's obligations was also at the origin of the criminal conviction of the persons acting on behalf of the plaintiff.

The *Commission* observes at the outset that the drafting of Regulation No 1071/68 was not perfect as regards legal terminology. Although Article 3 (1) (e) and Article 4 thereof speak of a "deposit" the term is at least to some extent incorrect. In the Commission's view the deposit system involves two elements: in making the contract the storer of meat consents to a contractual penalty and the payment thereof is guaranteed by a deposit. From the point of view of the wording only the second element of the system is clearly expressed in the regulation but there is no doubt about the existence of a system of contractual penalties. It is apparent from Article 4 (2) of Regulation No 989/68 of the Council of 15 July 1968 laying down general rules for granting private storage aid for beef and veal (Official Journal, English Special Edition 1968 (I), p. 264) and Regulation No 1071/68 which refers thereto that the deposit is not intended to ensure repayment of aid wrongly

allocated but constitutes an additional sanction in the event that the contractual obligations are not observed. That is the typical function of a contractual penalty in civil law. That being so, the question of the recovery of the deposit does not arise.

Although the deposit system in fact implies the storer's consent to a stipulation providing for a contractual penalty, the simple release of the deposit does not mean that the contractual penalty can no longer be claimed. If it appears that the penalty is in fact applicable because the storer has failed to meet his obligations under the contract, payment of the corresponding amount may be demanded independently of whether or not the deposit provided to guarantee the payment has been wrongly released. Release of the deposit simply removes the guarantee and not the substantive right which is the subject of the consent given to the stipulation providing for a contractual penalty.

In the Commission's view Article 4 (3) of Regulation No 1071/68 must be interpreted as meaning that the amount of the contractual penalty may be claimed if the obligations provided for in the contract are not observed. The first and fourth questions must therefore be answered as follows: Article 4 of Regulation No 1071/68 does not authorize national intervention agencies to recover deposits wrongly released thereunder. Nevertheless, the fact that a deposit has been wrongly released does not prevent the imposition of the contractual penalty incurred under Article 4 (3) of the regulation even after release of the deposit guaranteeing the penalty.

With regard to the second and third questions the Commission is of the opinion that national laws permitting the recovery of the deposit cannot be based on Community law. If, on the other hand, such provisions deal with the application of a contractual penalty as outlined above they are not only permissible but mandatory under Community law. There is no discretion in the matter since the amount of the contractual penalty is in any event payable when the contractual obligations are not observed. Discretion would lead to objectively unjustifiable discrimination within the common market (cf. the judgment in the aforesaid *BayWa* case).

The Commission therefore proposes that the second and third questions should be answered as follows: national legislation authorizing the revocation of an irregular decision to release a deposit pursuant to Regulation No 1071/68 and recovery of the amount of the deposit is not compatible with Community law. However, even after release of the deposit the competent intervention agency has a duty to recover the amount of the contractual penalty payable under Regulation No 1071/68.

As regards the fifth question the Commission considers that if the Court were to declare Article 4 of Regulation No 1071/68 invalid inasmuch as it provides for a contractual penalty, the judgment would have to apply equally to Article 4 (2) of Regulation No 989/68 of the Council of 15 July 1968 laying down general rules for granting private storage aid for beef and veal.

The Commission also notes that the national court does not regard Article 4 *a priori* as providing for a contractual penalty under civil law, but treats it as a criminal fine and consequently considers it in the light of a number of general principles of criminal law. The Commission does not support that view; it considers that the provision in question must be interpreted in the light of the general legal principles applicable to contractual penalties.

The Commission's power to provide for such penalties derives incontestably from Article 8 of Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187) and Article 4 (2) of the aforesaid Regulation No 989/68.

The Commission observes that if there were no sanction apart from the recovery of the aid in the event of breach of the contract of storage there would be a great temptation, for example, to remove the goods from storage before the expiry of the period provided for and the Commission would then not have a reliable general view of the market trend; thus the whole policy of storage would be placed in jeopardy. The Commission refers to the aforesaid judgment of 17 December 1970 in Case 11/70 *(Internationale Handelsgesellschaft).*

As regards the specific points put forward by the national court in relation to the legal validity of Article 4 of Regulation No 1071/68 the Commission considers that the argument of breach of the principle *in dubio pro reo* cannot be accepted for that principle applies only to criminal penalties. As regards obligations of civil law the principle does not apply.

The national court's view that the principle *nulla poena sine culpa* was breached inasmuch as a legal person (the company) was penalized for a wrongful act committed by its representatives is perhaps attributable to the mistaken view that the penalty in the present case is a criminal one. The Commission refers to German law and observes that the legal argument put forward by the national court is not tenable. It is even more obvious that a legal person who contracts a civil obligation must naturally also answer for a contractual penalty incurred because of the conduct of one of its representatives.

As regards the alleged infringement of the principle *ne bis in idem* the Commission points out that the national court is once again in error in treating the contractual penalty of civil law as a criminal penalty. If that were correct it would not be possible to impose two separate penalties for the same offence. However, as between contractual and criminal penalties the principle *ne bis in idem* does not apply.

As for the principle of proportionality the Commission considers that the present case does not in fact require consideration of the proportionality of the provisions contained in Article 4 of Regulation No 1071/68. According to the Commission the plaintiff seriously breached its contractual obligations in two respects and as appears from the criminal conviction it did so intentionally: it did not store fresh meat

pursuant to the aforesaid regulation and the meat did not originate in the Community. Nevertheless, the Commission admits that on the authority of the judgment of the Court of 21 June 1979 in Case 240/78 *(Atalanta* v *Produktschap vor Vee en Vlees* [1979] ECR 2137) the principle of proportionality must be fully taken into account in any of the Commission's measures, although it is not relevant in the present case. The regulation in question observed that principle since the deposit is proportionately forfeited only where the amount missing from storage exceeds 10%.

On the basis of the foregoing the Commission proposes that the fifth question should be answered as follows: consideration of the questions raised has disclosed no factor of such a kind as to affect the validity of Article 4 of Regulation No 1071/68 of the Commission. Nevertheless, independently of the provisions of Article 4 (3) of Regulation No 1071/68, the second paragraph of Article 4 (2) of Regulation No 989/68 of the Council remains applicable so that the competent agency may impose a contractual penalty and in consequence declare the deposit forfeit in whole or in part, depending on the seriousness of the breach of the contract.

III — Oral procedure

At the sitting on 11 April 1984 the plaintiff in the main action, represented by C. Volkmann, Rechtsanwalt, Bremen, and the Commission, represented by J. Sack, acting as Agent, presented oral argument.

The Advocate General delivered his opinion at the sitting on 20 June 1984.

Decision

1 By an order of 26 May 1983, which was received at the Court on 27 June 1983, the Verwaltungsgericht Frankfurt am Main referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation and validity of Article 4 of Regulation No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal.

2 Those questions were raised in proceedings between a German undertaking (the plaintiff) and the Bundesanstalt für landwirtschaftliche Marktordnung (the defendant). The plaintiff had undertaken, pursuant to Regulation No 1071/68, to store for four months a specific quantity of fresh beef

originating in the Community and, upon the expiry of the storage period, had obtained the release of the deposit which it had lodged, in accordance with Article 4 of the regulation, in the form of a bank guarantee.

3 Subsequently, the customs inspection authorities discovered that the plaintiff had stored frozen meat orginating in the People's Republic of China. As a result the defendant revoked its decisions granting the aid and releasing the deposit; it demanded repayment of the aid and declared the deposit to be forfeit. It stated that the amount of the deposit would be set off against a claim for the same amount which the plaintiff held against the defendant. Following criminal proceedings the partners and certain employees of the plaintiff undertaking were sentenced to imprisonment or fines in respect of the matters which led to the loss of the deposit.

4 The decision forfeiting the deposit was challenged in proceedings before the Verwaltungsgericht, which took the view that Regulation No 1071/68 contained no legal basis for revoking the decision releasing the deposit and that there was no such basis either in other Community provisions, including Article 8 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I) p. 218).

5 In the order requesting a preliminary ruling the Verwaltungsgericht also expressed serious doubts as to whether revocation of a decision releasing a deposit was possible under national law. Since the deposit represented a guarantee it could no longer be required when the risk had already materialized. If the provisions concerning deposits in Regulation No 1071/68 established a right to enforce a pecuniary obligation guaranteed by the deposit, and if the relevant conditions were satisfied, the Verwaltungsgericht considered that although the defendant could not revoke the decision releasing the deposit it could recover from the plaintiff a sum equal to the deposit. However, if such a right existed the Verwaltungsgericht considered that it was a right to impose a fine and queried whether the rule in question was consistent with the superior rules of Community law. In the present case it considered that certain principles of criminal law common to the Member States were violated, in particular because of the criminal penalties already imposed on those responsible.

6 The Verwaltungsgericht therefore submitted the following questions to the Court:

"1. Does Article 4 of Regulation (EEC) No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal (Official Journal, English Special Edition 1968 (II), p. 354) enable the national intervention agencies, after the period of storage has been completed, to recover a deposit which has been wrongly released?

2. If the first question is answered in the negative: Are national rules under which it is possible to revoke a wrongful decision releasing a deposit and to reclaim the amount of the deposit after the period of storage has expired compatible with Community law?

3. If the second question is answered in the affirmative: Are national rules such as those described in the second question which make revocation of a decision releasing a deposit and hence recovery of that deposit subject to the discretion of the intervention agency compatible with Community law?

4. If either the first or the second question is answered in the affirmative: What is the nature of the claim secured by the deposit referred to in Article 4 of Regulation (EEC) No 1071/68?

5. If the answer to the fourth question is that the claim secured by the deposit is a claim for a penalty: Do Article 4 of Regulation (EEC) No 1071/68 and the penalty provided for therein infringe superior rules of Community law?"

The first and fourth questions

7 It is appropriate to begin by considering the issues raised by the first and fourth questions, in order to determine whether Community law provides an adequate legal basis either for revoking a decision releasing a deposit or for demanding payment of a sum equal to the deposit wrongly released.

8 In the observations which it submitted to the Court the Government of the Federal Republic of Germany proposes that the first question should be answered in the negative because Article 4 of Regulation No 1071/68 does not cover the case of a deposit wrongly released. In its opinion, there are no provisions of Community law on the matter. On the other hand, it considers

that the principles to be derived from Article 5 of the EEC Treaty require the Member States to claim repayment of a deposit wrongly released. The main purpose of the deposit is to ensure that the storage contract is performed and Community law observed. Disregard of those obligations by a trader should be taken into account even after the release of the deposit; otherwise a person whose misconduct is only discovered after the deposit has been released would be placed in a better position than someone whose misconduct is discovered earlier.

9 The Commission contends that in entering into a storage contract the storer in fact assumes two obligations: namely, to pay, if necessary, a contractual penalty and to provide a deposit guaranteeing such payment. Unfortunately, only the latter obligation is clearly expressed in the regulation in question. The obligation to pay, however, continues even after the release of the deposit. When it becomes apparent that the storer has not performed the contract it is not possible to reconstitute or recover the deposit but it is possible to require payment of the corresponding amount as a contractual penalty.

10 As the national court and the Commission have observed, it must be accepted that it is not possible to require a guarantee to be reconstituted when the risk in respect of which it was provided has materialized. Thus the deposit cannot be recovered if it has been wrongly released after the period of storage. It is therefore necessary to consider whether, as the Commission has maintained, the deposit system in fact involves an obligation to pay a penalty of a contractual or administrative nature, such an obligation being distinct from the requirement of a guarantee and continuing even after the release of the deposit.

11 In that respect it must be emphasized that a penalty, even of a non-criminal nature, cannot be imposed unless it rests on a clear and unambiguous legal basis. To answer the first and fourth questions it is therefore necessary to consider whether such a basis is to be found in Article 4 of Regulation No 1071/68 interpreted in the light of its wording, context and purpose.

12 Article 4 is worded as follows:

"1. When a contract is concluded a deposit in an amount not exceeding 50% of the amount of aid specified in the contract shall be lodged by the storer in cash or in the form of a guarantee issued by a credit institution meeting the requirements of each Member State.

2. The amount of the deposit shall be fixed when the amount of aid is fixed or when tenders are invited.

3. The deposit shall be forfeited in full if the obligations imposed by the contract are not fulfilled; however, if less than 90% of the quantity agreed in the contract has been taken in store and stored within the time-limits laid down the deposit shall be forfeited proportionately to the missing part of the quantity referred to in Article 3 (1) (a).

4. The deposit shall not be forfeited if through *force majeure* the storer is unable to fulfil the above-mentioned obligations."

13 Although in certain other respects that article makes relatively detailed provisions, it contains no express provision concerning the situation which arises when a deposit is wrongly released. Nor do the other provisions of the regulation or the preamble provide any assistance in that respect. The same is true of Regulation No 989/68 of the Council of 15 July 1968 laying down general rules for granting private storage aid for beef and veal (Official Journal, English Special Edition 1968 (I), p. 264). None of the provisions in question expressly provides for the imposition of a penalty, contractual or otherwise, distinct from loss of the deposit, or expressly allows a stipulation to that effect to be included in contracts with traders.

14 With regard to the system of deposits established in respect of imports and exports of agricultural products, the Court stated in its judgment of 17 December 1970 (Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1979] ECR 1135) that the system was intended to guarantee that the imports and exports for which licences were requested were actually effected in order to enable the competent authorities to make judicious use of the instruments of intervention, such as purchasing, storing and distributing, fixing export refunds, applying protective

measures and choosing measures designed to avoid deflections of trade. It added that the undertaking given by traders would be ineffectual if observance of it were not ensured by appropriate means and in that respect the system of deposits was more effective than a system of fines imposed retrospectively. Finally, the Court held that the system of deposits could not be equated with a penal sanction, since it merely constituted a guarantee that an undertaking voluntarily assumed would be carried out.

15 In the same way the system of deposits established in connection with private storage is intended to ensure that the trader performs his obligations in accordance with the Community regulations and the terms of the relevant contract. That objective does not support an interpretation of Article 4 (3) of Regulation No 1071/68 to the effect that an amount equivalent to the deposit must be paid if the deposit is wrongly released after the period of storage has expired. At that stage the undertaking to store can no longer be performed and the payment can no longer serve to guarantee that the operation takes place but would simply constitute a penalty for failure to perform the undertaking.

16 As the German Government has pointed out, the absence of such a penalty may represent a lacuna in the deposit system, because a person who obtains the release of the deposit by means of false statements avoids losing it. That argument would be capable of supporting the interpretation favoured by the German Government and by the Commission if the provisions in question lent themselves to such an interpretation, having regard to their wording and the objective pursued. However, it is not sufficient on its own to provide a clear and unambiguous basis for the imposition of a penalty.

17 It follows that the answer to the first and fourth questions must be that Article 4 of Regulation No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal does not authorize the national intervention agencies, after the expiry of the period of storage, to recover deposits which have been wrongly released or to impose on traders pecuniary penalties of an amount equal to the deposits so released.

Second question

18 The second question asks whether national legislation under which it is possible to revoke a wrongful decision releasing a deposit and to reclaim the amount of the deposit after the period of storage has expired is compatible with Community law.

19 As indicated above, the German Government considers that Community law requires Member States to claim repayment of a deposit wrongly released, whereas the Commission takes the view that no such repayment may be claimed but that Member States must require payment of the corresponding amount as a contractual penalty. As regards the detailed rules, the German Government and the Commission agree that they fall to be determined by national legislation within the confines indicated by the Court in its decisions relating to the recovery of sums wrongly paid by the national authorities in the course of their management of the common organization of the markets.

20 In view of the answer which the Court has just given to the first and fourth questions it must be stressed that the Community legislation on the granting of private storage aid for beef and veal must be regarded as forming a complete system in the sense that it does not empower Member States to recify any lacuna in the system by laying down, under their national law, an obligation on traders which has no basis in the Community legislation. It could be otherwise only if the general Community provisions governing the management of the common organizations of the markets by the national authorities contained sufficient authority for that purpose.

21 On the latter issue the national court rightly refers to Article 8 of Regulation No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy, which provides that "the Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to . . . recover sums lost as a result of irregularities". However, as the Verwaltungsgericht observed, that provision refers to the recovery of sums paid by the European Agricultural Guidance and Guarantee Fund and cannot be extended to the recovery of a

penalty which has no legal basis in the Community legislation, even if in practice the sum thus recovered would ultimately be deducted by the national authorities from the expenditure financed by the Fund.

22 It must be added that Article 8 also requires Member States to take proceedings, pursuant to their national law, in connection with irregularities committed in relation to sums granted. The finding made above does not affect the right and the duty of the national authorities to take proceedings against a trader who has obtained the release of the deposit by fraudulent means. In the absence of a provision allowing the authorities to claim repayment of a sum equivalent to the deposit released, such action provides at least a partial remedy for the difficulty alluded to by the German Government.

23 The answer to the second question must therefore be that national legislation under which it is possible to revoke a wrongful decision releasing a deposit and to reclaim the amount of the deposit after the period of storage has expired is incompatible with Community law; however, that circumstance does not affect the right and the duty of the national authorities to take proceedings, in accordance with national law, against a trader who has obtained the release of the deposit by fraudulent means.

24 In view of the answer given to the first, second and fourth questions the other questions have become otiose.

Costs

25 The costs incurred by the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions submitted to it by the Verwaltungsgericht Frankfurt am Main by order of 26 May 1983, hereby rules:

1. **Article 4 of Regulation No 1071/68 of the Commission of 25 July 1968 laying down detailed rules for granting private storage aid for beef and veal does not authorize the national intervention agencies, after the expiry of the period of storage, to recover deposits which have been wrongly released or to impose on traders pecuniary penalties of an amount equal to the deposits so released.**

2. **National legislation under which it is possible to revoke a wrongful decision releasing a deposit and to reclaim the amount of the deposit after the period of storage has expired is incompatible with Community law; however, that circumstance does not affect the right and the duty of the national authorities to take proceedings, in accordance with national law, against a trader who has obtained the release of the deposit by fraudulent means.**

Mackenzie Stuart Galmot

Due Everling Kakouris

Delivered in open court in Luxembourg on 25 September 1984.

For the Registrar

D. Louterman

Administrator

A. J. Mackenzie Stuart

President