OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 18 November 1987 *

Mr President,
Members of the Court,

1. The Bundesverwaltungsgericht has referred to the Court six questions on the consequences of the Court's declaration that Council Regulation No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feedingstuffs (Official Journal, L 67, p. 18) is invalid, especially in relation to the annulment of a demand for the provision of security made on the basis of the regulation declared invalid and the release of the security.

2. In its request for a preliminary ruling the national court makes several references to the judgment of the Court of 13 May 1981 in Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191.

3. With regard to the answer to be given to the first three questions I agree to such an extent with the Commission that I should like to make only three brief observations and otherwise refer to the Commission's arguments.

4. **A** — The *first question* seeks to determine whether there is a rule of Community law to the effect that a demand for the provision of security which

(a) was made pursuant to Council Regulation (EEC) No 563/76 of 15 March 1976, and

(b) has been challenged in accordance with national law and has therefore not become definitive

may not be annulled although it would be annulled under the provisions of national law on the ground that Council Regulation No 563/76 is invalid.

5. I share the view of the plaintiff in the main proceedings and the Commission, who propose that that question should be answered in the negative.

6. There is no such rule under either the general principles of Community law or Regulation No 563/76. The judgment in *International Chemical Corporation* is silent on the question whether demands for the provision of security made on the basis of Regulation No 563/76, which has been declared to be invalid, may be annulled.

7. **B** — The Bundesverwaltungsgericht's *second question* seeks to determine whether there is a rule of Community law to the effect that security lodged pursuant to a demand which

(a) was made on the basis of Council Regulation No 563/76, and

(b) has been challenged in accordance with national law and annulled on the ground that Council Regulation No 563/76 is invalid

should nevertheless not be released.

* Translated from the French.

8. The Court has held (see the judgment of 12 June 1980 in Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887) that disputes relating to the recovery of sums levied on behalf of the Community under invalid Community regulations

'come within the jurisdiction of national courts and must be settled by those courts in application of their national law as regards both procedure and substance to the extent to which Community law has not made other provisions in the matter.' (paragraph 11)

That must logically apply also to the release of security the demand for which has not become definitive.

9. In the present case Community law, namely Article 5 of Regulation No 563/76, had expressly provided that 'in the case of contracts concluded before the date of entry into force of this regulation, the successive buyers of the products referred to in Articles 2 and 3, or of protein products processed therefrom, shall bear the burden of the costs arising under the arrangements laid down in this regulation.'

10. The Court could thus legitimately assume in the judgment in the *International Chemical Corporation* case that as regards old contracts the burden had already been passed on and that any refund of the security would accordingly lead to unjust enrichment of the importers.

11. As regards contracts concluded after 19 March 1976, in respect of which there was no legal obligation to pass on the burden of the security, it may nevertheless be assumed that the system set up by Regulation No 563/76 affected the distribution of the economic effects of the payment of security in so far as the demand for its provision, as in the *International Chemical Corporation* case, was not challenged in the competent national courts before the judgments of this Court declaring the regulation invalid.

12. However, no such assumption that the burden was passed on can be made in relation to contracts made after 19 March 1976 in respect of which the demand for the provision of security was challenged within a brief period in accordance with national law.

13. I accordingly propose to adopt the distinction based on the date the contracts were made, as proposed by the Commission, but to alter slightly the second part of the answer by holding with regard to 'new' contracts that if the demand for security was challenged in accordance with national law and annulled on the ground that Regulation No 563/76 is invalid there is no principle of Community law to prevent release of the security.

14. C — As regards the *third question* I also share the Commission's opinion that from the point of view of Community law it is irrelevant for the purposes of the release of the security whether it became forfeit before or after the judgments of the Court of 5 July 1977 holding Regulation No 563/76 to be invalid were delivered. What is important is the date on which the contract was entered into.

15. It seems to me, moreover, that in a case such as that before the Bundesverwaltungsgericht the problem with which the third question is concerned cannot arise.

16. Article 1 (2) of Commission Regulation No 677/76 of 26 March 1976 laying down detailed rules for the application of the system for compulsory purchase of skimmed-milk powder provided for in Council Regulation (EEC) No 563/76 (Official Journal 1976, L 81, p. 23) provides that the 'protein certificate' is valid for three months from its date of issue. Moreover, according to Article 10 (4) (b) of Regulation No 677/76 'the security shall be forfeit where the party concerned ... has not furnished proof of one of the matters referred to in paragraph 1 (b), (c), (d), (e) and (f) within six months following the expiry of the "protein certificate".'

17. Consequently, security lodged on 24 March 1976 would have had to be regarded as 'forfeit' as from 24 September 1976, that is to say, prior to the judgments of the Court of 5 July 1977.

18. I think it may be inferred from Article 10 that the security was automatically forfeit where the period of nine months had expired and the conditions for its release had not been fulfilled.

19. I am also led to that conclusion by the principle that Community law should be applied uniformly throughout the Community. It cannot therefore be accepted that the competent authority of a Member State should extend the time-limits under a Commission regulation by 'declaring the security forfeit' from a date subsequent to the end of the time-limit under the regulation. Any such declaration can thus be only by way of information that the security is already forfeit.

20. If it is accepted that the nine-month time-limit is automatic in its effects, it follows that no security lodged under Regulation No 563/76 could become forfeit after 31 July 1977, since according to Article 11 the regulation was applicable only to products imported before 31 October 1976. The normal period of validity of Regulation No 563/76 thus expired well before the judgments of the Court of 5 July 1977 declared it invalid.

21. For the reasons set out above I prefer to alter slightly the answer to the third question proposed by the Commission by referring to the security as 'forfeit' rather than 'declared forfeit'. The proposed wording is thus as follows:

From the point of view of Community law it is irrelevant to the release of security whether it became forfeit before or after delivery of the judgments of the Court of Justice of 5 July 1977 declaring Regulation (EEC) No 563/76 to be invalid.

22. **D** — *Questions 4 and 5* were asked only in the event that Question 3 (a) should be answered in the affirmative. Since that is not the case it is unnecessary to answer the following questions, including Question 6.

23. Alternatively and in so far as it may be of help I should like to indicate that it follows from my observations in section B that Questions 4 (b) and 5 (b) should in my opinion be answered in the affirmative. In other words:

The security may become forfeit even while legal proceedings concerning the lawfulness of the demand for security are pending;

As soon as the conditions laid down in the relevant provisions for the forfeiture of security are satisfied the resulting legal consequences arise automatically, and no formal administrative decision declaring the security forfeit is necessary.

24. Finally, with regard to *Question 6*, which seeks to determine whether there is a rule of Community law determining the legal consequences which follow if the demand pursuant to which a security that has already become forfeit was lodged is subsequently annulled as being unlawful, reference should be made once again to the aforementioned judgment of the Court of 12 June 1980 in Case 130/79 *Express Dairy Foods* v *Intervention Board for Agricultural Produce*.

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25. To summarize, I propose that the Court should answer the questions put by the Bundesverwaltungsgericht as follows:

(1) There is no provision of Community law to prevent the annulment in accordance with the rules of national law of a demand for security made on the basis of Regulation (EEC) No 563/76 (declared invalid by the Court of Justice) which was challenged in good time by an action brought in accordance with the national rules of procedure.

(2) Where protein products acquired under Regulation (EEC) No 563/76 have been resold on the basis of contracts made before that regulation entered into force, for the reasons set out in the judgment of 13 May 1981 in Case 66/80 there is no right to the release of security lodged under that regulation.

Where, on the other hand, protein products bought subject to the provision of security have been resold under contracts made after the entry into force of Regulation (EEC) No 563/76 and the demand for security was challenged in accordance with national law and annulled on the ground that Regulation No 563/76 was invalid, no principle of Community law prevents release of the security.

(3) From the point of view of Community law it is irrelevant to the release of security whether it became forfeit before or after delivery of the judgments of the Court of Justice of 5 July 1977 which held Regulation (EEC) No 563/76 to be invalid.