# JUDGMENT OF THE COURT
5 December 1985 *

In Case 124/83

REFERENCE to the Court under Article 177 of the EEC Treaty by the Østre Landsret for a preliminary ruling in the proceedings pending before the Court between

**Direktoratet for Markedsordningerne,** Copenhagen,

and

**Nicolas Corman & fils SA,** Brussels,

on the interpretation of certain provisions of Regulation No 232/75 of the Commission of 30 January 1975 on the sale of butter at reduced prices for use in the manufacture of pastry products and ice-cream (Official Journal 1975, L 24, p. 45),

## THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling, K. Bahlmann and R. Joliet, Presidents of Chamber, G. Bosco, T. Koopmans, O. Due, Y. Galmot and C. Kakouris, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of:

the Direktoratet for Markedsordningerne, the plaintiff in the main proceedings, by M. Gregers Larsen, Advocate,

Nicolas Corman & fils SA, the defendant in the main proceedings, by N. Gangsted-Rasmussen and H. E. Heyn, Advocates,

* Language of the Case: Danish.

the Netherlands Government, by M. Keur, acting as Agent,

the Commission of the European Communities, by H. P. Hartvig, a member of its Legal Department, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 9 May 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

## Decision

1 By judgment dated 30 June 1983, which was received at the Court on 4 July 1983, the Østre Landsret [Eastern Division of the Danish High Court] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions on the interpretation of certain provisions of Regulation No 232/75 of the Commission of 30 January 1975 on the sale of butter at reduced prices for use in the manufacture of pastry products and ice-cream (Official Journal 1975, L 24, p. 45).

2 The questions were raised in proceedings between the Direktoratet for Markedsordningerne, Copenhagen (a Danish intervention agency), and the Corman company which made use of the possibility offered by Regulation No 232/75 to acquire butter by tender at a reduced price.

3 In order to promote the disposal of stocks of butter arising from intervention on the butter market Regulation No 232/75 established a scheme whereby the intervention agencies sell butter at a reduced price under a standing invitation to

tender procedure with a view to the manufacture of pastry products and ice-cream. Article 6 (1) of the regulation provides that an undertaking may not take part in the scheme unless it gives a written undertaking to have the butter processed into concentrated butter (Article 6 (1) (a)), to have certain substances incorporated in the concentrated butter (Article 6 (1) (b)), to have the concentrated butter processed only into certain specific products (Article 6 (1) (c)) within a period of six months from the day on which the butter was taken over (Article 6 (1) (d)), to keep stock records (Article 6 (1) (e)) and in the case of any subsequent resale of the butter to include in the contract of sale the requirements laid down in sub-paragraphs (c) and (d) (Article 6 (1) (f)).

4 In order to ensure that the butter was not used otherwise than as intended the regulation provided for the deposit of a 'processing' security and established a system for checking the butter from the time when it was taken out of stock until it was finally processed. Except in cases of *force majeure*, the security is released only for quantities in respect of which the successful tenderer has furnished proof that the conditions laid down in Article 6 have been fulfilled. The proof primarily required is the T5 document referred to in Regulation No 2315/69 of the Commission of 19 November 1969 on the use of Community transit documents (Official Journal, English Special Edition 1969 (II), p. 515).

5 The Corman company bought butter from the Direktoratet for Markedsordningerne. After the butter had been processed into concentrated butter in Belgium, Corman deposited a processing security with the Office belge de l'économie et de l'agriculture. It subsequently sold the butter in the Federal Republic of Germany to the undertaking Sahne-Heinrich which in its turn re-sold the butter to the undertaking Scheunemann which sold it to various buyers.

6 The processing security was released by the Office belge de l'économie et de l'agriculture on the basis of T5 control documents bearing an attestation of the German customs authorities that the butter had been used for its prescribed purpose.

7 During a subsequent inspection it was discovered that the butter had not been used for its intended purpose. The attestation on the T5 documents was therefore wrong.

8 Following that discovery the Direktoratet for Markedsordningerne applied to the Østre Landsret on 18 January 1980 for an order requiring Corman to pay it an amount equal to the difference between the price paid by Corman and the intervention price on the day on which the tender was submitted plus the statutory interest due on that amount. Its main submission was that the obligation to pay that amount arose directly from the terms of the contract entered into and as an alternative submission it argued that that amount constituted compensation for the loss caused by the failure to observe the conditions laid down in the contract.

9 Corman, on the other hand, contended in particular that it had acted in accordance with the Community regulations and in good faith. It also argued that there was a case of *force majeure* within the meaning of Article 18 (2) of Regulation No 232/75 because the lack of supervision by the German customs authorities had made it impossible for it in practice to produce any form of proof.

10 In order to resolve the dispute the Østre Landsret stayed the proceedings and requested the Court to give a preliminary ruling on the following questions:

'(1) Is it in accordance with the provisions of Community law, in particular Regulation (EEC) No 232/75 of the Commission, that a purchaser of butter who has given an undertaking to comply with the conditions relating to Formula A in Article 6 (1) (c) of that regulation is discharged from his obligations when the processing security which he has provided is released on the basis of a control copy which is in the form required by Article 18 (2) of the regulation but the contents of which are subsequently proved to contain an error?

(2) Is it relevant to the answer to be given to Question 1 whether the error in the contents of the control copy arose from the failure of the customs authorities to carry out a check on subsequent purchasers?

(3) Is it relevant to the reply whether the undertaking which bought the butter from the intervention agency acted in good faith as regards using the butter in accordance with the relevant provisions at the time when the processing security was released?

(4) Is it relevant to the reply that the purchaser had previously obtained the release of the processing security, in connection with the resale of butter, on the basis of control copies whose contents were erroneous?

(5) Are the circumstances mentioned in Questions 1 to 4 relevant to the defence of *force majeure* contained in Article 18 (2) of Regulation No 232/75?

(6) If the replies to the above questions mean that the purchaser is not released from his obligations, must a Member State require the purchaser to pay to the intervention agency the difference between the price previously paid and the intervention price on the day when the purchaser submitted his tender?

(7) If the answer to Question 6 is not in the affirmative, is it contrary to Community law if the provisions of the Member State's domestic law on the sale of goods bring about the effect in law which is mentioned in Question 6?

(8) If it is held that the purchaser is not released from his obligations, does it follow from Community law, including considerations of legal certainty, that even the circumstance that the processing security has been released itself excludes a claim against the purchaser?

(9) If the processing security was released on the basis of a control document, the contents of which were erroneous in the circumstances related above, does Community law contain rules as to the party on whom the burden of proof rests in establishing whether the butter purchased was used in accordance with the relevant provisions?'

**Questions 1 to 5**

11 The first five questions should be dealt with together because in substance they are all designed to ascertain whether the responsibility of the person who buys butter at a reduced price (hereinafter referred to as 'the successful tenderer') to have the

butter processed into certain specific products continues to exist after the processing security deposited by him has been released or whether the release of the security means that the successful tenderer is discharged from his obligations.

12 Those questions are also designed to ascertain whether the various circumstances set out below may be relevant to the reply to be given to the question set forth above or may constitute a case of *force majeure* within the meaning of Article 18 (2) of Regulation No 232/75:

(i) the fact that the security was released after the authorities of a Member State had issued a control document whose contents subsequently proved to be erroneous and the error was due to a lack of supervision by the customs authorities at later marketing stages;

(ii) the fact that the successful tenderer acted in good faith as regards the proper use of the butter at the time when the processing security was released and that he had previously obtained the release of the security by the authorities on the basis of control copies whose contents were erroneous.

13 The plaintiff in the main proceedings contends that the successful tenderers's obligations regarding the proper use of the butter continue to exist even if the security was released on the basis of a control document in accordance with Article 18 (2) of Regulation No 232/75. It also takes the view that none of the circumstances mentioned in Questions 2, 3 or 4 alter the successful tenderers's obligations or constitute a case of *force majeure* within the meaning of Article 18 (2) of the regulation.

14 The defendant in the main proceedings contends that Regulation No 232/75 does not provide for any other sanction than the loss of the security where the butter is used for purposes other than those for which it is intended. Considerations of legal certainty and the legitimate expectation of tenderers that Member States will perform their supervisory duties properly also support the view that the Member States themselves are solely responsible for breaches of the processing obligation which come to light after the security has been duly released. If the processing security was to be regarded only as a security for another economic sanction, that ought to have been expressly laid down in Regulation No 232/75 and the exceptions of *force majeure* should also apply to the other sanctions and not only to

the security. Irregular use of the butter where the irregularity results from errors which were discovered in the documents of proof only after the security had been released and were due to insufficient supervision must constitute a case of *force majeure* as far as the successful tenderer is concerned. In the defendant's view, the means of proof referred to in Article 18 (2) also have an absolute character. If such formally valid proof is furnished in accordance with Article 18 (2), the intervention agency with which the security was deposited is not entitled to investigate on its own initiative whether the butter was used within the period prescribed and in accordance with its intended purpose. It must release the security. Nor may the intervention agency which sold the butter, in this case the plaintiff in the main proceedings, be allowed to furnish proof to the contrary.

15 The defendant in the main proceedings also submits that if the Member State concerned has exercised its right under Article 18 (3) of Regulation No 232/75, a direct action against the final users is possible. In view of the considerable risk which the successful tenderer must bear under that regulation if Article 18 (3) is not applied, inasmuch as he is also responsible for the conduct of subsequent buyers, it is proper that he should be able to rely on the effectiveness of the customs control. In particular, he must be entitled to assume that his contractual liability will come to an end as soon as the proof referred to in Article 18 (2) has been furnished. Only in the case of manifest bad faith on the part of the tenderer and not in the case of negligence on the part of the supervising customs authority may the interests of the intervention agency prevail over those of the tenderer and an action against the tenderer be justified. Neither Article 15 of the regulation in question nor the German implementing provisions provide for controls to be carried out *a posteriori*.

16 It is clear from the written observations lodged by the Netherlands Government that it essentially shares the defendant's view and considers that if the buyer has furnished the documents attesting that the product has been used correctly, he has satisfied the requirements of Article 18 of the regulation and for that reason is released from his main obligations.

17 The Government of the Federal Republic of Germany and the Commission essentially share the plaintiff's view.

18 Before answering the questions raised, the supervisory system established by Regulation No 232/75 to guarantee that the butter is used to manufacture pastry products and ice-cream should be explained.

19 It is clear from Article 10 (5) of the Regulation, which provides that 'the rights and obligations arising in connection with the invitation to tender are not transferable', as interpreted by the Court in its judgment of 3 July 1985 in Case 20/84 (*De Jong Verenigde NV and Another* v *Voedselvoorzienings in- en verkoopbureau* [1985] ECR 2061), that the successful tenderer remains responsible for the use to which the butter is finally put and that he must answer for the conduct of subsequent buyers.

20 That obligation remains incumbent on the successful tenderer even if he has sold the butter. Sanctions, including the loss of the processing security, are attached to that obligation, which means that he must in his own interests be vigilant to ensure that his undertaking regarding the final use to which the butter is put is complied with. To that end Article 6 (1) (f) of the regulation states that at each subsequent sale of the product the successful tenderer must ensure that the obligation to process the butter into pastry products or ice-cream is laid down. The checks which the successful tenderer may then carry out to ascertain whether that obligation has been complied with are in his interests alone and do not affect his liability towards the selling agency.

21 The Member States also have a supervisory duty to prevent fraud. It must be emphasized that this supervisory duty is owed to the Community and that only the Community authorities may act upon any breach of such duty. The supervision exercised in this connection has neither the aim nor the effect of discharging the successful tenderer in any way whatever from his responsibilities arising from the tender.

22 The function of the compulsory security provided for by Regulation No 232/75 is to ensure that the successful tenderer's main obligations, into which he freely

enters, are observed, but the obligation to provide the security remains separate and the release of the security does not discharge the tenderer from those main obligations.

23 It also follows from the fact that the successful tenderer is responsible for the use to which the butter is finally put that if subsequent buyers have not used the butter for its prescribed purpose that tenderer may not rely on his good faith or on the control documents issued by the competent authorities or plead *force majeure* because of the conduct of the subsequent buyers.

24 The answer to the first five questions must therefore be that:

(i) The buyer of the butter who has given an undertaking to comply with the conditions referred to in Article 6 (1) (c) of Regulation No 232/75 of the Commission (the successful tenderer) is not discharged from his obligations solely because the processing security was released on the basis of a control copy referred to in Article 18 (2) of the regulation.

(ii) The successful tenderer may not rely on the lack of supervision by the customs authorities, his own good faith or on the administration's previous practice in order to be discharged from his obligations; those circumstances do not constitute *force majeure* within the meaning of Article 18 (2) of Regulation No 232/75.

**The sixth question**

25 This question is in substance designed to ascertain whether Community law requires the successful tenderer, in the event that the butter is used for an improper purpose, to pay the difference between the price which he had paid and the intervention price prevailing on the day when he submitted his tender and, if so, whether the Member States are obliged to recover that amount.

26 The plaintiff in the main proceedings submits in this regard that where an economic advantage proves to have been wrongly granted out of Community funds, regularization is possible — and even necessary — unless quite special circumstances exist. That conclusion is based on Article 8 of Regulation No 729/70 of 21 April 1970 on the financing of the common agricultural policy

(Official Journal, English Special Edition 1970 (I), p. 218), which requires the Member States to recover sums lost as a result of irregularities or negligence, and also on the case-law of the Court.

27 The defendant's main contention is that the scheme of Regulation No 232/75, concerning the processing security and its loss, establishes an independent system of sanctions based entirely on Community law, which in no way implies a basis for a secured claim. Thus the release of the security implies a permanent waiver of demands for other payments. Alternatively, it argues that the intervention agency which sold the butter cannot claim from the successful tenderer the difference between the price paid and the intervention price unless the intervention agency which released the processing security has first reversed its decision to do so.

28 The German Government proposes an answer along these lines: if the processing obligation is not fulfilled, the successful tenderer bears the legal consequences of the non-performance of the contract of sale; if the processing security, the amount of which is meant to cover the difference between the reduced price and the market price, may no longer be reclaimed, the Member States must be able to reclaim that difference from successful tenderers.

29 The Netherlands Government takes the view, however, that there are no Community rules regulating the recovery of undue payments.

30 The Commission takes the view that it follows from Article 8 of Regulation No 729/70 that in the event of a breach of obligations the Member States must take the necessary steps for reclaiming any economic advantage granted under Community legislation out of Community funds as part of the common agricultural policy, such as the purchase of butter at a reduced price pursuant to a contract of sale as in this case. The intervention agency which sold the butter must therefore assert its claim for payment against the successful tenderer, the recovery of the amount due being governed by national law.

31 It must be pointed out that Regulation No 232/75 provides for compliance with the successful tenderer's undertaking to use the butter for its prescribed purpose to be guaranteed by *inter alia* the provision of security before each quantity of butter is taken over; according to Article 9 (2), the amount of the security is to be fixed per 100 kg 'by reference to the difference between the market price of butter and the minimum prices'.

32 Moreover, as stated above, the fact that the security was released does not mean that the successful tenderer is discharged from the main obligations into which he freely enters. Being contractual, those obligations are independent and continue to exist as long as the contract of sale is not terminated. It follows that a successful tenderer who was unable to comply with his contractual obligations may not claim any right to be charged the reduced price, which is granted solely in order to facilitate the disposal of the butter.

33 That result is consistent with the aims and the scheme of Regulation No 232/75, Article 9 (2) of which provides that the amount of the security is to be equivalent to the difference between the minimum sale price fixed for each tender and the market price of butter.

34 It follows that the successful tenderer remains liable to pay the difference between the price which he paid and the market price if the butter sold at a reduced price has not been used for its prescribed purpose. That obligation continues to exist even after the security has been released.

35 Finally, it must be borne in mind that Article 8 (1) of Regulation No 729/70, cited above, requires the Member States to prevent and deal with, in accordance with national provisions laid down by law, regulation or administrative action, irregularities in transactions and to recover sums lost as a result of irregularities or negligence.

36 The answer to the sixth question must therefore be that if the butter sold at a reduced price is not used in accordance with Regulation No 232/75, the Member States must require the successful tenderer to pay the difference between the reduced price which was paid and the market price.

## The seventh question

37 In view of the answer give to the sixth question, there is no need to answer this question.

## The eighth question

38 The plaintiff in the main proceedings takes the view that because of the extent of the successful tenderer's liability the principle of legal certainty does not bar an action against him since he must reasonably have expected to have sanctions imposed on him if subsequent buyers failed to comply with the provisions of the regulation.

39 The defendant, on the other hand, maintains that the principle of legal certainty bars an action against the successful tenderer after the security has been released.

40 The Netherlands Government takes the view that Community law does not prevent the national court from applying the principle of legal certainty provided, however, that its application does not make it virtually impossible to exercise rights arising under Community law.

41 The Government of the Federal Republic of Germany takes the same view as the plaintiff.

42 The Commission takes the view that Regulation No 232/75 bars the application of provisions or principles of national law concerning legal certainty since it has made the position clear in this regard by compelling the successful tenderer to safeguard his position *vis-à-vis* subsequent buyers of the relevant products by inserting appropriate clauses in his contracts.

43 It is to be noted that Regulation No 232/75 imposes a personal responsibility on the successful tenderer and that the release of the security or the existence of special circumstances cannot discharge him from his obligations. He may not therefore successfully plead the fact that the security was released or the principle of legal certainty in order to avoid the payment of an amount to offset a wrongly-granted advantage.

44 The answer to the eighth question must therefore be that an action against the successful tenderer for failure to fulfil his obligations is not barred by application of the principle of legal certainty once the security has been released.

## The ninth question

45 The Direktoratet for Markedsordningerne, the plaintiff in the main proceedings, suggests that the Court should answer this question to the effect that, if the competent intervention authorities have managed to establish that the customs declaration certifying that the butter was used correctly is wrong, the onus is on the tenderer seeking to be discharged from his obligations to produce evidence substantiating fully that, despite all appearances, the butter was in fact used for the prescribed purpose. That conclusion follows from the absolute burden of proof resting on the successful tenderer which is consistent with the fundamental rule established by the regulation that the successful tenderer bears personal responsibility and from the fact that the subsequent buyers failed to comply with the obligation to keep stock records which thus made it impossible to prove how the butter had finally been used. The disadvantages of that situation must be borne by the successful tenderer. The Direktoratet for Markedsordningerne submits that it is a generally accepted principle in the legal systems of the Member States that the burden of proof rests on the person having the means of proof or on the person who ought to have secured the means of proof.

46 The defendant contends that under the provisions of Regulation No 232/75 the material burden of proof rests on the successful tenderer until the security is released and that the proof is provided by the endorsement of the T5 control document by the competent authorities. However, it considers that Regulation No 232/75 is silent on the question of the burden of proof after the release of the security. Nevertheless, it believes that it is possible to deduce from the Court's judgment of 9 June 1964 (Joined Cases 94 and 96/63 *Bernusset* v *Commission* [1964] ECR 297) that a general principle exists according to which an authority which adopts measures adversely affecting the persons concerned or which withdraws a favourable decision must bear the burden of proof itself. In any event, the intervention agency bears the entire burden of proving that the processing requirements set out in Article 6 were not fulfilled, especially since in the present case the customs authorities deprived the successful tenderer of the only means of proof available under Article 18 (2) by not extending its checks to the trader who carried out the final processing.

47 The German Government takes the view that Community law contains no rule regarding the burden of proof and that therefore national law should be applied to determine the burden of proof but within the limits laid down by the Court in its judgment of 21 September 1983 (Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH and Others* v *Germany* [1983] ECR 2633).

48 In the view of the Netherlands Government, the rules of national law apply as regards the burden of proof. On this point it observes that Regulation No 232/75 entrusts the Member States with the entire responsibility for supervision and that, if the national authorities do not exercise proper supervision, they are primarily responsible: the person concerned by the regulation has no other obligation under Community law than to produce the documents of proof required by the regulation.

49 The Commission submits that, as regards the period prior to the release of the security, Article 18 (2) of Regulation No 232/75 determines not only the burden of proof but also how it is to be discharged, namely by the production of the T5 customs documents by the tenderer concerned. As regards the period following the release of the security, the Commission's view is that the national authorities which raise a claim against the successful tenderer must show that the security was wrongly released. It is then for the successful tenderer to adduce positive proof, based on information supplied by himself or subsequent buyers, that the products were used in accordance with the requirements of the regulation.

50 The Court would observe that, whilst Article 18 (2) of Regulation No 232/75 requires the successful tenderer seeking the release of the security to furnish proof, by means of the T5 document, that the butter has been used properly, it is for the competent authorities claiming that there is an error in that document to furnish proof of the error.

51 The answer to the ninth question must therefore be that, if the processing security was released as a result of an error in the control document, the burden of proving that error, in particular of proving that the butter was not used for its prescribed purpose, rests on the national authorities concerned.

## Costs

52 The costs incurred by the German and Netherlands Governments and by 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions submitted to it by the Østre Landsret by judgment of 30 June 1983, hereby rules:

**(1) The buyer of the butter who has given an undertaking to comply with the conditions referred to in Article 6 (1) (c) of Regulation No 232/75 of the Commission (the successful tenderer) is not discharged from his obligations solely because the processing security was released on the basis of a control copy referred to in Article 18 (2) of the regulation.**

**The successful tenderer may not rely on the lack of supervision by the customs authorities, his own good faith or on the administration's previous practice in order to be discharged from his obligations; those circumstances do not constitute *force majeure* within the meaning of Article 18 (2) of Regulation No 232/75.**

**(2) If the butter sold at a reduced price is not used in accordance with Regulation No 232/75, the Member States must require the successful tenderer to pay the difference between the reduced price which was paid and the market price.**

**(3) An action against the successful tenderer for failure to fulfil his obligations is not barred by application of the principle of legal certainty once the security has been released.**

**(4) If the processing security was released as a result of an error in the control document, the burden of proving that error, in particular of proving that the butter was not used for its prescribed purpose, rests on the national authorities concerned.**

Mackenzie Stuart Everling Bahlmann Joliet

Bosco Koopmans Due Galmot Kakouris

Delivered in open court in Luxembourg on 5 December 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President