In Case 122/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Administratif, Paris, for a preliminary ruling in the action pending before that court between

S.A. BUITONI

and

FONDS D'ORIENTATION ET DE RÉGULARISATION DES MARCHÉS AGRICOLES

on the validity and the interpretation of Article 3 of Commission Regulation No 499/76 of 5 March 1976 amending Regulation No 193/75 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 59, p. 18),

THE COURT,

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the observations submitted pursuant to 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

Pursuant to Regulation No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for

the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 25, p. 10), the issue of import and export licences by the national intervention agencies is conditional upon the giving of a security which guarantees the obligation to import or export during the period of validity of the licences. The provisions of Article 17 (2) and (3) of that regulation lay down that release of the security shall be subject to production of proof of completion of customs import or export formalities, that proof being furnished by production of Copy No 1 of the licence endorsed by the office where the customs formalities were completed. Pursuant to Article 18 (1) of the regulation the security shall be released "as soon as the proof referred to in Article 17 (2) and (3) . . . has been furnished."

That regulation was amended by Commission Regulation No 499/76 of 5 March 1976, Article 3 of which added to Article 18 of Regulation No 193/75 a paragraph (4) which reads as follows:

"4. Where the proof referred to in Article 17 (2) and (3) has not been furnished within the six months following the expiry of the licence, the security shall be forfeit save in case of *force majeure.*"

The reasons behind that provision are clear from the third recital in the preamble to that regulation, which states that "for administrative reasons, provision should be made for the proof required for the release of the security to be furnished within a reasonable time, except in the case of *force majeure*".

On 19 November 1976 S.A. Buitoni, a company incorporated under French law, was issued with four import licences covering 2 900 tonnes of tomato concentrate coming from third countries and deposited the corresponding security of FF 163 270. The licences issued expired on 1 February 1977. The company undertook those imports within the period of validity of the licences but omitted to submit to the Fonds d'Orientation et de Régularisation des Marchés Agricoles (French Fund for the Guidance and Regulation of Agricultural Markets, hereinafter referred to as "the Fonds"), the French intervention agency, the proof of importation within the six months following the expiry of the licences (that is, before 1 August 1977).

By letter of 28 August 1977 the Fonds required Buitoni to pay the amount of the security. On 6 September 1977 the company sent to the Fonds the documentary proof of discharge of its obligation to import within the period laid down, requesting that the security be released. That request was rejected by the Fonds on 26 October 1977.

Buitoni then brought an action before the Tribunal Administratif, Paris, claiming that the decision rejecting its request for release of the security was *ultra vires.*

Buitoni submitted before the national court that Article 3 of Regulation No 499/76 is contrary to the general principles of Community law in so far as it disregards the rule of the proportionality of the penalty. It was also said to be contrary to the objective and spirit of the Community system of securities.

By judgment of 22 March 1978 the Tribunal Administratif, Paris, after consideration of the submissions made before it by Buitoni, stayed the proceedings until the Court of Justice has given a preliminary ruling on the validity and interpretation of Article 3 of Regulation No 499/76.

The judgment making the reference was registered at the Court on 25 May 1978.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by Buitoni, by the French Government and by the Commission of the European Communities.

After 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.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court

In the submissions of *Buitoni*, the *plaintiff in the main action*, the objective of the Community system of securities is, on the one hand, to guarantee the fulfilment of an obligation, freely entered into, to import or export and, on the other, to ensure that the Community and the Member States have a precise knowledge of the flow of trade within and outside the Community.

In the light of that system and of the case-law of the Court of Justice it is clear that the (secondary) objective of economic forecasting can in no way justify such drastic measures as those for which provision is made in Article 3 of Regulation No 499/76. Those measures should therefore be held to be invalid, by reason of their incompatibility both with the fundamental principles of Community law and with the objectives of the system of securities.

In the first place, Article 3 of Regulation No 499/76 violates the principle of proportionality, which is a general principle of Community law recognized by the Court of Justice (see the judgment of 17 December 1970 in Case 11/70, [1970] ECR 1125). The overall statistical view which is necessary for the equilibrium of the market cannot in fact justify an *excessive* measure, where the system which has been instituted is primarily intended to oblige traders to effect their imports or exports. It is contrary to the principle of proportionality to apply the same penalty in respect of non-performance of the obligation which the security is intended to guarantee and of a mere delay in submitting proof of performance of the obligation which has been discharged correctly and within the time-limit. It is contrary both to the principle of proportionality and to the principles of equality of treatment and equality in relation to public charges that a trader who has partially completed his transaction and who produces proof within six months of the partial fulfilment of his obligation should be penalized less severely than a trader who has discharged his obligation fully but has not furnished proof thereof within the period laid down by Regulation No 499/76.

In the view of the plaintiff in the main action the Community should either have left it to the Member States to apply the national provisions in force relating to penalties for delay or have laid down less severe penalties, together with provisions to ensure fairness.

The Commission ought further to have provided, in accordance with the general principle of natural justice, for the mandatory transmission of formal notice prior to the expiry of the period.

Secondly, the plaintiff in the main action claims that Article 3 of Regulation No 499/76 is contrary to the system of securities. It states that the security is merely the guarantee of the discharge of an obligation freely entered into (see the

judgment of the Court of Justice of 11 May 1977 in Joined Cases 99 and 100/76, [1977] ECR 861). The sole purpose of Article 3 is to gather a fuller body of statistics relating to market factors. It is clear that in order to attain the objectives laid down by the regulation it was not necessary to provide for forfeiture of the whole of the security.

Thus the purpose of the security was substantially modified by Regulation No 499/76, which has the effect of making it a statistical instrument contrary to the system of import and export licences, the principle objective of which is to encourage traders to fulfil the obligations which they have initially entered into.

In the alternative, in the event of the Court's deciding that Regulation No 499/76 is valid, the plaintiff in the main action asks that it should interpret the failure to produce the licence within the six-month period as being the result, in this instance, of unusual circumstances to be treated as a case of *force majeure*. The plaintiff was the victim of internal administrative disorder during the holiday period. Having effected its importations within the period of validity of the licences it was certainly not in its interest to forego the securities. The plaintiff seeks a liberal interpretation such as to enable it to claim the release of the security.

In conclusion, the plaintiff maintains that Regulation No 499/76 should be declared invalid, in that it is contrary to the principles of proportionality, natural justice and equality in relation to public charges and in that it abuses the system of securities by deflecting the principle of the provision of security from its initial purpose. In the alternative, it asks the Court, in the event of the latter's deciding that the regulation is valid, to interpret the concept of the period for compliance in a liberal manner and to find that payment of the security was not necessary in this case.

The *French Government*, without undertaking a legal assessment of the provision in dispute, summarizes the way in which the case came before the courts in France in relation to the Community rules.

The *Commission* recalls that before the introduction of the provisions in dispute the periods following which securities were forfeited varied from one Member State to another which, in its opinion, led to discriminatory treatment for the traders concerned and distorted the system of securities, the purpose of which was to enable the Community to follow with precision the market situation. There was also the need, at the administrative level, to introduce a period of time on the expiry of which a file could be definitively closed.

The Commission rejects the argument that the provisions of Article 3 of Regulation No 499/76 are disproportionate to the objective sought and claims that a period of six months is more than reasonable for the mere transmission of documents, especially when it is borne in mind that that period is calculated as from the expiry of the licences. Furthermore, provision is made by the regulation for an exception in circumstances of *force majeure* in order to safeguard cases where traders are unable to produce the documents.

As regards the legal classification of the period of six months, it is in no sense a time-bar but a merely administrative time-limit. Indeed, as long as the trader has not furnished proof that the transactions for which the licences were issued to him have been completed, the administrative authorities are entitled, in reliance on a legal fiction, to consider that the said

transactions have not taken place. Contrary to the claims of the plaintiff in the main action, therefore, proof is indeed required of the trader in order to ensure compliance with the whole system of licences and securities.

The Commission contends that the Court should declare that consideration of the question referred to it by the Tribunal Administratif, Paris, has disclosed no factor of such a kind as to affect the validity of Article 3 of Regulation No 499/76.

III — Oral procedure

The plaintiff in the main action, represented by L. Funck-Brentano, Advocate of the Paris Bar, and the Commission of the European Communities, represented by its Agent, P. Kalbe, and assisted by J. Delmoly, a member of its Legal Department, submitted oral observations.

The Advocate General delivered his opinion at the hearing on 30 January 1979.

Decision

1 By judgment of 22 March 1978 the Tribunal Administratif, Paris, referred to the Court under Article 177 of the EEC Treaty a question relating to the validity and interpretation of Article 3 of Commission Regulation No 499/76 of 5 March 1976 amending Regulation No 193/75 of 17 January 1975 (Official Journal L 25, p. 10) laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 59, p. 18).

2 It appears from the judgment making the reference that the plaintiff in the main action, which had obtained, subject to the provision of a security, import certificates for a quantity of tomato concentrates coming from third countries and had imported those goods within the period of validity of the licences was, by decision of the French intervention agency, refused release of the security on the ground that it had failed to submit to that agency the requisite proof of importation within the period laid down in Article 3 of Regulation No 499/76.

3 Before the national court, in which it brought an action against that decision, the plaintiff in the main action pleaded the invalidity of Article 3 of Regulation No 499/76, in particular on the ground of violation of the principle of proportionality, and it also claimed that that article is contrary to the purpose and spirit of the Community system of securities.

4 In the light of those considerations the national court requested the Court of Justice to give a preliminary ruling on the validity and interpretation of the said article.

5 Pursuant to Regulation No 193/75 of the Commission of 17 January 1975, the issue of an import or export licence by the national intervention agencies is conditional upon the giving of a security calculated, as is stated in the sixth recital in the preamble to that regulation, to guarantee that the obligation to import or export will be fulfilled during the period of validity of the licence.

6 It appears from the provisions of Article 17 (2) of the regulation that release of the security shall be subject to production of proof of completion of the customs import or export formalities, which proof shall be furnished, according to the rules laid down in paragraph (3) of that article, by production of Copy No 1 of the licence endorsed by the office where those formalities were completed.

7 Pursuant to Article 18 (1) of the regulation, the security shall be released "as soon as the proof referred to in Article 17 (2) and (3) ... has been furnished".

8 By virtue of Article 18 (2) and (3) of that regulation the whole of the security shall be forfeited if the net quantity imported or exported amounts to less than 5% of the net quantity indicated in the licence, but it may be released by the Member States in proportion to the quantities of products, equal to at least that percentage, in respect of which the proofs referred to in Article 17 (2) and (3) have been furnished.

9 Article 3 of Regulation No 499/76 added to Article 18 of Regulation No 193/75 a paragraph (4) pursuant to which, where proof has not been furnished within the six months following the expiry of the licence, the security shall be forfeit save in case of *force majeure.*

10 It appears from the third recital in the preamble to Regulation No 499/76 that the provision was introduced "for administrative reasons".

11 The plaintiff in the main action has claimed, in particular, that it is contrary to the principle of proportionality to apply the same penalty for failure to fulfil the obligation to import, which the security is intended to guarantee, and for mere delay in submission of the proofs of fulfilment of the obligation, which has been discharged correctly and within the prescribed period.

12 In its written observations the Commission maintains that Article 3 of Regulation No 499/76 is justified by the fact that before its introduction the forfeiture of securities occurred on the expiry of different periods from one Member State to another, which led both to discriminatory treatment for traders and a distortion of the system of securities, the purpose of that system being to enable the Community to have precise knowledge of the market situation.

13 There was, in addition, the need, at the administrative level, to set a period for the definitive closure of files.

14 However, the Commission also emphasized, during the oral procedure, the importance, within the system of import and export licences, of the informational rôle played by the submission by traders to the competent national agencies of the proofs, in the form of Copy No 1 of the licence endorsed by the office where the customs formalities were completed, of completion of the import or export transactions.

15 In its submission, indeed, it is only by that means that the national agencies and, through them, the Community authorities, can obtain exact knowledge of the number of transactions actually effected on the basis of the licences.

16 As regards the problem of proportionality, it should be examined whether the penalty laid down in Article 3 of Regulation No 499/76 for failure to comply with the period for presentation of the proofs prescribed by that provision exceeds what is appropriate and necessary to attain the objective sought.

17 In this respect it should be recalled, on the one hand, as appears from the sixth recital in the preamble to Regulation No 193/75, that the system of securities is intended to guarantee that the obligation to import or export, which has been voluntarily undertaken, will be fulfilled during the period of validity of the licence issued for that purpose.

18 As already stated, pursuant to Article 18 (2) and (3) of that regulation the penalty laid down in case of failure to fulfil the obligation is, in essence, proportionate to the degree of that failure.

19 On the other hand, the provisions of Article 3 of Regulation No 499/76, prompted by "administrative reasons", provide not only for a period within which those proofs must be furnished but also the loss of the whole of the security in the event of failure to comply with that period.

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

21 Although, in view of the inconvenience caused by the belated production of proofs, the Commission was entitled to introduce the period laid down in Article 3 of Regulation No 499/76 for the furnishing of proof, it should have sanctioned failure to comply with that period only with a penalty considerably less onerous for those concerned than that prescribing the loss of the whole of the security and more closely allied to the practical effects of such an omission.

22 Indeed, even if administrative efficiency requires that files should not remain open indefinitely, it must, however, be noted that failure to comply with such a period will be exceptional in nature in that it is contrary to the very interests of the exporter or importer concerned, who will normally seek release of his security as soon as possible.

23 It is accordingly appropriate to reply to the question raised by the national court that Article 3 of Regulation No 499/76 is invalid.

Costs

24 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

25 As these proceedings are, in so far as the parties to the main action are concerned, 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,

in answer to the question referred to it by the Tribunal Administratif, Paris, by judgment of 22 March 1978, hereby rules:

Article 3 of Commission Regulation No 499/76 of 5 March 1976 is invalid.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 20 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President