In Case 42/79,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht [Administrative Court] Frankfurt am Main in the proceedings pending before the court between

MILCH-, FETT-, UND EIER-KONTOR GMBH Hamburg,

and

BUNDESANSTALT FÜR LANDWIRTSCHAFTLICHE MARKTORDNUNG [Federal Office for the Organization of Agricultural Markets], Frankfurt am Main,

on the interpretation of the concept of *"force majeure"* appearing in Article 4 (3) of Regulation (EEC) No 1308/68 of the Commission of 28 August 1968 on the sale of butter from public storage for exportation (Journal Officiel L 214 of 29 August 1968, p. 10),

THE COURT (First Chamber),

composed of: A. O'Keeffe, President of Chamber, J. Mertens de Wilmars and G. Bosco, Judges,

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

gives the following

JUDGMENT

Facts and Issues

1 — Facts and written procedure

1. Milch-, Fett- und Eier-Kontor GmbH (hereinafter referrred to as the "Eier-Kontor"), the plaintiff in the main action, which has its registered office in Hamburg, acquired from the German agricultural intervention agency, the Bundesanstalt für Landwirtschaftliche Marktordnung (hereinafter referred to as "the Bundesanstalt"), the defendant in the main action, some 168 tonnes of butter from storage at a reduced price during the period 21 July to 14 October 1970. The purchases were effected on the basis of the provisions of Regulation (EEC) No 1308/68 of the Commission of 28 August 1968 on the sale of butter from public storage for exportation. Under Article 3 of that regulation the butter had to be exported "within a period of 30 days of its sale by the intervention agency".

Eier-Kontor resold that butter to Butter-Import-Norden GmbH (hereinafter referred to as "Norden") which has its registered office in the free port of Hamburg: Eier-Kontor held shares in Norden. However, the 168 tonnes of butter in question never reached the free port of Hamburg since Norden's duly authorized agent [Prokurist], Mr Ehlers, misappropriated them and sold them on the domestic market.

In connexion with those events Mr Ehlers was sentenced by the Landgericht [District Court] Hamburg, by judgment of 3 April 1974, to a number of years' imprisonment *inter alia* for misappropriation with aggravating circumstances. The judgment of the Landgericht established that:

— Eier-Kontor and Norden were economically interdependent;

— Ehlers was employed by Eier-Kontor from 1 October 1968 to 31 May 1969; at that time one of the managers of Eier-Kontor was also manager of Norden;

— Ehlers was manager of Norden from 1 January to 30 June 1971.

The said judgment also establishes that Ehlers' misconduct "was particularly serious as he and his accomplices had acted with exceptionally great criminal determination and cunning". He and his accomplices had made excellent plans for all the criminal acts and had carried them out over a long period of time, continually thinking out fresh variations for their actions. Ehlers deceived the plaintiff, Norden, the defendant and the customs authorities. The criminal court finally stated that Ehlers had six previous convictions, three after being given a power of attorney by Norden and before the conclusion of the contract of sale between Norden and Eier-Kontor.

The Bundesanstalt first released the security prescribed in Article 4 of Regulation No 1308/68. However, when it discovered that the butter had not in fact been exported it requested Eier-Kontor to return the processing security to it and decided that the security must be considered forfeit, in accordance with Article 4 (3). That provision reads as follows:

"Save in cases of *force majeure* the security shall be forfeit if the butter is not exported within the period prescribed in Article 3".

The Bundesanstalt maintained that Eier-Kontor was liable for the wrongful acts of Mr Ehlers in his capacity as an employee of its subsidiary and that it could not avoid liability by relying on the principle of *force majeure* contained in that provision. Eier-Kontor on the other hand maintains that there is a case of *force majeure* within the meaning of the said provision.

2. The Verwaltungsgericht Frankfurt am Main, before which the case is pending, asks first whether the person to whom the intervention agency sold the butter is liable for the failure of the undertaking which bought the butter from it to put the butter to the use prescribed by Regulation No 1308/68 and secondly, whether Ehler's misappropriation of the butter constitutes with regard to Eier-Kontor a case of *force majeure* for the purpose of Community law.

In order to have these points clarified the Verwaltungsgericht decided on 22 February 1979 to stay the proceedings and to refer, pursuant to Article 177 of the EEC Treaty, the following questions to the Court of Justice:

"1. Does a case of *force majeure* within the meaning of Article 4 (3) of Regulation (EEC) No 1308/68 of the Commission of 28 August 1968 and the relevant case-law of the Court of Justice also arise if a duly authorized agent acting without permission and to the detriment of the exporting undertaking makes the exports impossible through criminal offences and, if the answer to this question is in the affirmative, is the knowledge of the persons acting for and responsible for the actions of the plaintiff (directors and shareholders) of the previous convictions of that duly authorized agent at the time of his appointment as such or afterwards relevant as regards the duty to take care?

2. Must the principles laid down in the judgment of the Court of Justice of 11 May 1977 in Joined Cases 99 and 100/76 also be applied, in addition to their application to Regulation No 1259/72 which is the basis of that case, to the Regulation mentioned in (1) above in such a way that the plaintiff must be liable for a wrongful act on the part of the undertaking with which it has entered into an agreement?"

3. The order for reference was received at the Court Registry on 12 March 1979.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice written observations were submitted by Milch-, Fett- und Eier-Kontor GmbH, represented by P. Wendt and H. E. Heyn, of the Hamburg Bar, by the Bundesanstalt für Landwirtschaftliche Marktordnung represented by Mr Grobosch and Mr Tiedemann, acting as Agents, and by the Commission of the European Communities, represented by J. Sack, a member of its Legal Department, acting as Agent.

The Court, upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without a preliminary inquiry.

It also decided pursuant to Article 95 (1) of the Rules of Procedure to assign the case to the First Chamber.

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

Both the parties to the main action and the Commission of the European Communities consider that the order of the questions drawn up by the national court should be reversed and the second question dealt with first since the problem of *force majeure* arises only if the purchaser is held liable for the misconduct of a subsequent purchaser of the butter.

Question 2

Eier-Kontor, the plaintiff in the main action, states that it has to admit that the objective of Regulation (EEC) No 1308/68 is undoubtedly the exportation of butter purchased at a reduced price from the intervention agency and that the attainment of that objective is ensured by the provision of a security. If the goods are not exported the security is forfeit. The purchaser indeed is not personally obliged to fulfil the obligation he entered into to export the butter since the resale of the butter on the domestic market is not prohibited by the provisions of Regulation No 1308/68 but there is no doubt that the security can be released only if the butter has been exported. The sole exception to that rule is in the case of *force majeure* the existence of which the plaintiff wishes to prove in the present case.

The *Bundesanstalt,* the defendant in the main action, observes that, although Regulation No 1308/68 does not prohibit the resale on the domestic market of intervention butter purchased at a reduced price, the purchaser nevertheless remains liable on pain of forfeiture of the security for the undertakings given by him to the intervention agency. If this were not the case it would be too easy for the persons concerned to evade their obligations by selling the butter to other purchasers on the domestic market.

Support for that view can be found in the judgment of the Court of Justice of 11 May 1977 in Joined Cases 99 and 100/76 concerning the interpretation of Regulation (EEC) No 1259/72 which also prescribes an obligation (in those cases an obligation to process butter) coupled with a security. In that decision it was not only held that the rights and obligations of the successful tenderer under Article 10 (5) of the said regulation are untransferable but it was also emphasized that it is necessary as a general rule to have an effective guarantee that the objectives of the Community provisions have been complied with.

Nevertheless if that were the end of the matter the position of the first purchaser who resells the butter for export would be less favourable than that of the purchaser who himself carries out the exportation: he would in fact be subject to the same obligations as the latter but would not, on the other hand, be able to rely on *force majeure* where his obligations were not fulfilled. It must thus be accepted that the person concerned may plead *force majeure* even in cases where the impossibility of exporting the butter intended for export confronts a subsequent purchaser.

The *Commission of the European Communities* observes that, unlike other more recent regulations, Regulation No 1308/68 has a very simple structure and does not regulate, *inter alia,* the question of a possible resale of butter on the domestic market.

It might be considered that the possibility of resale was not envisaged in view of the very short period (30 days) prescribed for the exportation but, since there is no provision prohibiting resale, it must not necessarily be assumed that a purchaser is obliged personally to implement the undertaking to export the butter.

Nevertheless, that does not mean that the purchaser is no longer liable to the intervention agency. Any other interpretation would unavoidably lead to the exclusion of any possibility of resale or to allowing the system established by Regulation No 1308/68 to collapse since the guarantee of exportation formed by the security could thus be evaded very easily.

Although the judgment delivered by the Court of Justice in Joined Cases 99 and 100/76 concerned a somewhat different situation, since the provision at issue, Regulation (EEC) No 1259/72, expressly authorized resales, the considerations set out in the grounds of that decision (in particular with regard to the need to ensure the effectiveness of the system of checks set up by the regulation) are equally applicable to this case.

If the exportation is not carried out the security is forfeit not only pursuant to Articles 3 and 4 of Regulation No 1308/68 but also pursuant to the contract governed by private law concluded with the intervention agency. It is true that the purchaser is not obliged personally to implement the obligation to effect the exportation, but pursuant to a general principle of the law of contract common to all the Member States, he is liable for the fault of the persons on whom he relies for the implementation of his contractual obligation.

It might perhaps be possible to stretch the interpretation of Article 4 (3) of Regulation No 1308/68 to mean that the purchaser is relieved of his contractual liability only if the *force majeure* affects him personally and not if, on the other hand, it relates to the third parties upon whom he relies to fulfil his obligation to export the butter. Nevertheless, the Commission does not wish to adopt such a narrow interpretation of the said provision and it is prepared to recognize that the purchaser may also rely upon *force majeure* relating to the persons upon whom he relies in order to fulfil his obligations.

The Commission accordingly proposes that the reply to the second question should be as follows:

"1. Article 4 (1) and (3) of Regulation (EEC) No 1308/68 of the Commission of 28 August 1968 must be interpreted to mean that the purchaser of the butter is obliged to export it and to provide security for fulfilment of that obligation in the form of a deposit. Although that obligation cannot be transferred the purchaser is not obliged to fulfil it personally and may have recourse to third parties or resell the butter".

Question 1

Eier-Kontor submits that in practical terms the court making the reference is asking to what extent the purchaser is liable for the actions of other persons in connexion with the obligation to export.

It must be recalled first of all that a person is clearly liable for his own actions which means in the case of an undertaking that it is liable for the *intra vires* acts of the natural persons who represent it. If that principle were applied to this particular case it would have to be held that Eier-Kontor could not itself be

held liable for the acts of a person who was not empowered under national law to represent it.

Where the person concerned, instead of himself fulfilling the obligation to export has recourse to third parties as representatives [Hilfsperson] (including in any event employees of an undertaking or freight or transport undertakings) German law recognizes the principle set out in Article 278 (1) of the Bürgerliches Gesetzbuch [Civil Code] whereby "A debtor is responsible for the fault of his legal representative and of persons whom he employs in performing his obligation, to the same extent as for his own fault". As the Commission has expressly admitted, that principle also applies in Community law.

What is ultimately the position of the subseqent purchaser? He is not bound by the instructions of the seller of the goods, only by the stipulations of the contract of sale. Nevertheless, according to German case-law he is regarded as an Erfüllungsgehilfe [agent of the obligor for the fulfilment of an obligation] since his cooperation is necessary for the performance of the obligor's export obligation.

The conduct of the subsequent purchaser is furthermore controlled by the purchaser who may ensure, by means of contractual agreement, that the obligation to export the goods is fulfilled. Nevertheless, in certain cases such agreements are unnecessary. Article 2 of Regulation (EEC) No 1041/67 in fact provides that supplies for victualling sea-going vessels are to be treated as exports from the Community. Under the German regulation of 24 January 1968 concerning EEC export refunds, adopted in implementation of Regulation (EEC) No 1041/67, goods "purchased by a ships' supplier in a free port" are to be treated as supplies for victualling vessels. Since Norden was in fact a ships' supplier with its registered office in the free port of Hamburg the sale of butter to it by the plaintiff constitutes not a resale on the domestic market but an export operation.

Norden must thus be regarded as Eier-Kontor's agent only in so far as it was required to transfer the butter from a national cold store to a warehouse situated in the free port. The dishonest Prokurist was in his turn an agent of an agent.

There would undoubtedly be a case of *force majeure* if the butter had been removed, prior to exportation, from the possession of the purchaser against his will as a result of the misconduct of a third party other than a representative of the purchaser. However, even an Erfüllungsgehilfe is no longer acting in implementation of the obligation of the purchaser but as an ordinary third party if he acts without the knowledge of the purchaser and contrary to his wishes. In such a case the purchaser is not liable for the acts of that person.

It would, however, be possible to arrive at a different conclusion if, as the national court envisages in the second limb of the first question, it were possible to maintain that Norden (or Eier-Kontor if it were held that Eier-Kontor in fact decided on appointments at Norden), in its choice of the duly authorized agent, was in breach of its duty to exercise due care and diligence [Sorgfaltspflicht].

Apart from the fact that in the present case Ehlers was appointed duly authorized agent at a time when he had no convictions the general question arises whether the engagement of an employee when it is known that he has a criminal

record by itself constitutes a failure to exercise due care and diligence.

In this connexion it should be remarked first that the criminal record in question may consist of minor offences which are not of a serious nature and which do not provide grounds for the apprehension that the person might commit serious crimes and secondly that from the point of view of the rehabilitation of criminals the personal impression given by the person concerned may outweigh knowledge of his previous convictions.

It must thus be concluded that such problems must be resolved on the merits of each case having regard to the circumstances, in particular to the nature and gravity of the offences but also on a personal appraisal of the individual in question.

The *Bundesanstalt* observes that in this case the butter was not exported because it had been misappropriated by an employee of the subsequent purchaser, Norden.

That cannot, however, be considered as case of *force majeure* even it were proved that Norden had exercised care in choosing its employees and had supervised them sufficiently. In fact *force majeure* is excluded where the person concerned is at fault. A principal is liable not only for his own fault but also for that of his legal representatives and agents.

This is a general principle of law which is recognized by the legal systems of all Member States and which, according to the case-law of the Court of Justice, thus forms an integral part of Community law.

If vicarious liability were excluded the risk of the purchaser would diminish as the numbers of his employees or intermediaries increased. However, a solution of this nature would be wholly irreconcilable with the requirements of an economic order which is based on a high degree of division of labour as the Community must be held to be.

The *Commission of the European Communities* considers that Eier-Kontor must at any rate be liable for the misconduct of the duly authorized agent of Norden and that it cannot therefore rely on the element of *force majeure* contained in Article 4 (3) of Regulation No 1308/68.

There are two means of showing that Eier-Kontor must be vicariously liable for the fault of Norden's duly authorized agent.

The first consists in emphasizing that the facts set out by the court making the reference establish that, from an economic point of view, Eier-Kontor and Norden were a single entity. Although from the legal point of view Norden must be considered as an independent legal person it may easily be shown that many reasons (of a tax, economic or organizational nature) may prompt an undertaking to establish an independent legal person rather than a branch (in this case the reason is that as a legal person Norden was able to choose the free port in Hamburg for its registered place of business). In fact, then, the sale of the butter to the Norden undertaking must be interpreted as if Eier-Kontor had entrusted the exportation to one of its branches. On the basis of those considerations it must therefore be concluded that Eier-Kontor is liable for the acts of Norden's employees in the same way as it is for the acts of its own employees.

If, on the other hand, it were accepted that the two undertakings are truly independent of each other, the same

conclusion is reached by considering the question from a different point of view. It is sufficient to observe that the general principle of law that a principal is liable for the acts of his agents also appears to apply where the representative of the successful tenderer in his turn entrusts the fulfilment of the obligation to export goods to other persons (in particular to his employees). Since the principal obligor is thus liable for his agent for the fulfilment of an obligation [Erfüllungsgehilfe] and the latter is liable in his turn for his own agent for the fulfilment of an obligation it follows that the fault of the latter must be considered as the fault of the principal obligor.

The question whether Eier-Kontor or Norden failed in their duty to exercise due care and diligence [Sorgfaltspflicht] is relevant only if the two legal arguments set out above are rejected. Nevertheless the point may be discussed.

In the present case, since Mr Ehler's first three convictions were pronounced after his appointment as duly authorized agent, it is not entirely justified to maintain that the undertakings in question should at any rate have revoked his authority itself or at least no longer have entrusted important functions to him. It may be considered that, having regard to the rehabilitation of criminals in society, there is a certain discretion which is ultimately dependent to a very large extent on the nature and gravity of the convictions. On the other hand it must be pointed out that, where an employee has been convicted of a criminal offence, the employer must supervise him particularly carefully. If the employer fails to exercise such vigilance he cannot rely on the principle of *force majeure*. That is the position in the present case of Eier-Kontor and Norden which, on the one hand, had an absolute duty to exercise strict supervision having regard to the extensive powers normally exercised by a duly appointed agent and which, on the other, cannot maintain that in any event such supervision would have been ineffective because of the cunning of Mr Ehlers as his misappropriations were ultimately discovered.

The Commission therefore proposes that the Court of Justice should reply as follows to the first question:

"2. a) A purchaser who is obliged to export butter pursuant to the provisions in question (Article 4 (1) and (3) of Regulation No 1308/68 is liable for the misconduct of a duly authorized agent of a company to which he resold the butter as though it were, the misconduct of his own employees since the duly appointed agent of the undertaking took part in the operations and in particular the exportation and as the legal and economic links between the two undertakings are so close that they must be considered as an economic entity in connexion with the acquisition and exportation of the butter.

b) A purchaser is also liable for the misconduct of the persons relied on by the intermediary who fulfils on his behalf the obligation to export the goods in question.

3. An undertaking which learns that one of its duly authorized agents has been convicted of a criminal offence is bound to institute special supervision and safeguards. If such measures do not amount to more than ordinary supervision the undertaking cannot seek to rely on the principle of *force majeure* within the meaning of Community law if the duly authorized agent is guilty of misappropriation."

III — Oral procedure

At the sitting on 27 September 1979 oral observations were submitted by the Bundesanstalt für Landwirtschaftliche Marktordnung, represented by Paul Tiedemann, acting as Agent, and the Commission of the European Communities, represented by Jörn Sack, of its Legal Department, acting as Agent.

The Bundesanstalt first of all states that, in its view, a principal is also liable for the criminal conduct of an agent fulfilling an obligation on his behalf and requests the Court to provide a definition of the concept of *force majeure* which has general scope and not restricted to Regulation No 1308/68.

The Commission of the European Communities first of all sets out its views on certain statements made by the plaintiff in the main action after the closure of the written procedure. Whilst it is true that Eier-Kontor is a shareholder in Norden (and Norden is therefore a subsidiary of Eier-Kontor) and that Ehlers was never a duly authorized agent of the plaintiff, but only of Norden, that is of no importance in relation to the submissions lodged by the Commission. The information appearing in the plaintiff's letter of amendment on the contrary shows very clearly that in reality Norden is merely a branch of Eier-Kontor which confirms the Commission's point of view. Finally, with regard to the concept of *force majeure* the Commission considers that it should be defined within the framework of Regulation No 1308/68.

The Advocate General delivered his opinion at the sitting on 15 November 1979.

Decision

By an order of 22 February 1979 which was received at the Court on 12 March 1979 the Verwaltungsgericht Frankfurt am Main referred to the Court of Justice, under Article 177 of the EEC Treaty, two questions on the interpretation of Regulation No 1308/68 of the Commission of 28 August 1968 on the sale of butter from public storage for exportation (Journal Officiel, L 214, 1968 p. 10).

2 The questions were raised in the course of an action between the Bundesanstalt für Landwirtschaftliche Marktordnung, in its capacity as the German agricultural intervention agency in the market in milk and milk products, and the plaintiff in the main action which, in the period between 21 July and 4 October 1970, purchased from that intervention agency certain quantities of butter from public storage at a reduced price pursuant to Regulation No 1308/68 of the Commission. In accordance with Article 3 of that regulation the butter should have been exported within a period of 30 days

after its sale by the intervention agency. The purchaser resold the butter in question to an undertaking which, however, failed to export it. In view of that the Bundesanstalt decided that the securities which had been provided by the first purchaser in accordance with Article 4 of the said Regulation No 1308/68 should be forfeit and it also claimed the reimbursement of the securities already released. The purchaser challenged that decision on the ground that the butter from storage had been diverted from its lawful destination by the duly authorized agent of the undertaking to which the butter had been resold and that, consequently, its diversion constitutes a case of *force majeure* which, pursuant to Article 4 (3) of Regulation No 1308/68, means that the securities lodged must be released.

3 The national court found that economic links existed between the purchaser and the said undertaking and that the duly authorized agent of the latter undertaking had from 1 October 1968 to 31 May 1969 been an employee of the purchaser and had criminal convictions, a number of which antedated the last sale of the butter in question, and submitted to the Court the following two questions:

"1. Does a case of *force majeure* within the meaning of Article 4 (3) of Regulation (EEC) No 1308/68 of the Commission of 28 August 1968 and the relevant case-law of the Court of Justice also arise if a duly authorized agent acting without permission and to the detriment of the exporting undertaking makes the exports impossible through criminal offences and, if the answer to this question is in the affirmative, is the knowledge of the persons acting for and responsible for the actions of the plaintiff (directors and shareholders) of the previous convictions of that duly authorized agent at time of his appointment as such or afterwards relevant as regards the duty to take care?

2. Must the principles laid down in the judgment of the Court of Justice of 11 May 1977 in Joined Cases 99 and 100/76 also be applied, in addition to their application to Regulation No 1259/72 which is the basis of that case, to the regulation mentioned in (1) above in such a way that the plaintiff must be liable for a wrongful act on the part of the undertaking with which it has entered into an agreement?"

4 Those questions, taken together basically raise two problems: the first preliminary point is whether Regulation No 1308/68 of the Commission of 28 August 1968 must be interpreted to mean that a purchaser of butter from public storage at a reduced price can, when reselling that butter to a third

party for exportation, transfer to the third party the obligations entered into by the purchaser *vis-à-vis* the agricultural intervention agency or if on the other hand the purchaser remains responsible to that agency with regard to the prescribed use of the goods and is accordingly liable for any wrongful conduct on the part of the undertaking with which he has entered into an agreement. The second problem is, more particularly, whether, where the exportation of the butter resold to a third party is rendered impossible by criminal offences committed by a duly authorized agent of that third party in the circumstances set out by the national court, the first purchaser of the butter can rely on the principle of *force majeure* embodied in Regulation No 1308/68 recover his security.

The first problem

5 The Court of Justice, in its judgment of 11 May 1977 (Joined Cases 99 and 100/76 "*De Beste Boter*" *and Hoche* [1977] ECR 861) concerning the interpretation of Regulation (EEC) No 1259/72 of the Commission of 16 June 1972 on the disposal of butter at a reduced price to certain Community processing undertakings (Official Journal, English Special Edition 1972 (II), p. 559) ruled that the effectiveness of the arrangements established by that regulation, which provides for the sale of butter from storage at a reduced price to certain undertakings on condition that they give an undertaking guaranteed by a security that they will process that butter or have it processed into certain foodstuffs, would be "seriously compromised if the acceptance of an obligation to process by a subsequent purchaser who was not himself under any legal obligation to the competent authority were regarded as sufficiently discharging an undertaking entered into by the successful tenderer against a deposit". The Court accordingly concluded that "even where the successful tenderer does not himself carry out processing it is necessary to establish that the processed products comply with the conditions laid down in Article 6 (1) (c) of the regulation and that they have been produced within the period therein prescribed before the deposit may be released".

6 Regulation No 1308/68 of the Commission closely resembles the said Regulation No 1259/72 both with regard to its objectives and the essential content of its provisions. Regulation No 1308/68 in fact is also intended to provide a remedy for the large quantities of butter held in public storage by the agricultural intervention agencies and for that purpose makes special arrangements for the sale by such agencies of surplus butter at a reduced price to persons who undertake to export it to non-member countries within

a specified period. Like Regulation No 1259/72 Regulation No 1308/68 further provides in Article 4, in order to ensure that the goods reach their proper destination, that a purchaser must lodge a security which, save in cases of *force majeure,* is forfeit, if the butter is not exported within the said period and is released only for quantities proved to have been exported. The differences between the two regulations with regard to the proper destination of the butter from storage — disposal on the world market in the case of Regulation No 1308/68 and distribution to the food-manufacturing industry in the case of Regulation No 1259/72 — relate only to the choice of the most appropriate method for creating fresh opportunities for disposing of the surplus butter and do not concern the structural aspects of the two regulations which remain essentially similar.

7 In view of that basic similarity it follows that the principles laid down by the Court of Justice in the context of Regulation No 1259/72 concerning the obligation of the purchaser of butter from storage to ensure that it reaches its proper destination also apply in the context of Regulation No 1308/68. The fact that the latter regulation does not expressly contain a provision analagous to Article 10 (5) of Regulation No 1259/72 in accordance with which "rights and obligations arising out of the invitation to tender shall not be transferable" does not mean that Regulation No 1308/68 intended to enable the purchaser to free himself of the obligation to ensure that the butter is actually exported within the period prescribed by the regulation by reselling the butter. For the reasons set out above such a right would in fact open a loophole in the system laid down by Regulation No 1308/68 to such an extent as to jeopardize its objectives and operation. Furthermore the provisions of Article 4 (3) of the said regulation, which render release of the security dependent on the actual exportation of the butter, lay down clearly the condition that, so long as the butter has not been exported, the first purchaser of the butter from storage, who has in the meantime resold it, may not recover his security but, save in cases of *force majeure,* is liable for the acts of the person with whom he has entered into an agreement.

8 For those reasons it is necessary to reply that Regulation No 1308/68 of the Commission must be interpreted to mean that where the purchaser of butter from storage does not himself export the butter but resells it to a third party for export he is liable for any wrongful act on the part of the other contracting party and can recover his security only if the butter is actually exported within the period prescribed by the regulation.

The second problem

9 The questions submitted also raise the problem whether a purchaser of butter from storage who has transferred it to a third party in order to have it exported can, if such exportation becomes impossible as a result of criminal conduct on the part of a duly authorized agent of that third party and to its detriment, free himself of his obligation to the intervention agency regarding the prescribed destination of the goods and recover his security in reliance on the principle of *force majeure* embodied in the first subparagraph of Article 4 (3) of Regulation No 1308/68.

10 The objectives and the provisions of the relevant agricultural legislation show that the concept of *force majeure* within the meaning of the said first subparagraph of Article 4 (3) must be understood as referring to absolute impossibility caused by abnormal circumstances unrelated to the purchaser of the butter from storage, the consequences of which could not have been avoided except at the cost of excessive sacrifices, despite the exercise of all due care. Whilst Regulation No 1308/68 does not contain any provisions formally prohibiting the resale of butter from storage the fact none the less remains that the nature of the operations necessary for the exportation of the product as prescribed, which do not call for the intervention of specialized undertakings, and the shortness of the period allowed for the exportation show that under the system set up by Regulation No 1308/68 the butter sold by the intervention agency was not normally intended to form the subject-matter of subsequent commercial transactions within the Community. If, in spite of the background of those provisions, the first purchaser of the butter from storage decides to resell it to a third party for the purposes of exportation he thereby undertakes, with regard to the agricultural intervention agency, all the risks which a diligent trader can and should reasonably foresee in the context of that transaction, including that of misappropriation of the butter through the fraudulent conduct of a duly authorized agent of the subsequent purchaser. The possibility of such conduct was not a risk which could in no way have been foreseen by the reseller, especially in the circumstances described by the national court. Consequently, the fact that, as a result of the said misappropriation, the reseller was unable to ensure that the goods were actually exported cannot be considered as an exceptional and abnormal circumstance fulfilling the conditions for a case of *force majeure* within the meaning of the first subparagraph of Article 4 (3) of Regulation No 1308/68 in such a way as to release the initial purchaser of the butter from storage from his obligation to the intervention agency to ensure that the butter reaches the proper destination.

11 For those reasons it is therefore appropriate to give the reply to the national court that where the purchaser of the butter from storage referred to in Regulation No 1308/68 of the Commission of 28 August 1968 resells it to a third party for export in accordance with that regulation, the fact that it is impossible to export the butter because it has been diverted from its proper destination by the criminal acts of a duly authorized agent of that third party to the detriment of the latter does not constitute a case of *force majeure* within the meaning of the first subparagraph of Article 4 (3) of the said regulation and consequently does not lead to the release of the security provided in accordance with Article 4 (1) of that regulation in respect of consignments of butter which have not been exported.

Costs

12 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable; as these proceedings are, in so far as the parties to the main action are concerned, a step in the proceedings before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main, by an order of 22 February 1979, hereby rules:

1. **Regulation (EEC) No 1308/68 of the Commission must be interpreted to mean that where the purchaser of butter from storage does not himself export the butter but resells it to a third party for export he is liable for any wrongful act on the part of the other contracting party and can recover his security only if the butter is actually exported within the period prescribed by the regulation.**

2. **Where the purchaser of the butter from storage referred to in Regulation No 1308/68 of the Commission of 28 August 1968 resells it to a third party for export in accordance with that regulation, the fact that it is impossible to export the butter because it has been diverted from its proper destination by the criminal acts of a duly authorized**

agent of that third party to the detriment of the latter does not constitute a case of *force majeure* within the meaning of the first subparagraph of Article 4 (3) of the said regulation and consequently does not lead to the release of the security provided in accordance with Article 4 (1) of that regulation in respect of consignments of butter which have not been exported.

O'Keeffe Mertens de Wilmars Bosco

Delivered in open court in Luxembourg on 13 December 1979.

A. Van Houtte
Registrar

A. O'Keeffe
President of the First Chamber

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 15 NOVEMBER 1979 [1]

Mr President,
Members of the Court,

1. The proceedings for a preliminary ruling to which my opinion relates concern the interpretation of Article 4 (3) of Regulation (EEC) No 1308/68 of the Commission of 28 August 1968 on the sale of butter from public storage for exportation and relates in particular to the definition of the concept of *force majeure* embodied in that article. Clarification was also requested of the scope of principles laid down in the judgment of the Court of 11 May 1977 in Joined Cases 99 and 100/76 concerning the extent of the obligations and liability of persons acquiring butter at a reduced price from national intervention agencies.

I shall provide a brief summary of the facts.

In the period from 21 July to 14 October 1970 the German undertaking Milch-, Fett- und Eier-Kontor (hereinafter referred to as "Eier-Kontor") bought from the German intervention agency (the Bundesanstalt für Landwirtschaftliche Marktordnung, hereinafter referred to as "the Bundesanstalt") some 168 tonnes of butter in a number of consignments at the particularly advantageous price prescribed by the said regulation. The butter had to be exported within 30 days of sale. Eier-Kontor paid

1 — Translated from the Italian.