OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 24 May 1989 *

Mr President,
Members of the Court,

1. The case in which a question has been submitted to the Court by the College van Beroep voor het Bedrijfsleven (hereinafter referred to as 'the national court') concerns the validity of Article 13a of Commission Regulation (EEC) No 1687/76, inserted in that Regulation by Regulation (EEC) No 45/84.[1] Regulation (EEC) No 1687/76 contains the Community rules for verifying the use and/or destination of products from intervention.[2]

In the proceedings before the national court, the Inspecteur der Invoerrechten en Accijnzen (Inspector of Customs and Excise), Amersfoort (hereinafter referred to as 'the Inspector'), refused, on behalf of the defendant (the Minister for Agriculture and Fisheries), the request which the second plaintiff, as the consignor, acting on behalf of the first plaintiff, had submitted for an exemption, under the arrangements for returned goods, from agricultural levy on the importation of a consignment of skimmed-milk powder. As will be shown in greater detail hereinafter, the arrangements for returned goods are designed to exempt from customs duty goods which originally came from the Community and are re-imported into the Community after exportation from it. The dispute was brought before the national court because the plaintiffs contested the decision to refuse to treat the goods as returned goods.

The refusal concerns a consignment of skimmed-milk powder from the stocks of the German intervention agency which was exported in the course of 1984 by Schenker (hereinafter referred to as 'the exporter') on behalf of the Community as food aid in the framework of the world food programme.[3] It is clear from the notice of invitation to tender for the consignment in question[4] that the order was placed in the form of a cif contract, which means *inter alia* that the exporter with which it was placed, namely Schenker, must bear the costs of insurance.[5] When the goods reached their destination in the Middle East, it was found that mould and deterioration in the packaging had made the milk powder unfit for use as food aid. It became clear at the hearing that the security for delivery, which had been lodged by the exporter in accordance with Article

* Original language Dutch

1 — Commission Regulation (EEC) No 45/84 amending Regulation (EEC) No 1687/76 laying down common detailed rules for verifying the use and/or destination of products from intervention; OJ 1984, L 7, p 5

2 — Commission Regulation (EEC) No 1687/76 of 30 June 1976, OJ 1976, L 190, p 1

3 — See Council Regulation (EEC) No 1278/84 of 7 May 1984 laying down the implementing rules for 1984 for Regulation (EEC) No 3331/82 concerning food-aid policy and food-aid management, OJ 1984, L 124, p 1, and Commission Regulation (EEC) No 1354/83 of 17 May 1983 laying down general rules for the mobilization and supply of skimmed-milk powder, butter and *butteroil* as food aid, OJ 1983, L 142, p 1, as amended by Regulation (EEC) No 1986/83, OJ 1983, L 187, p 29, see in particular also Commission Regulation (EEC) No 3295/84 of 23 November 1984 on the supply of various lots of skimmed-milk powder as food aid, OJ 1984, L 309, p 16, and Annex E thereto

4 — See Annex E cited in footnote 3 above

5 — Article 18(2) of Regulation (EEC) No 1354/83, from Article 18(8) of the same Regulation it is moreover clear that he must bear the risk of deterioration until the time of shipment

4(1) of Regulation (EEC) No 1354/83 when he removed the goods to be transported to the Middle East, was released as soon as it became clear that the goods were damaged.[6] The first plaintiff, a Netherlands undertaking, then purchased the consignment and shipped it back to Bremen, from where it had been shipped to the Middle East, and on 15 June 1985 declared it for home use there as returned goods.

The Hauptzollamt Bremen-Nord refused to accept the declaration under the arrangements for returned goods and the Oberfinanzdirektion Bremen rejected the complaint submitted against that refusal by decision of 28 October 1985. The first plaintiff then shipped the consignment to the Netherlands and placed it in a warehouse belonging to the second plaintiff. On 17 January *1986* the plaintiffs applied to the Netherlands customs authorities to import the consignment under the arrangements for returned goods. On 5 January *1987* the Inspecteur van Financiën rejected their application and on 8 January 1987, since no security had been lodged, imposed on the second plaintiff an agricultural levy of HFL 848 374.80. An action challenging those two decisions was brought before the national court.

6 — It is not clear whether the security was released on the basis of Article 26(2) (proof that the conditions on use and/or destination have been satisfied) or on the basis of Article 26(9) (*force majeure*) of Regulation (EEC) No 1354/83. The answer to this question is in any event irrelevant for the purposes of the question of law at issue. It is clear from Article 16(3) of the same Regulation that the rights and obligations arising from the award are not transferable. This means that the legal relationship between Schenker and the German intervention agency was not transferred to Vreugdenhil.

The Community rules

2. The dispute must be seen in the context of the customs treatment applicable to goods returned to the customs territory of the Community. The second and third recitals in the preamble to the basic Council Regulation applicable, which is Regulation (EEC) No 754/76,[7] state as follows:

'... certain goods which are imported into the customs territory of the Community to be entered for free circulation may previously have been exported from that territory;

whereas where, at the time of their exportation, such goods satisfied the conditions laid in Articles 9 and 10 of the Treaty, and where such exportation was not carried out under outward processing arrangements, the re-importation of such goods into the Community must be free of import duties applicable to them'.

Those arrangements for 'returned goods' are designed to abolish import levies of all kinds where goods originating in the customs territory of the Community are re-imported into the Community. An exception is made to that principle, however, as is clear from the fifth recital in the preamble to the Regulation:

7 — Council Regulation (EEC) No 754/76 of 25 March 1976, OJ 1976, L 89, p. 1

'. . . in order to prevent any speculation, exemption must be refused where goods returned to the customs territory of the Community are goods which, at the time of export, were the subject of customs formalities with a view to the grant of refunds or other amounts due upon export within the framework of the common agricultural policy; whereas derogation from this principle may however be allowed, provided that the sums paid out are refunded or that all measures are taken to avoid payment, where evidence is furnished . . . that it is on account of circumstances not brought about by the exporter that the goods are returned to the customs territory of the Community'.

'(1) Where the provisions of Article 2(2) of Council Regulation (EEC) No 754/76 apply:

the security referred to in Article 13(1) shall be forfeit if it has not yet been released,

an amount equivalent to the security shall be payable if the latter has already been released.'

The policy objective expressed in the first half of the fifth recital (exclusion of exemption) was achieved in Article 2(1)(b) of basic Regulation (EEC) No 754/76 and the objective expressed in the second half (permitted derogations) was achieved in Article 2(2) of the Regulation. The text of Article 2 as applicable at the material time is set out in the Report for the Hearing (in section 1).

3. At the material time the aforementioned Commission Regulation (EEC) No 1687/76 of 30 June 1976 contained the provisions on verification with regard to products from intervention stocks. As I have already mentioned, it was by means of an amending regulation, namely Commission Regulation (EEC) No 45/84 of 6 January 1984, that the contested Article 13a was inserted in Regulation (EEC) No 1687/76. Article 13a is made up of several parts. Article 13a(1) provides as follows:

Thus Article 13a(1) amplifies Article 2(2) of Council Regulation (EEC) No 754/76. As already explained, Article 2(2) lays down the derogations from the principle of non-exemption contained in Article 2(1): it determines in which cases and subject to what condition goods which are excluded from the category of 'returned goods' in Article 2(1)(b) because they 'were the subject of customs export formalities with a view to obtaining refunds and other amounts granted on exportation within the framework of the common agricultural policy' may none the less be considered to be returned goods. This exceptional recognition of the goods as returned goods is subject to the condition that 'it is established that the amounts granted have been repaid or that all measures have been taken . . . for such sums to be withheld'. It is precisely this condition which is amplified in Article 13a(1), which states that the security designed to guarantee that goods from intervention reach their destination must be declared forfeit, or that if it has already been released, an amount equal to the security must be paid.

Article 13a(2) (and (3)) then lays down a presumption which has a pecuniary consequence:

'(2) Where products for which a security, as provided for in Article 13(1), was lodged, leave the geographical territory of the Community without the customs exports formalities for obtaining a refund being completed, those formalities shall, for the purposes of the application of Regulation (EEC) No 754/76, be regarded as having been completed and the provisions of paragraph 1 shall apply.

(3) The amount of the security specified in paragraphs 1 and 2 shall be regarded as a forfeited security within the meaning of Article 2 of Council Regulation (EEC) No 352/78'.

The effect of the presumption contained in Article 13a(2) is as follows: where goods from intervention stocks are reimported into the Community, it is assumed first of all that the condition laid down in Article 2(1)(b) of Regulation (EEC) No 754/76 is satisfied, that is to say it is assumed that when the goods left the Community the customs export formalities with a view to obtaining refunds (or other agricultural amounts) were completed, and secondly Article 13a(1) is applicable, that is to say the security lodged (and not released) or if the security has already been released an amount equal to the security is declared forfeit.

The result of this presumption is two-fold. First of all, a refund (or some other agricultural amount) is considered to have been paid in respect of all goods from intervention. By virtue of Article 2(1)(b), they may therefore no longer have the status of returned goods. Since the presumption operates only in cases in which no formalities were in fact completed in order to obtain a refund (or some other agricultural amount) and in which no such amount was therefore paid, it is impossible to repay a refund not received and thus to benefit from one of the derogations provided for in Article 2(2), for example in the case in which the lot is re-exported to the Community because it is defective. Secondly, the consequence in monetary terms of Article 13a(1) takes effect: before the goods may be reimported, security (not yet released or re-lodged) must be forfeit, or, if the security has already been released, a sum equal to the delivery security applicable to the consignment must be paid.

In the present case in which skimmed-milk powder has been exported as food aid, the situation is as follows. In accordance with Article 4(1) Regulation (EEC) No 1354/83, cited in footnote 3, which lays down general rules for the mobilization and supply of skimmed-milk powder and similar products as food aid, the exporter was required to lodge a delivery security equal to the intervention price of the product plus 10%. This security lodged by the exporter was,

however, contrary to the rules applicable in other export situations, not transferable; this is clear from Article 16(3) of Regulation (EEC) No 1354/83.[8] Under Article 13a(2), a fresh security of the same amount therefore had to be lodged by those wishing to return the products from intervention to the Community, namely the applicants, and this they do *not* do; consequently, an agricultural levy was imposed.

4. Subsequent to the facts which gave rise to the action before the national court, the Council, by Regulation (EEC) No 1147/86 of 17 April 1986,[9] amended Article 2 of Regulation (EEC) No 754/76 on returned goods by adding, in Article 2(1)(b) a more general exclusion clause. Since both the plaintiffs and the Commission derive a line of argument from this addition, it is worth comparing the amended provision with the contested Article 13a.

The following second indent was added to Article 2(1)(b) of Regulation No 754/76:

'(1) (The following shall not be considered to be returned goods:

. . .

(b) goods:

. . .

or)

for which a financial advantage other than such refunds or other amounts has been granted within the framework of the common agricultural policy, with the requirement that the said goods be exported.'

The introductory section of Article 2(2) was amended as follows:

'(2) Notwithstanding paragraph 1(b), provided it is established, as the case may be, that the refunds or other amounts paid have been repaid or that all measures have been taken by the competent authorities for such refunds or other amounts to be withheld, or that any other financial advantages granted have been cancelled, goods referred to in the said paragraph shall be considered to be returned goods if they: . . . '.

According to the Commission, the differences between this and Article 13a are as follows. First of all, the Council provision might be wider and more extensive in scope: the second indent of Article 2(1)(b) as cited above covers situations which are outside the scope of Commission Regulation (EEC) No 1687/76 because they do not concern

8 — 'The rights and obligations arising from the award shall not be transferable'

9 — Council Regulation (EEC) No 1147/86 amending Regulation (EEC) No 754/76 on the customs treatment applicable to goods returned to the customs directory of the Community, OJ 1986, L 105, p. 1

products from intervention. The Commission cites goods exported under an EXIM system, [10] beef and veal exported from stocks receiving special storage aid, [11] and exportation outside the Community of sheepmeat for which a slaughter premium has been paid. [12]

Secondly, the fact that the Council Regulation amends Article 2(1)(b) and Article 2(2) means that Article 2(2) also applies, that is to say that if the financial advantages paid are reimbursed the status of returned goods may be obtained for goods which fall into one of the three categories defined in paragraph 2, for example because they are defective. Strictly speaking, the way in which repayment would be made under the new arrangements introduced by the Council Regulation is of no importance in this case, which pre-dates that Regulation. Nevertheless, the Court asked the Commission a question in this regard, and the Commission informed the Court that in its view Article 13a adopted by the Commission (which has since been reproduced in its entirety in a new Article 19; see paragraph 5 below) is still the implementing provision. Under that implementing rule, the 'advantage . . . granted' in cases such as that before the Court must be regarded as equal to the security lodged in order to ensure that the goods reach their destination outside the Community, that is to say 110% of the intervention price. If this view is accepted, the second difference compared with the situation prior to the Council Regulation is practically inexistent (see also paragraph 12 below).

5. In order to give a full chronological account I would also point out that, in spite of the aforesaid amendment to Article 2 of Council Regulation (EEC) No 754/76, the Commission nevertheless reproduced Article 13a of its implementing Regulation (EEC) No 1687/76 in its entirety in Article 19 of its new Regulation (EEC) No 569/88 of 16 February 1988. [13] As already stated, the new Article 19 is, in the Commission's view, a rule implementing the amended Article 2 of Regulation (EEC) No 754/76.

The arguments of the parties

6. Before the national court the plaintiffs put forward four arguments, only one of which has been submitted to the Court: it concerns the Commission's lack of competence to insert the contested Article 13a into Commission Regulation (EEC) No 1687/76 by means of Regulation (EEC) No 45/84. I would refer to the Report for the Hearing for a summary of the observations of the parties. In this Opinion I shall confine myself to the basic reasoning of the

10 — These are rules which, instead of providing for export refunds, give the right to import specified quantities of the same product free of import duties. These rules are regularly applied in the beef and veal sector and were for a long time also applied in the fats and oils sector.

11 — Article 7 of Commission Regulation (EEC) No 2437/87 of 11 August 1987 providing for the grant of private storage aid fixed at a standard rate in advance in respect of carcasses, half-carcasses, hindquarters and forequarters from adult male bovine animals; OJ 1987, L 225, p. 13.

12 — See Commission Regulation (EEC) No 3916/88 of 15 December 1988 extending the period of validity of the measures provided for by Regulation (EEC) No 3191/80 on transitional measures concerning non-recovery of the variable slaughter premium for sheepmeat and goatmeat products exported from the Community; OJ 1988, L 347, p. 57.

13 — Regulation (EEC) No 569/88 laying down common detailed rules for verifying the use and/or destination of goods from intervention; OJ 1988, L 55, p. 1

plaintiffs and the Commission. Before doing so I would point out that since this question is still of some relevance another argument put forward by the plaintiffs before the national court concerns the breach by the Netherlands authorities of the principles of legal certainty and protection of legitimate expectation (see also paragraph 14 below).

The plaintiffs consider that the question of competence submitted to the Court should be regarded as a conflict between Regulation (EEC) No 754/76, a Council Regulation adopted on the basis of Articles 28, 43 and 235 of the Treaty, after consultation of the European Parliament, and Regulation (EEC) No 45/84, a Commission Regulation which as such could not derogate from the former Regulation.

The plaintiffs claim that, by adding Article 13a to Commission Regulation (EEC) No 1687/76 on verifying the use and/or destination of products from intervention, the Commission usurped the powers of the Council to amend basic Regulation (EEC) No 754/76 on the customs treatment applicable to returned goods. In their view, the sentence

'Where products ... leave the geographical territory of the Community without the customs export formalities for obtaining a refund being completed, those formalities shall, for the purposes of the application of Regulation (EEC) No 754/76, be regarded as having been completed and the provisions of paragraph 1 shall apply'

contained in Article 13a(2) in practice 'erases', for the products in question, the phrase

'which ... were the subject of customs export formalities with a view to obtaining refunds and other amounts granted on exportation within the framework of the common agricultural policy'

contained in Article 2(1)(b) of basic Regulation (EEC) No 754/76.

In their observations, the plaintiffs refer to the judgments of the Court, and in particular to its judgments in *Tradax*[14] and *Compagnie Continentale*.[15] They define their criticism more precisely by stating that Article 15(2) of Council Regulation (EEC) No 754/76 expressly confers on the Commission power to adopt the provisions necessary for the application of Article 2(2) in particular. Article 15(2) provides that this power is to be exercised according to the 'Committee on Duty-Free Arrangements' procedure.[16] The Commission used this power in Regulation (EEC) No 2945/76 of 26 November 1976.[17] The fact that this

14 — Judgment of 10 March 1971 in Case 38/70 *Tradax* v *Einfuhr und Vorratsstelle Getreide* [1971] ECR 145, chiefly at paragraph 10, second sentence.

15 — Judgment of 10 March 1971 in Case 58/70 *Compagnie Continentale* v *Hoofdproduktschap voor Akkerbouwprodukten* [1971] ECR 163, paragraph 15.

16 — This Committee was set up by Article 7 of Regulation (EEC) No 1798/75 of the Council of 10 July 1975 on the importation free of Common Customs Tariff duties of educational, scientific and cultural materials; OJ 1975, L 184, p. 1. Article 9 of that Regulation prescribes the procedure: the Committee gives an opinion on a draft submitted by the Commission. If the proposed measures conform with the opinion of the Committee acting by a weighted majority, the Commission may adopt the text. If the proposed measures do not conform with the opinion of the Committee, the Commission forthwith submits a proposal to the Council, which acts by a qualified majority. If after three months the Council has not acted, the proposed measures are adopted by the Commission.

17 — Regulation (EEC) No 2945/76 laying down provisions for the implementation of Council Regulation (EEC) No 754/76 on the customs treatment applicable to goods returned to the customs territory of the Community; OJ 1976, L 335, p. 1.

procedure was not followed when Regulation (EEC) No 45/84 was adopted constitutes a breach of an essential procedural requirement which renders the Regulation void.

7. The Commission contends that it had power to adopt the Regulation and states that in regard to the common agricultural policy it has a wide implementing power, as was recognized by the Court in the *Rau* case, [18] and that in this case it adopted a measure to prevent abuse or speculation. It stresses the fact that Commission Regulation No 1687/76, which was amended by Commission Regulation (EEC) No 45/84, contains general rules for controlling agricultural products from intervention in the framework of the various organizations of the market. The wide implementing power enjoyed by the Commission with regard to organizations of the market is therefore the legal basis for the contested Article 13a.

The Commission then states that it does not agree with the way in which the question of law is formulated as a conflict between Council regulations which take precedence, on the one hand, and Commission regulations, on the other. It acted within the ambit of its power in respect of the organization of the markets. The matter is therefore rather more than a question of the delimitation of autonomous powers. In the exercise of such powers, [19] it is inevitable that rules adopted pursuant to an autonomous power will have an impact on the scope of the other autonomous power and vice versa.

Since the Commission was authorized on the basis of its power in agricultural matters, it was not bound to follow the 'Committee on Duty-Free Arrangements' procedure since that procedure concerns the adoption of detailed rules for implementing customs rules.

Assessment of the arguments concerning competence

8. The first question which must be answered is whether the judgments of the Court relied upon by the parties are in fact of use in this case. The applicants rely upon the judgment in *Tradax*, in which the Court stated in the third sentence of paragraph 10 that an implementing regulation not directly based on Article 43(2) of the Treaty could not derogate from the basic regulation to which it was subordinate. The Commission relies upon the judgments in *Rau* and *Franken* in which the Court recognized that it had a wide implementing power for the implementation of the basic regulation, that is to say for the implementation of the Council Regulation applicable to a certain agricultural sector which introduces a common organization of the market for that sector.

The present case concerns the relationship between Council Regulation (EEC) No 754/76 on the customs treatment applicable to returned goods and Commission Regulation (EEC) No 1687/76 on the verification of the use and/or destination of products from intervention. Council Regu-

18 — Judgment of 11 March 1987 in Joined Cases 279, 280, 285 and 286/84 *Rau* v *Commission* [1987] ECR 1069, paragraphs 14 and 15.

19 — Judgment of 15 May 1984 in Case 121/83 *Zuckerfabrik Franken* v *Hauptzollamt Würzburg* [1984] ECR 2039, paragraph 13.

lation (EEC) No 754/76 is directly based on three articles of the Treaty, namely Article 28 (Common Customs Tariff), Article 43 (common agricultural policy) and Article 235. Commission Regulation (EEC) No 1687/76 is not directly based on the Treaty. It is based on provisions in the various basic agricultural regulations which instruct the Commission to lay down more detailed rules on intervention.[20] We are not therefore concerned with the same situation as in the *Tradax* and *Continentale* cases, because the Council Regulation which the applicants maintain is affected by the contested Commission Regulation No 45/84 is not the basic regulation on which the contested regulation is based. The problem arising is also different, however, from that in the *Rau* and *Franken* cases because the question now before us is whether a wide implementing power conferred on the Commission in the framework of the organization of agricultural markets permits it to derogate from rules which the Council has adopted in other spheres, such as that of the Common Customs Tariff.

9. The question of competence which has arisen is essentially a question of the precedence which must be given to two objectives. On the one hand, there is the objective of combating and preventing any abuse in order that Community funds are used as responsibly as possible in an area as sensitive as agriculture, and more especially as regards goods from intervention. On the other hand, there is the objective of treating undertakings fairly on the reimportation of goods into the customs territory of the Community.

As regards the first objective, in its judgment in *Rau* the Court linked the power of the Commission to adopt implementing measures with the rapid developments on the agricultural markets subject to regulation and with the need which may arise therefrom to act quickly and effectively. In a later judgment[21] the Court stated that the Commission was justified in adopting a measure which effectively restricted a right conferred by the basic regulation, in exercising its implementing power, because it clearly referred to a concrete likelihood of abuse. In that case the danger of abuse was inherent in the existence of different rules concerning import refunds in different sectors.

The abuses which the Commission had in mind in this case are stated in the recital to the contested amending regulation, Regulation (EEC) No 45/84:

'(second recital) . . . whereas products from intervention intended for export and exported, whether with or without a refund, should be prevented from being reimported as Community products . . .

20 — See, for example, Article 11(5) and 26(3) of Regulation No 136/66/EEC of the Council on oils and fats, cited in the preamble to Regulation (EEC) No 1687/76 and, for the milk-products sector, Article 6(7) and Article 7(5) of Regulation (EEC) No 804/68, OJ, English Special Edition 1968 (I), p 176

21 — See the judgment of 14 February 1989 in Case 13/88 *Knoeckel* v *Hauptzollamt Landau* [1989] ECR 337, in particular paragraph 28.

(third recital) whereas the selling price of products from intervention may be below the market price; whereas the difference between the two prices may be greater than the import duties; whereas this situation could give rise to abuse . . .

(fourth recital) whereas in cases where products from intervention are reimported into the Community in accordance with Article 3(1) of Council Regulation (EEC) No 754/76, they should be prevented from being imported into the Community at a price below the Community price; whereas, accordingly, provision should be made for payment at an amount equivalent to the security in cases where the latter has already been released'.

10. As regards the second objective, regarding the fair treatment of undertakings when goods are reimported into the customs territory of the Community, it will be remembered that the Council itself had in mind possible speculation in Regulation No 754/76. That is why exemption was in principle refused for goods which were the subject of customs formalities with a view to the grant of refunds or other amounts. Derogation from this principle was allowed only in clearly defined cases where it could be established that the amounts granted were not paid out or were refunded (see paragraph 3 above).

In its observations, the Commission states that the Council, by excluding from the arrangements for returned goods solely goods for which refunds were granted, had been thinking of the *quod plerumque fit* and that, as soon as it was aware that the arrangements for returned goods were used for goods from intervention stocks, it was bound to prohibit such a practice as an improper use of the rules and speculation to the detriment of the Community.

Such improper use could disturb the organization of the agricultural market in question in two ways. First of all, when the goods were taken from intervention stocks and sold at a price below the world market price and in view of the fact that the export levies charged in the organization of an agricultural market are fixed (and varied) in order to make up the difference between the world price and the price in the Community, there is a possibility that goods from intervention, which are goods taken out of the market at the expense of the Community budget, may undercut supplies within the Community. Secondly, the return of goods from intervention results in an increase in the goods offered on the Community market, which may contribute to the need for 'fresh' intervention purchases at the expense of the Community budget.

11. In this conflict of aims, which is also a conflict of the powers to attain such aims, precedence must, in my view, be given to the first objective, for the following reasons. However important the second objective may be, the first, that is to say the careful management of Community funds, seems to me to be even more important because it

directly affects the general interest. The possibilities referred to by the Commission of the improper use of the arrangements for returned goods in the case of goods from intervention stocks seem to me to be sufficiently real to justify intervention on the part of the Commission. The Commission is directly empowered to do so as a result of its implementing power, to be interpreted widely according to the judgments of the Court, with regard to the organization of agricultural markets, and in particular as regards the verification of the use and destination of products from intervention. That is not altered by the fact that it used this power in a somewhat artificial way in so far as it gave the impression in the wording of Article 13a(2) that it had amended Article 2(1)(b) of Council Regulation (EEC) No 754/76, since the preamble to that Regulation recognized the need to avoid any speculation in determining the arrangements for returned goods (see paragraph 2 above). In this connection, it seems to me to be reasonable that the refusal in principle to exempt from the agricultural levy products which were the subject of customs formalities with a view to the grant of refunds or other amounts, was considered by the Commission to have been given by way of example and that it considered that it was entitled to use its power relating to the verification of products from intervention in the same perspective in order to fill a lacuna which it had identified in the arrangements for returned goods.

The argument put forward by the applicants as regards the subsequent introduction by the Council of a provision of the same import does not in any way detract from the Commission's power to fill lacunae. On the contrary, the fact that the Council introduced a more general rule of the same scope confirmed that the Commission's intervention was justified and was within the rules introduced by the Council in Regulation (EEC) No 754/76.

The proportionality of Article 13a

12. The observations set out above bring me to the second important argument put forward by the applicants: is the solution introduced by the Commission by means of Article 13a of Regulation (EEC) No 1687/76 proportionately too drastic in relation to the improper use which it was designed to prevent?

Let me recall once again the effect of Article 13a inserted by the Commission. As a result of that article, goods from intervention are regarded on return as falling within Article 2(1)(b) of Regulation (EEC) No 754/76 and are therefore excluded from the status of returned goods as goods in respect of which a refund has been paid, without however qualifying under the derogating provisions of Article 2(2) (see paragraph 3 above). This situation was changed by the new Article 2, amended by Council Regulation (EEC) No 1147/86, were it not for the fact that the Commission considers Article 13a to be a provision implementing Article 2 (see paragraph 4 above). This attitude on the part of the Commission further means that the reply to the question of proportionality is still relevant as regards facts which occurred

after the amendment introduced by Council Regulation (EEC) No 1147/86.

The applicants' complaint of disproportionality is precisely that the amount confiscated, which is equal to 110% of the intervention price of any given product, in this case skimmed-milk powder (see paragraph 3 in fine above) is far more than the actual value of the product, and in this case, according to the applicants, 2.79 times higher than the value of the damaged consignment. The applicants consider that this is a disproportionately severe measure for preventing an improper use to be made of any difference between the price at which goods from intervention stocks are made available and the market price. When the Court put a written question to the Commission in this regard, it replied that 'this is the most convenient solution from an administrative point of view. It avoids the necessity of making a comparison between the purchase price and the market price, especially when the market price may not always be precisely ascertained'.

Can this explanation of the Commission be accepted? Before answering this question, I would point out that the security (or the corresponding amount) at issue here is not intended to guarantee that the goods in question reach a specified destination but rather to discourage their reimportation into the Community. This is an important factor as regards the assessment of the relevance in this case of the judgments of the Court on the proportionality of the forfeiting of securities in agricultural regulations.

13. In paragraph 8 of its judgment of 23 February 1983 in *Fromançais SA* v *Forma*,[22] the Court stated as follows:

'In order to establish whether a provision of Community law is consonant with the principle of proportionality it is necessary to establish, in the first place, whether the means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement'.

As I have already stated (see paragraph 10), the aim is to prevent goods from intervention from disturbing the Community market by offering subsidized competition with the Community producers and increasing the supply on the market and thus necessitating fresh intervention. The means employed, namely the requirement of an amount replacing the release security of the exporter, seems to me to correspond to the importance of that objective (see paragraph 11 above).

A more controversial question is whether the means employed are necessary for the achievement of the aim. That is to say, could not the Commission have used a more refined system? In reply to the question put by the Court in this regard, the Commission confined itself to emphasizing the administrative simplicity of the solution which it had chosen. Although a fuller reply would have been desirable, I consider that the Commission's statement must be sufficient for the following reasons.

22 — Case 66/82 *Fromençais SA* v *Forma* [1983] ECR 395.

Unlike the other cases in which the Court has given judgment,[23] the plaintiff in this case, Vreugdenhil BV, not being the exporter, did not provide the original security but took upon itself the commercial risk of purchasing damaged goods from intervention stocks and attempting to reimport them into the Community. This factor has the effect of severing the link with the original security lodged by the exporter.[24] This is of great importance in the present case: whereas the person who supplied the original security could perhaps claim a certain entitlement to reimport the goods on the basis of his legal connection with the Community or the German intervention agency, or both, or at least to the release of the security which he had lodged, that does not seem to be the case of the first applicant, who could in any event have covered itself contractually in the basic transaction against the risk of not being able to reimport the goods (and may even have done so).[25]

14. Against this background two factors stand out. In the first place, it becomes clearer what the Commission has in mind when it refers to grounds of administrative simplicity. The facts in the present case support the Commission's statement that when the rules applicable to security are adopted no account may be taken of particular circumstances such as the resale of goods with the contract terms unknown to third parties. Secondly, and more especially, it is clear from the judgments of the Court — in which, in order to assess whether the forfeiture of the entire security is compatible with the principle of proportionality, a distinction is drawn between primary obligations and secondary obligations[26] — does not lead to the conclusion here that the rules adopted on the provision of security with regard to goods from intervention are unnecessary to attain the desired aim. It is a case of imposing a rule to attain a primary aim. In this instance, that aim is not, however, as in the majority of cases brought before the Court, to guarantee that goods exported from the Community actually leave the Community and reach their destination but to discourage the reimportation of goods previously held in intervention. In the *Fromançais* case cited above, the Court accepted (albeit with regard to the first situation which I have referred to above but nonetheless in general terms) that the forfeiture of the whole security, as a means of preventing speculation, was not disproportionate.[27] Thus where, as in this case, it is a question of discouraging a transaction considered undesirable from the Community point of view, the confiscation

23 — See, for example, the judgment of 20 January 1979 in Case 122/78 *Buitoni* v *Forma* [1979] ECR 677; of 21 June 1979 in Case 240/78 *Atalanta Amsterdam BV* v *Produktschap voor Vee en Vlees* [1979] ECR 2137; of 23 February 1983 in Case 66/82, cited above; and of 24 September 1985 in Case 181/84 *The Queen, ex parte Man (Sugar) Limited* v *Intervention Board for Agricultural Products* [1985] ECR 2889.

24 — That is apparent, moreover, from Article 16(3) of Regulation (EEC) No 1354/83: 'The rights and obligations arising from the adjudication are not transferable' which I have already cited (in paragraph 1, footnote 7, and paragraph 3).

25 — Neither the Court (nor the Commission) has been told of the precise circumstances and conditions of the transaction, such as the identity of the purchasers (Schenker, an insurer, the intervention agency?), the moment at which ownership was transferred, the risks and any insurance against damage or *force majeure*, the price and whether the security to be lodged may be deducted from it.

26 — See, for example, paragraph 20 of the judgment in Case 122/78 *Buitoni*; paragraph 10 of the judgment in Case 240/78 *Atalanta*; and paragraphs 20 to 28 of the judgment in Case 181/84 *Man (Sugar) Limited*, cited in footnote 23 above.

27 — In paragraphs 10 to 13 and 18. See also judgment of 2 December 1982 in Case 272/81 *RU-MI* v *Forma* [1982] ECR 4167, and in particular paragraphs 11 and 12.

of a security equal to 110% of the intervention price of the product in question cannot be considered inappropriate.

Nevertheless, in the course of the procedure, certain facts have come to light which do not, however, concern the validity of Article 13a of Commission Regulation (EEC) No 1687/76. Thus, the plaintiffs state that they were told by the authorities that they did not want the damaged bags marked 'Food aid — gift of the EEC' to continue to circulate within the Community. In addition, the plaintiffs state that by the time they knew that an agricultural levy was to be imposed, it was too late for them to do anything but reimport the goods into the Community, partly owing to the delay on the part of the authorities.

It seems to me that these are factors which must be assessed by the national court in the context of the arguments put to it by the plaintiffs (see paragraph 6 above) that their legitimate expectations were not fulfilled. Those particular circumstances of the case, of which the Court is in any event not sufficiently aware, do not, however, affect the general appraisal of the validity of Article 13a of Regulation (EEC) No 1687/76.

Conclusion

15. On the basis of the considerations set out above I propose that the Court should reply to the question put to it by the national court as follows:

Consideration of the preliminary question has disclosed no factor of such a kind as to cast doubt on the validity of Article 13a of Commission Regulation (EEC) No 1687/76, as inserted therein by Commission Regulation (EEC) No 45/84.