# REPORT FOR THE HEARING
delivered in Case 38/86 *

## I — Facts and procedure

On 27 March 1981 the plaintiff in the main proceedings, Firma Karl-Heinz Neumann, submitted to the defendant in the main proceedings, the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agriculture Markets, hereinafter referred to as 'the Federal Office') an application to purchase silversides of young steers under Commission Regulation (EEC) No 713/81 of 19 March 1981 on the sale at a price fixed in advance of certain boned beef and veal held by certain intervention agencies (Official Journal 1981, L 74, p. 27). The sales were to take place from 30 March to 30 April 1981 or until stocks were exhausted.

The price for the product in question was fixed at 3 675 ECU per tonne, which was equivalent to DM 10 112.68 per tonne at the time when the plaintiff submitted its purchase application.

In accordance with Article 2 (2) of Regulation No 2173/79, the plaintiff lodged at the same time as its purchase application a security which, in accordance with Article 15 of the regulation, amounted to 50 ECU per tonne. As regards forfeiture of the security, Article 16 of the regulation provides as follows:

'1. If the purchaser does not pay for the product within the time-limit specified in Article 18 (1) the contract shall, without prejudice to the provisions of paragraphs 2 and 3, be cancelled by the intervention agency in respect of the quantity not paid for.

2. Except in cases of *force majeure* the security shall be forfeit:

(a) in proportion to the quantity not paid for within the specified time-limit, if the quantity paid for is not less than 60% and not more than 95% of the quantity covered by the contract;

(b) in total, if the quantity paid for is less than 60% of the quantity covered by the contract.

3. In cases of failure to comply with the other obligations laid down in the contract, the competent authority of the Member State concerned may declare the security totally or partly forfeit, depending on the seriousness of the breach concerned. The competent authorities of the Member States shall notify the Commission of cases where the preceding subparagraph is applied, specifying the circumstances involved and the action taken.'

On 1 April 1981, following the adjustment of the central rates of the Member States' currencies, which had already come into effect on 23 March 1981, the Council adopted Regulation (EEC) No 850/81 amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture (Official Journal 1981, L 90, p. 1). That regulation increased the 'green' rate of the German mark as from 6 April 1981, which led to a fall in the price per tonne of the meat which the plaintiff wished to buy from DM 10 112.68 to DM 9 763.01. On 7 April 1981 the Federal Office transmitted to

* Language of the Case: German.

the plaintiff a 'confirmation of sale' at the original price.

The new conversion rate was to the advantage of the plaintiff's competitors who did not submit their purchase applications until after 6 April 1981. For that reason the plaintiff considered that it had no prospect of marketing the products taken out of storage at the old conversion rate without making a loss. After discussing the matter by telephone with the defendant's officials, the plaintiff, acting through Martin Lund GmbH, had the contract 'cancelled' by telex messages of 14 and 23 April 1981. That company, which belongs to the same group as the plaintiff, submitted, together with the notification of cancellation, two new purchase applications at the new rate which the Federal Office accepted. Delivery was duly taken of the goods and payment was duly made.

The Federal Office subsequently declared forfeit the security lodged at the same time as the purchase application of 27 March 1981, on the ground that the plaintiff had not discharged the obligation to pay for the goods arising from its original application.

The plaintiff thereupon brought an action challenging that decision before the Verwaltungsgericht Frankfurt am Main in which it sought to recover the security.

In those proceedings, the Verwaltungsgericht referred to the Court two questions for a preliminary ruling, one essentially on the interpretation of Regulation No 850/81 and the other asking whether there was a general principle of objective unfairness ('sachliche Unbilligkeit') in Community law.

In his Opinion of 26 September 1985, the Advocate General stated that a general principle of objective unfairness did not exist in Community law but added:

'... I consider that there is indeed a breach of the principle of proportionality where a security is forfeited in full although it is clear that the intervention agency concerned has suffered no or in any event a substantially smaller loss as a result of substitute sales to the applicant in circumstances of the type involved in this case.'

In its judgment of 14 November 1985 in Case 299/84 *Neumann* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1985] ECR 3663, the Second Chamber of the Court followed that Opinion so far as concerns the principle of objective unfairness. With regard to the principle of proportionality, the Court made, *inter alia*, the following findings:

'However, since in its order requesting a preliminary ruling the Verwaltungsgericht has expressly described the principle of objective unfairness as a particular embodiment of the principle of proportionality, the Court must examine whether the result propounded by the Verwaltungsgericht may be founded on the principle of proportionality in the form recognized in Community law.

The question to be examined in this regard is whether the forfeiture of the security in circumstances such as those described in the order for reference is a measure disproportionate to the legitimate aim of the rules governing securities'.

After considering the rules in question and the facts of the case, the Court came to the following conclusion:

'... in circumstances such as those described in the order for reference the principle of proportionality recognized in Community law cannot provide any solution to the dispute pending before the Verwaltungsgericht.'

None the less the Verwaltungsgericht considered that the dispute called for an assessment of the validity of Article 16 (2) of Regulation No 2173/79 in the light of the principle of proportionality. Therefore, by order of 15 January 1986, the Verwaltungsgericht decided to refer to the Court for a preliminary ruling the following additional question:

Is Article 16 (2) of Commission Regulation (EEC) No 2173/79 of 4 October 1979 on detailed rules of application for the disposal of beef bought in by intervention agencies and repealing Regulation (EEC) No 216/69 (Official Journal 1979, L 251, p. 12) invalid owing to incompatibility with the principle of proportionality in so far as it also applies where delivery is not taken of a quantity of intervention goods purchased pursuant to a contract and no payment is made therefor but instead new contracts for the same quantity of goods are concluded, with the cooperation of the intervention agency, by the same purchaser or a sister firm, which are performed in full, and the purchaser's behaviour is due to the fact that performance of the original contract would have involved it in considerable economic losses owing to a change in the ECU conversion rate?

The order for reference was received at the Court Registry on 12 February 1986.

In its order the Verwaltungsgericht notes that in view of the reasoning of the Advocate General in his Opinion of 26 September 1985 there is justification for a further reference to the Court. It considers that the reason why the Court of Justice did not follow the Advocate General's proposal is that the Verwaltungsgericht had not raised the question of the amount of the security in the context of the principle of proportionality.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiff in the main proceedings, represented by Mr Schiller, of the Cologne Bar, and by the Commission of the European Communities, represented by P. Karpenstein, a member of its Legal Department, acting as Agent.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided on 19 November 1986 to assign the case to the Second Chamber, pursuant to Article 95 of the Rules of Procedure, and to open the oral procedure without any preparatory inquiry.

## II — Written observations

The plaintiff in the main proceedings points out that the principle of proportionality is a fundamental principle of Community law which is intended to curb the adoption by public authorities of measures imposing burdens on individuals.

In order to determine whether a provision of Community law is in conformity with the principle of proportionality, it is necessary to establish whether the means which it employs are appropriate to the aim pursued and whether they are necessary for its achievement.

Accordingly the basic question is whether the undifferentiated penalty involving total and automatic forfeiture of the security under Article 16 (2) of Regulation No 2173/79 is appropriate and necessary even where, as in this case, the plaintiff has, admittedly, neither taken delivery of nor paid for the quantity of intervention goods purchased under the original contract of sale, but instead new contracts for the same quantity of goods have been concluded, with the cooperation of the intervention agency, by the same purchaser or a sister

firm, which have been performed in full. The plaintiff points out that intervention stocks were diminished as a result. Referring to the first judgment given by the Court in this case on 14 November 1985, the plaintiff submits that the aim of the rules in question requiring a security to be lodged in the context of the disposal of beef bought in by intervention agencies is to guarantee the performance by the buyer of the contractual obligations arising from his purchase application and observance of the conditions of sale laid down in the regulations in question. In the circumstances of this case, the standard, total and automatic forfeiture of the security is wholly out of proportion with the aim of the rules requiring a security to be lodged.

On account of its specific features this case may be clearly distinguished from that where a trader does not perform his obligation to take delivery of the goods, either under the original contract or under a substitute contract. That is a criterion which cannot be disregarded in determining whether the forfeiture of the security is appropriate.

The plaintiff therefore suggests that the question submitted for a preliminary ruling should be answered as follows:

"Article 16 (2) of Commission Regulation No 2173/79 of 4 October 1979 on detailed rules of application for the disposal of beef bought in by intervention agencies and repealing Regulation No 216/69 is invalid owing to incompatibility with the principle of proportionality in so far as it also applies where delivery is not taken of a quantity of intervention goods purchased pursuant to a contract and no payment is made therefor but instead new contracts for the same quantity of goods are concluded, with the cooperation of the intervention agency, by the same purchaser or a sister firm, which are performed in full."

The Commission notes *in limine* that in the grounds of its first judgment given on 14 November 1985, the Court considered at length the question whether forfeiture of the security pursuant to Article 16 (2) of Regulation No 2173/79 constitutes a breach of the principle of proportionality. Accordingly the question raised by the Verwaltungsgericht has in substance already been answered by the Court and is redundant. Furthermore, the Commission contends that the proportionality of a measure must be assessed by determining whether the end justifies the means, that is to say, in this case, whether the means employed, namely forfeiture of the security, is appropriate to the aim pursued, namely proper performance of the legal obligation guaranteed by the lodging of a security, and is necessary for its achievement.

In its case law, the Court has pointed out in particular that the breach of principal and secondary obligations must not be penalized by the imposition of the same penalties. If there has been a failure to discharge an obligation whose performance was precisely to be guaranteed by the security, it is normal for the security to be forfeited in its entirety. However, in the event of failure to discharge a secondary obligation of lesser importance it is necessary to determine in each case whether total forfeiture of the security lodged is to be regarded as an excessive penalty.

With regard to the question whether the effect of Article 16 (2) is not disproportionate, the Commission points out that the scheme of that provision was conceived in conformity with the principle of proportionality and, consequently, so as to preclude any over-harsh decisions in this field.

The Commission adds that the security lodged represented only 1.36% of the price and that it would be manifestly anomalous to treat as an excessively severe measure the forfeiture of a security which is negligible by comparison with the principal obligation which was not performed.

The Commission acknowledges that Article 16 (2) does not permit account to be taken of specific considerations such as those at issue in the main proceedings, but it takes the view that even in circumstances such as those described by the plaintiff there are no grounds for declaring the provision in question invalid.

If, as in the plaintiff's case, the purchase of intervention products proves to be an unprofitable transaction for the purchaser in view of statutory adjustments in the conversion rates, that is one of the risks to which all traders are exposed. Adjustments in conversion rates cannot in principle affect either the validity of contracts of sale which have been concluded or the Community's interest, which is guaranteed by the security, in the performance of such contracts. In that regard, it is noticeable in particular that in this case, even though the monetary situation was particularly uncertain, the plaintiff decided, in order to secure the award of the contract, to submit its purchase application at an early date, with the result that the previous and less favourable rate for converting ECUs into German marks was still in force.

The plaintiff thus evidently submitted its purchase application even before the entry into force of Regulation No 713/81 in order to ensure that its application would be taken into consideration. The fact that the plaintiff now relies on the advantageous conversion rate available to its competitors who did not submit their application until after the adjustment of the ECU conversion rate cannot constitute a legally valid ground for alleging that the rule in Article 16 (2) concerning the forfeiture of the security is inappropriate.

The security referred to in Article 15 of Regulation No 2173/79, which is fixed on a flat-rate basis irrespective of the actual losses involved, is intended primarily to ensure that tenders are serious and that contracts entered into are performed, rather than to compensate for any damage which the intervention agency may sustain.

According to the Commission, therefore, the principle of proportionality does not make it necessary to distinguish, for the purposes of the release of the security, between the costs actually incurred by the Community and those incurred by the intervention agencies.

The Commission suggests that the Court should answer the question submitted for a preliminary ruling as follows:

"Consideration of the question raised has disclosed no factor of such a kind as to call in question the compatibility of Article 16 (2) of Commission Regulation (EEC) No 2173/79 of 4 October 1979 on detailed rules of application for the disposal of beef bought in by intervention agencies and repealing Regulation (EEC) No 216/69 (Official Journal 1979, L 251, p. 12) with the principle of proportionality in Community law."

O. Due
Judge-Rapporteur