# OPINION OF ADVOCATE GENERAL TESAURO

delivered on 15 July 1993 *

*Mr President,*
*Members of the Court,*

1. The question referred by the Verwaltungsgericht Frankfurt am Main for a preliminary ruling concerns the validity of the provisions on forfeiture of security in the context of the Community rules on the granting of subsidies for oil seeds harvested and processed in the Community.

2. In order to encourage the processing industry to use oil seeds from the Member States, Article 27 of Council Regulation (EEC) No 136 of 22 September 1966 on the establishment of a common organization of the market in oils and fats [1] provided for the granting of a processing subsidy for colza, rape and sunflower seeds. The general principles governing the granting of that subsidy are laid down in Council Regulation (EEC) No 1594/83 of 14 June 1983 [2] and the detailed rules for the application of the system by Commission Regulation (EEC) No 2681/83 of 21 September 1983. [3]

For the purposes of this case, it should be borne in mind that under Article 3(2) of Regulation No 1594/83, [4] the amount of the subsidy granted, which is equal to the difference between the target price applicable for a seed variety and the world market price, 'shall be that which is applicable on the day on which the Member State concerned identifies the seed', that is to say assumes control of the seed at an oil mill or a feed mill. The amount of the subsidy may, however, be fixed in advance and, in that case, the amount applicable is that of the day on which the application was lodged, adjusted in accordance with Article 7 of the regulation, that is to say in the light of 'the difference between the target price valid on that day and that valid on the day on which the seeds are identified' and, 'if necessary, a corrective amount'. That amount is determined, under Article 7(2), taking into account price trends for the product on the world market and, where appropriate, the economic advantages accruing from the processing of the main competing seeds.

Article 4 of the same regulation introduces a two-part Community certificate, one part of which (known as the 'ID' part) is intended to provide proof that the seeds harvested in the Community have been identified at an oil mill or a feed mill, while the other (the 'AP' part) is intended to certify, where such is the case, that the amount of the subsidy has been fixed in advance. Where that is the case, Article 5 provides that the issue of the certificate 'shall be subject to the provision of a security to guarantee the obligation to request identification of the seeds ... during the period of validity of that part of the certificate. The security shall be forfeited in whole or in part if, during that period, such a

* Original language: Italian.

1 — OJ, English Special Edition 1965-1966, p. 221.

2 — OJ 1983 L 163, p. 44.

3 — OJ 1983 L 266, p. 1.

4 — As the events material to this case took place in 1991, reference is made hereafter to the text of Articles 3 to 8 as amended by Council Regulation No 935/86 of 25 March 1986 on the subsidy for oil seeds (OJ 1986 L 87, p. 5).

request is not made or is made only for a part of the quantity concerned'.

Article 10(2) of Regulation No 2681/83 imposes an obligation to request identification from the competent national authorities during the period of validity of the certificate, and Article 11 of that same regulation specifies that, with regard to sunflower seeds — the subject-matter of the main proceedings — that period expires at the end of the fourth month following that during which the application was lodged.

If that obligation is not fulfilled by the party concerned within the time-limit laid down, Article 23(2) of the regulation provides that the security is to be forfeited in respect of a quantity equal to the difference between 93% of the net quantity shown on the certificate and the quantity identified at the undertaking, determined in accordance with the method defined in Annex I to the regulation. However, if the quantity identified amounts to less than 7% of the net quantity shown in the certificate, the whole of the security is to be forfeited.

Finally, Article 24 provides for a derogation for reasons of *force majeure*, in which case the competent authority of the Member State issuing the certificate is to decide, at the request of the titular holder, either to cancel the obligations imposed, and thus that the security is to be released, or that the validity of the certificate is to be extended for the period of time considered necessary in the circumstances.

3. I now turn to the facts of the case. On 21 January 1991, the Bundesanstalt für landwirtschaftliche Marktordnung (Federal Office for the Organization of Agricultural Markets — hereinafter 'the BALM') issued ADM Ölmühlen GmbH, Ölwerke Spyck (hereinafter 'ADM'), on application from that company and after security had been lodged, with an AP certificate for 4 000 000 kg of sunflower seed, the subsidy having been fixed in advance. The certificate stated that identification was to take place no later than 31 May 1991.

Following an inspection carried out by the BALM, which revealed that ADM had not fulfilled its obligation to carry out identification within the time-limit laid down, the security was declared forfeit. ADM objected — unsuccessfully — against that decision, claiming that the failure to comply with the statutory time-limit was the result of a serious oversight on the part of the employee responsible in the undertaking. ADM, however, considered the forfeiture of the security to be illegal on the ground that the absence of intent to defraud should have been taken into account in this case, and brought an action before the Verwaltungsgericht Frankfurt am Main, which referred the matter to the Court of Justice for a preliminary ruling.

4. The national court is therefore asking whether Article 5 of Regulation No 1594/83 and Article 23(2) of Regulation No 2681/83 are valid having regard to the principle of proportionality in so far as, where the amount of the Community subsidy is fixed in advance, they provide for the security lodged in order to guarantee compliance with the obligation to place the oil seeds under the control of the States concerned to be forfeited, if that operation is not carried

out within the time-limit laid down. The national court is asking more especially whether the aim pursued by the contested provisions could not be achieved by means less restrictive of the rights of traders, possibly by reducing the amount of the subsidy in the event of failure to comply with the time-limit.

5. In order to assess whether a rule of Community law is compatible with the principle of proportionality, it is necessary to consider, in accordance with the established case-law of the Court of Justice, whether the rule in question exceeds what is appropriate and necessary to achieve the aim pursued and, more particularly, to ascertain whether the means applied to that end correspond to the importance of the aim and are necessary in order to achieve it. [5]

6. In this case, the aim pursued by the Community legislature in requiring observance of a time-limit for placing under the control of the State concerned the seeds benefiting from the subsidy, where the amount of that subsidy is fixed in advance, is specified in the sixth recital in the preamble to Regulation No 1594/83, which states that 'in that case, to prevent speculative operations, the issue of the certificate should be made subject to the provision of a security to guarantee the obligation to place the seeds under control for the period of validity of the certificate'.

It must be borne in mind that the obligation to provide security is laid down only in cases in which the amount of the subsidy is fixed in advance. Moreover, that system was introduced to help processing undertakings which have to contend with constant fluctuations in world market prices.

If then the level of subsidy is definitively set by fixing it in advance, producers of oil or animal feed can accurately determine their production costs without having to bear, should the circumstances arise, the consequences of a reduced level of subsidy resulting from an increase in world market prices. Since the subsidy is equal to the difference between the target price applicable and the world market price, producers are able to choose — as pointed out by the Commission and the Council — between the security they enjoy if the subsidy is fixed in advance and a subsidy the level of which is unforeseeable but which is determined on the basis of actual prices.

Against that background, fixing a time-limit within which the seed has to be placed under control seems crucial in order to prevent the undertakings concerned from speculating on the fluctuations in prices for the product and, consequently, delaying the submission of their request for identification.

Moreover, the purpose of penalizing failure to comply with the time-limit by forfeiture of the security, in part or in whole, in proportion to the quantities in respect of which the obligation regarding identification has not been fulfilled, is, in the event that world market prices fall, to prevent the party concerned from unnecessarily allowing the time-limit to expire, thereby foregoing advance-fixing and not undertaking identification

5 — See most recently the judgments in Case C 127/91 *CNTA* [1992] ECR I 5681, paragraph 23; Case C 319/90 *Pressler* [1992] ECR I 203, paragraph 12, Case C 199/90 *Italtrade* [1991] ECR I-5545, paragraph 12; Case C 155/89 *Philipp Brothers* [1990] ECR I 3265, paragraph 34; and Case C 118/89 *Imgenfelser* [1990] ECR I-2637, paragraph 12.

until a later date, in order to obtain a higher subsidy. The provision is therefore intended to prevent traders from adopting a 'wait and see' approach in order possibly to benefit from price trends and decide, in the light of those trends, whether or not to avail themselves of advance-fixing.

7. The length of the delay in fulfilling the obligation under Article 5 of Regulation No 1594/83 is hardly relevant here because, given the fluctuations to which oil seed prices are prone, a speculative operation could take place even if the time-limit were exceeded by just one day.

Strict compliance with that time-limit therefore appears necessary to guarantee that the subsidy system set in place by the Community legislation functions properly, its aim being to encourage Community production of oil seeds by guaranteeing producers a fair income [6] and not in fact to give processing undertakings an advantage.

It follows that penalizing failure to comply with that obligation by forfeiture of the security does not constitute a measure that is disproportionate having regard to the aim pursued but appears instead to be necessary and not excessive in order to prevent misuse of Community legislation on the common organization of the agricultural markets.

That finding is confirmed by the case-law of the Court of Justice. In its judgment in *Fromançais* v *FORMA*, [7] the Court of Justice held to be consistent with the principle of proportionality the failure to release security on the ground that the tenderer had not furnished proof that certain quantities of butter had been processed within the specified period in so far as the provisions at issue were designed 'to prevent tenderers who acquire butter at a reduced price from accumulating stocks for speculative purposes': speculation of that kind conflicted with the 'purpose of the regulations relating to the sale of butter at a reduced price, which is to remove surplus butter from the market by promoting its use as a substitute for other fats ...'. Similarly, in Hopermann II, [8] the Court of Justice considered that forfeiture of entitlement to aid in the case of a trader who had failed to meet the time-limit laid down for submitting his application was not disproportionate having regard to the aim pursued by the legislation which provides for special measures for peas and field beans: since 'the amount of aid to be granted is that in force on the date on which the application for aid is lodged, certain operators could be minded — if the period laid down for the submission of the applications were not mandatory in nature — to wait for a more favourable moment for doing so, thereby obtaining an unjustified advantage.'

More generally, the Court has taken the view, in the context of Community agricultural legislation, that it is not incompatible with the principle of proportionality to set time-limits and penalize failure to comply with them by forfeiture of the aid or security wherever it has appeared essential to do so, as in the present case, so as to guarantee proper management of the market and of the aid system in question. [9]

6 — See the second and fifth recitals in the preamble to Regulation (EEC) No 136/66 and the second recital in the preamble to Regulation (EEC) No 1594/83.

7 — Case 66/82 [1983] ECR 395.

8 — Case C-358/88 [1990] ECR I-1687.

9 — See, *inter alia*, the judgments in Case 147/81 *Merkur Fleisch-Import* [1982] ECR 1389; Case 15/83 *Denkavit Nederland* [1984] ECR 2171; Case C-155/89 *Philipp Brothers*, cited above; Case C-199/90 *Italtrade*, cited above; and Case C-127/91 *CNTA*, cited above.

8. I also endorse the view taken by the Commission, according to which the crucial factor is that it is in theory possible for speculative operations to be carried out, since that is the aim of the legislation, and it is not therefore necessary to establish whether operations of that kind have actually been carried out in individual cases. Nor is the point made by the national court relevant, namely that exceeding the time-limit could entail, as in this case, a reduction in the amount of the subsidy, with the result that the trader would be subjected to a twofold penalty. In point of fact, failing to meet the time-limit does not necessarily have that effect because, in those circumstances, the level of subsidy reverts to being fixed in the light of the actual price trend on the world market and thus may well be higher than that fixed in advance.

9. The four-month time-limit allowed for identification of the seed seems, moreover, reasonable and allows the trader concerned to select, during that period, the most convenient time to undertake identification. The penalty also appears appropriately differentiated given that, other than in cases of *force majeure*, the security is forfeited, under Article 23(2) of Regulation No 2681/83, in proportion to the net quantity of oil seed that is not identified.

10. Finally, the fact there was in this case, as submitted by ADM, no intent to defraud on its part, is of no significance either. It is sufficient to bear in mind here that the penalty forms part of a system — on the the advance-fixing of the subsidy — for which the party concerned opts freely and in its own interest and in which the concept of intent to defraud has no place. [10]

11. I therefore propose in the light of the foregoing considerations that the Court should answer the question submitted by the Verwaltungsgericht Frankfurt am Main as follows:

Consideration of the question has disclosed no factor of such a kind as to affect the validity of Article 5 of Council Regulation (EEC) No 1594/83 of 14 June 1983 or Article 23(2) of Commission Regulation (EEC) No 2681/83 of 21 September 1983.

10 - See, on this point, the judgment in Case 137/85 *Maizena* v *BALM* [1987] ECR 4587