OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 21 March 1996 *

1. The questions referred to the Court of Justice for a preliminary ruling in the present case came from the Rechtbank van Eerste Aanleg, Brussels, which needs a preliminary ruling in order to settle a dispute between A. Maas & Co. NV, the applicant in the main proceedings (hereinafter 'Maas') and the Belgische Dienst voor Bedrijfsleven en Landbouw (Belgian Office for the Economy and Agriculture), now known as the Belgisch Interventie-en Restitutiebureau (Belgian Intervention and Refund Agency), the defendant (hereinafter 'the BDBL').

The national court asks the Court to interpret Commission Regulation (EEC) No 1824/80 of 11 July 1980 opening an invitation to tender for the mobilization of 5 000 tonnes of common wheat as food aid for the Republic of Benin. [1] That regulation was adopted on the basis of Council Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals, [2] and Regulation (EEC) No 2750/75 of the Council of 29 October 1975 fixing criteria for the mobilization of cereals intended as food aid. [3]

2. According to the first recital in the preamble to Regulation No 1824/80, on 28 May 1980 the Council of the European Communities declared that by way of Community action it proposed to grant Benin 5 000 tonnes of common wheat under its 1979/80 food-aid programme. Under Article 1 thereof, the tendering procedure was to take place in Belgium in one lot and the product was to be mobilized on the Community market and loaded for departure from one of the Community ports. Article 1(3) provides:

'The product referred to in paragraph 1 is to be delivered in bulk to the port of shipment in the vicinity of the vessel. The goods must be set down at the place nominated by the recipient country or its agent, the timing being settled by the tenderer and the recipient body's agent.'

According to Article 4, the contract was to be awarded to the tenderer offering the best terms.

* Original language: Spanish.
1 — OJ 1980 L 178, p. 5.
2 — OJ 1975 L 281, p. 1
3 — OJ 1975 L 281, p. 89.

Article 5 provides:

'If the tenderer is unable to deliver the goods in compliance with Article 1(3) on the date given in the notice of invitation to tender as a result of the late availability of the vessels to be used for sea transportation, the resulting costs shall be borne by the intervention agency.'

Under Article 6,

'1. The tenderer shall give security in an amount of 6 ECU per tonne of goods.

It shall be released:

— ...

— in the case of the successful tenderer, when the operations concerned have been carried out within the prescribed time-limit and on submission of the original export licence duly granted and endorsed by the competent authorities of the Member State mentioned in the tender pursuant to Article 3(2),

— ...'.

Article 7 further provides that:

'The common wheat referred to in Article 1 must be of fair and sound merchantable quality and correspond at least to the standard quality for which the reference price is fixed.'

Finally, so far as concerns the present case, Article 8 makes the Belgian intervention agency responsible for the tendering operations.

3. A reference price was introduced into the common organization of the market in cereals by Council Regulation (EEC) No 1143/76 of 17 May 1976, [4] which amended some of the articles of Council Regulation (EEC) No 2727/75. The purpose of fixing a reference price was to encourage the production of common wheat of good breadmaking quality. [5] That regulation was supplemented

4 — OJ 1976 L 130, p. 1.

5 — Fifth recital in the preamble to Regulation No 1143/76.

the following year by Council Regulation (EEC) No 1151/77 of 17 May 1977. [6]

The new wording of Article 3(2) of Regulation No 2727/75 provides:

'... the reference price shall be fixed for common wheat which meets standard quality criteria and medium bread-making quality requirements',

and Article 3(4) further provides that:

'The reference price for common wheat of breadmaking quality shall be calculated by adding to the common single intervention price for this product an amount reflecting the difference in return between the production of common wheat of breadmaking quality and that of common wheat of non-breadmaking quality.'

4. Regulation (EEC) No 2731/75 of the Council of 29 October 1975 fixing standard qualities for common wheat, rye, barley, maize and durum wheat [7] was supplemented by Council Regulation (EEC) No 1156/77 of 17 May 1977. [8] The new wording of Article 1 provides:

'The standard quality for which the intervention price, the reference price and the target price for common wheat are fixed is defined as follows:

(a) common wheat of a sound and fair marketable quality, free from abnormal smell and live pests, of a colour proper to this cereal and of a quality corresponding to the average quality of common wheat harvested under normal conditions in the community;

(b) moisture content: 16%;

(c) total percentage of matter other than basic cereals of unimpaired quality: 5% ...'.

5. Regulation No 2750/75 provides in Article 4(1) that the buying in of cereals intended as food aid, referred to in Article 3(1) and (3), is to be carried out by the intervention

6 — OJ 1977 L 136, p. 1.
7 — OJ 1975 L 281, p. 22.
8 — OJ 1977 L 136, p. 11.

agencies by way of tender and, in Article 4(4), provides:

'The terms of the invitation to tender must ensure equal access and treatment for all persons concerned irrespective of their place of establishment within the Community.'

6. The notice of invitation to tender for the purchase on the Community's internal market of 5 000 tonnes of common wheat for delivery to the Republic of Benin was published by the Commission on 15 July 1980. [9] Article 3 of Title II specifies with regard to the successful tenderer that the security is to be forfeit if he fails to fulfil his obligations within the time stipulated, save in a case of *force majeure*. Title III provides that a tender is to be valid only if accompanied by a declaration from the tenderer whereby he undertakes, first, to deliver in accordance with the conditions laid down in Article 1(3) of Regulation No 1824/80 the lot meeting the set requirements and, secondly, to carry out the delivery operations between 1 and 31 August 1980.

7. It appears from the documents before the Court that on 25 July 1980 Maas submitted a tender to BDBL, which awarded it the contract on 29 July 1980 for the supply in bulk of 5 000 tonnes of common wheat to the port of Antwerp, in the vicinity of the vessel, at a price of BFR 7 300 per metric tonne net weight.

8. The agent appointed by the State receiving the aid informed Maas on 29 July that its client intended to make a vessel available for loading from 5 to 7 August. Maas replied that it would not be possible for loading to take place before the second half of August.

9. The agent for Benin then informed Maas that it could make another vessel available for loading from 21 to 30 August 1980. Maas replied that, because of bad weather, harvesting could not yet commence. In view of that reply, the agent expressly reserved its position in relation to any additional costs which might be incurred by reason of late delivery.

10. However, two days later, Maas notified the agent that it 'hoped to be able to deliver to the vessel by 22 August', to which the agent replied that, in view of the telex of 19 August in which Maas stated that it could not deliver the goods for the time being, the offer of a vessel had not been confirmed.

9 — OJ 1980 C 176, p. 10.

11. The contract for the purchase of the goods was concluded on 21 August. The vendor loaded the grain in the Netherlands on eleven lighters bound for Antwerp. On 26 August, Maas informed the vendor that the results of the inspection carried out indicated that the cargo of the first lighters did not meet the standard quality, in particular the moisture content was too high, and urged it to take the necessary steps to ensure that the mean result was achieved in relation to the entire consignment in accordance with the standards agreed.

12. On 29 August, Maas requested the agent to specify a vessel for loading by 1 September 1980 at the latest, guaranteeing that quality standards of the wheat would be met. The agent replied that it would do everything possible to make a vessel available. On 3 September Maas informed the BDBL that it was reserving its rights with regard to the additional costs incurred by the delay in taking up the goods.

13. According to Article 8(4) of Regulation No 1824/80, the intervention agency is to request the successful tenderer to supply, inter alia, after shipment, a certificate showing the quantities dispatched and the quality of the goods. According to the report drawn up to that end by a specialized laboratory, the moisture content of the wheat was 16.32% and the total percentage of matter other than basic cereals of unimpaired quality 5.78%.

14. On 12 September, the agent for Benin issued a certificate stating that it had taken delivery on 6 September of 4 700 metric tonnes of common wheat and that the quality of the grain did not correspond to the standard quality for which the reference price was fixed.

15. On 25 September, Maas informed the BDBL that the balance of 300 tonnes was, by agreement with the agent for Benin, to be loaded on board a barge bound for Rouen, where the consignment would be transhipped on board an ocean-going vessel. Samples of that delivery were inspected, whereupon it was found that, in this instance, the proportion of the cereal not of unimpaired quality was only 3% but that, none the less, the moisture content of the wheat was 16.36%. The certificate of acceptance of delivery of those goods was issued by the agent for Benin on 1 October.

16. In June 1981 the final consignee issued a certificate confirming that it had received the 5 000 tonnes of wheat 'in good condition' and, on 2 July, Maas requested the BDBL to release the security amounting to BFR 1 217 853 which it had provided in order to be admitted to the tender procedure. In early November 1981, Maas invoiced the BDBL BFR 168 169 by way of storage charges incurred as a result of the allegedly late acceptance of the goods by the agent for the Republic of Benin and, at the same time, again requested release of the security.

17. In mid-December 1981, the BDBL replied that it was retaining the security as a 'general penalty' since Maas had failed to meet both the time-limit for delivery and the quality standards. Moreover, the BDBL refused to reimburse Maas for the amount claimed by way of storage charges.

18. In the main proceedings, Maas is claiming from the BDBL the release of the security and payment of the storage costs. In their submissions before the national court, the parties expressed their doubts on the interpretation of Regulation No 1824/80 which formed the basis of the award of the contract, and the Rechtbank van Eerste Aanleg, Brussels, referred the following questions to the Court of Justice for a preliminary ruling:

'1. What is the precise nature of the operations to be performed by the tenderer within the prescribed time-limit pursuant to Article 6(1) of Regulation (EEC) No 1824/80 of 11 July 1980, on pain of forfeiture of the security provided?

Can liability attach to the tenderer where shipment on board is effected after expiry of the time-limit referred to, even though delivery, that is to say, the placing of the goods in the vicinity of the vessel, took place within that time-limit?

2. Should Articles 6 and 7 of Regulation (EEC) No 1824/80 of 11 July 1980 be read together? In other words, can the security be forfeited if there is a (slight) failure to comply with the quality standards, even where the consignee concerned makes no observations or reservations whatever in this regard?'

19. Since both the first paragraph of the first question and the second question refer to the nature of the obligations which the tenderer must fulfil in order for the security to be released by the intervention agency, I will examine together the questions raised there. Next, I will deal with liability for any storage charges incurred between 1 September and the date on which the goods were embarked, which is the subject of the second part of the first question.

The precise nature of the operations to be performed by the tenderer in order to be entitled to return of the security

20. The applicant in the main proceedings, the defendant and the Commission have submitted observations in these proceedings.

21. The applicant claims, in so far as concerns compliance with the time-limit for delivery, that release of the security cannot continue to be refused for not having observed that time-limit since Regulation No 1824/80 does not indicate that delivery was to take place between 1 and 31 August and since that condition appeared only in the notice of the invitation to tender, which does not have binding legal effect. It states that, in any event, it set down the goods at the port of Antwerp on 29 August 1980 and it cannot be made liable for loading not taking place until 6 September since the agent did not make a vessel available. As to the quality of the goods, the applicant maintains that Regulation No 1824/80 does not provide that the wheat should comply with the quality standards of any regulation in particular and that the consignee confirms that it received it in good condition and that Article 6 of the abovementioned regulation, which regulates release of the security, does not make such release subject to observance of any quality standard.

So far as concerns the quality of the wheat, the defendant states that the moisture content of the first consignment exceeded the permitted maximum by 0.32% and that the total percentage of matter other than basic cereals of unimpaired quality was 5.78%, whereas the maximum permitted was 5%, while the moisture content of the remaining 300 tonnes exceeded the maximum permitted, 16%, by 0.36%.

Moreover, observance of the quality standards was particularly important in this case since the recipient country could hardly refuse the wheat in view of its pressing need for food. The credibility of the Communities requires that food aid to the most disadvantaged countries should be of unimpaired quality. The fact that that country certified that the wheat received was of good quality must be considered irrelevant for the purposes of release of the security.

22. The defendant submits, with regard to the time-limit for delivery, that the successful tenderer could not simply set down the goods in the port of Antwerp on any day in August but that the timing of delivery should be settled by mutual agreement with the agent for the Republic of Benin. The agent was not able to take delivery of the first 4 700 tonnes until 6 September. The remaining 300 tonnes were loaded on board a barge bound for Rouen on 26 September and that delay was due exclusively to the fact that the successful tenderer refused on two occasions the vessel made available by the agent.

23. The Commission examines exhaustively the obligations incumbent on the successful tenderer in the light of both Regulation No 1824/80 and the notice of the invitation to tender. It adds that it is for the national court to assess whether it has fulfilled those obligations on the basis of the ruling on the interpretation of Community law to be made by the Court of Justice.

24. The Commission submits that the tenderer did not fulfil one of the essential obligations imposed by that legislation on the successful tenderer, namely that of settling the timing of delivery of the goods with the agent. Delivering goods of a specific quality, which in that case should at least have corresponded to the standard quality for which the reference price is fixed, formed part of the operations to be performed by the successful tenderer in two respects: first, because it is expressly provided for in Article 7 of Regulation No 1824/80 and, secondly, because when it submitted its tender, the successful tenderer undertook to deliver, pursuant to Title III(a) of the notice of the invitation to tender, a lot 'meeting the set requirements'. The Commission concludes that the successful tenderer must be deemed not to have fulfilled those two obligations which must be considered essential and that the security must therefore be forfeited. The fact that the aid-receiving country accepted the consignment is irrelevant since it is not in a position to release the successful tenderer from its obligations.

25. The national court describes the successful tenderer's failure to comply with the quality standards as minor. The Commission considers that, once the provision has been infringed, there is no need to grade that infringement. In fact, the quality of the wheat supplied neither corresponded to the standard quality for which the reference price was to be fixed nor met the absolute minimum conditions necessary for acceptance by the intervention agency. Those conditions for the relevant period are set out in Commission Regulation (EEC) No 1629/77 of 20 July 1977 laying down detailed rules of application for special intervention measures to support the development of the market in common wheat of bread-making quality, [10] according to which the moisture content is not to exceed a percentage fixed by the intervention agency at between 14 and 16% according to region.

26. Finally, the Commission points out that the obligation to comply with the standard quality laid down in Regulation No 1824/80 and the sanction which may be imposed for non-compliance with the obligation guarantee the equal treatment of tenderers in the awarding of contracts since the contract was to be awarded to the tenderer offering the best terms.

27. I agree with most of the arguments put forward by the Commission in this respect. Reference must be made not only to Regulation No 1824/80 but also to the wording of the notice of the invitation to tender in order to ascertain the nature of the obligations which the successful tenderer was to fulfil in order to be entitled to the release of the security.

28. The security which was to be lodged by tenderers, pursuant to Article 6 of Regulation No 1824/80, consisting of ECU 6 per tonne of the product, was intended, according to the seventh recital in the preamble to

10 — OJ 1977 L 181, p. 26.

the regulation, to guarantee fulfilment of the obligations arising from participation in the invitation to tender provided for in the regulation. Under Title II(3) of the notice of invitation to tender, that security was to be released or forfeited according to whether or not the successful tenderer fulfilled his obligations within the time stipulated, save in a case of *force majeure*.

29. It follows from a detailed examination of the abovementioned provisions that the obligations of the successful tenderer were as follows:

— to deliver 5 000 tonnes of common wheat in bulk, in the vicinity of the vessel, to the port of shipment specified, in this case Antwerp;

— to set down the goods at the place nominated by the agent for Benin, with whom the timing of delivery was to be settled;

— to carry out the delivery operations between 1 and 31 August 1980;

— to complete the customs export formalities for the products; and

— to deliver goods meeting the set requirements, that is to say that, according to Article 7 of Regulation No 1824/80, the common wheat was to be of fair and sound merchantable quality and at least correspond to the standard quality for which the reference price was fixed.

30. It appears from the case-file that the successful tenderer did actually set down 5 000 tonnes of wheat at the port of Antwerp within the time-limit prescribed for that purpose. However, it did so without first having come to an agreement with the agent for the Republic of Benin, despite the fact that that obligation was clearly set out in Article 1(3) of Regulation No 1824/80. Instead, Maas on two occasions refused the vessels offered by the agent and, on 29 August, requested it to specify a vessel for loading 'by 1 September 1980 at the latest', once the goods were at the port. It is not surprising that the agent did not manage, in such a short time, to make a vessel available to transport 5 000 tonnes of wheat from Antwerp to Cotonou.

31. The conduct of the successful tenderer resulting in the loading operation being delayed until 6 September when 4 700 tonnes were shipped, the remaining 300 tonnes not leaving port until 26 September on board a barge bound for Rouen, is contrary to the obligation to settle the timing of delivery with the agent.

32. I do not share the applicant's view that Article 6 of Regulation No 1824/80, which regulates release of the security, does not make such release subject to observance of any quality standard. On the contrary, the purpose of furnishing security is to guarantee fulfilment of the obligations arising from participation in the invitation to tender provided for in the regulation. In this case, the invitation to tender was for the supply of 5 000 tonnes of common wheat to the Republic of Benin, by way of food aid, and the quality of that wheat was to correspond, at least, to the standard quality for which the reference price is fixed.

33. I believe that the obligation consisting in delivering wheat of a precisely defined quality was also not fulfilled by the successful tenderer. According to the tests carried out by specialist laboratories, the moisture content of the first delivery of 4 700 tonnes was 16.32% and the total percentage of matter other than basic cereals of unimpaired quality was 5.78%, exceeding the permitted maximum by 0.32% and 0.78% respectively, and the moisture content of the remaining 300 tonnes also exceeded that maximum by 0.36%.

34. In order to appreciate the proper significance of those figures, it should be observed that, according to Article 1 of Regulation No 2731/75, as amended by Regulation No 1156/77, in force at the material time, the moisture content corresponding to the standard quality for which the reference price for common wheat of breadmaking quality was fixed must not exceed 16% and the total percentage permitted of matter other than basic cereals of unimpaired quality is 5%. On the other hand, Regulation No 1629/77 fixing the procedure and conditions for the taking-over of cereals by intervention agencies, provides in Article 5(2) that the moisture content must not exceed a percentage fixed by the intervention agency at between 14 and 16% according to region. Those figures admit of no exceptions. [11]

I conclude that the consignment delivered by the successful tenderer for shipment to the Republic of Benin was not accepted by the intervention agency since it exceeded the permitted moisture content and did not therefore fulfil the minimum quality requirements.

35. The question as to whether forfeiture of the security, provided for in Title II(3) of the notice of invitation to tender, constitutes a measure whose severity is out of proportion to the failure of the successful tenderer to fulfil those requirements is a separate matter.

11 — That regulation provides for the reference price to be increased where the moisture content of common wheat of bread-making quality offered for intervention is less than the moisture content laid down for the standard quality. It also provides for increases and reductions to be applied to the reference price where the specific weight of common wheat of bread-making quality offered for intervention differs from the specific weight laid down for the standard quality. However, it does not provide for any exception to the maximum moisture content.

36. The Court has consistently held that, '... 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'. [12]

37. In the present case, the aim pursued was indeed important. It concerned the grant by way of a Community action of a not inconsiderable amount of wheat to a country with pressing food shortages. Thus, the obligations imposed on the successful tenderer include the obligation to settle the timing of delivery with the agent for the recipient country within a time-limit and that of delivering goods of a well-defined standard quality.

38. In my view, those obligations both constitute principal obligations within the meaning of the case-law of the Court, which has held that 'it is necessary to establish ... whether the obligations breached in this case must be regarded as principal obligations whose observance is of fundamental importance to the proper functioning of a Community system and whose infringement may be punished by total forfeiture of the security, without there being any breach of the principle of proportionality, or whether they are secondary obligations whose infringement should not be punished with the same rigour as non-fulfilment of a principal obligation'. [13]

39. This is not the first time that the Court of Justice has had to rule on whether the entire security for tender in a food aid operation was to be forfeited when the goods supplied did not correspond to the standard quality. I would refer to Case 56/86, [14] which concerned the delivery by a successful tenderer undertaking of a consignment of 755 tonnes of sugar, offered by the Community by way of food aid to the United Nations Relief and Works Agency for Palestine Refugees. Checks made on samples taken before embarkation showed that all the samples were of sugar of quality 3 (an inferior quality) and not 2 (which is the standard quality) on the sole ground that the colouring of the solution exceeded by 0.7 of a point the margin of 6 points, which was the maximum limit for the standard quality, although all the other criteria for that quality were satisfied.

Advocate General Mischo, in his Opinion in that case, stated that '... the quality of the goods, especially in the context of a food-aid

12 — See the judgments in Case 66/82 *Fromançais* [1983] ECR 395, paragraph 8; Case 125/83 *Corman* [1985] ECR 3039, paragraph 36; Case 266/84 *Denkavit France* [1986] ECR 149, paragraph 17; and Case 47/86 *Roquette Frères* [1987] ECR 2889, paragraph 19.

13 — Case 21/85 *Maas* v *Bundesanstalt für Landwirtschaftliche Marktordnung* [1986] ECR 3537, paragraph 15.

14 — Case 56/86 *Société pour l'exportation des sucres* v *OBEA* [1987] ECR 1423.

operation, is an absolutely essential aspect of the contract awarded'. [15]

In its judgment, the Court ruled that, since the supply of sugar of standard quality was one of the successful tenderer's obligations, the security for tender was to be forfeited in its entirety if the sugar supplied was not of the standard quality even if the beneficiary of the aid has disposed of it.

40. In the present case, I consider that the observance of both obligations, namely settling the timing of delivery with the agent for the recipient country within a time-limit and that of delivering goods of a well-defined standard quality, is fundamental both to the proper functioning and to the efficiency and credibility of the Community food-aid system.

41. As to the means employed to achieve the objective pursued, the Court stated in Case 56/86 that forfeiture of the security, '... is a standard one in transactions under the common organization of the agricultural markets ...'. [16]

Provision of a security of ECU 6 per tonne, which at the time represented BFR 1 217 853, to guarantee performance of a contract of BFR 36 500 000 corresponds to the objective pursued. Its forfeiture does not seem to me to be unjustified in the present case since, as I stated above, two of the essential obligations guaranteed by that security have not been fulfilled.

42. Moreover, I agree with the Commission that forfeiture of the security also achieves the objective of ensuring equality between tenderers. If the possibility did not exist of penalizing a successful tenderer for failing to fulfil obligations considered essential for the proper functioning of the system, the tendering system would be distorted. [17]

43. I therefore believe that forfeiture of the security as a penalty, in the circumstances set forth, does not breach the principle of proportionality since it does not go beyond what is necessary in order to have the desired dissuasive effect.

15 — ECR 1423 et seq., in particular p. 1436.

16 — Judgment referred to in footnote 14 above, paragraph 31.

17 — Judgment referred to in footnote 14 above, paragraph 30, and the Opinion of Advocate General Mischo in that case, ECR 1437.

44. Finally, I would add that, as held by the Court in Case 56/86, [18] the fact that the recipient country accepted the wheat without objecting to its quality is irrelevant for that purpose.

45. In view of the foregoing, I consider that the operations which the successful tenderer was obliged to carry out within the prescribed time-limit, pursuant to Article 6(1) of Regulation No 1824/80, on pain of forfeiture of the security provided, are all provided for both in that regulation and in the notice of invitation to tender as follows: to deliver 5 000 tonnes of common wheat in bulk, in the vicinity of the vessel, to the port of shipment specified, in this case Antwerp; to set down the goods at the place nominated by the agent for Benin, with whom the timing of delivery was to be settled; to carry out the delivery operations between 1 and 31 August 1980; to complete the customs export formalities for the products; and to deliver goods meeting the set requirements, that is to say that, according to Article 7 of Regulation No 1824/80, the common wheat was to be of fair and sound merchantable quality and at least correspond to the standard quality for which the reference price was fixed.

Articles 6 and 7 of that regulation must be read together to the effect that the security can be forfeited even where there is a minor failure to comply with the quality standards, even where the consignee makes no observations or reservations whatever in this regard.

Liability for storage charges incurred from 1 September until the date on which the goods were shipped on board a vessel for sea transportation

46. The national court asks next whether liability can attach to the tenderer where shipment on board is effected after expiry of the time-limit referred to, even though the placing of the goods in the vicinity of the vessel took place within that time-limit.

47. The obligation of the successful tenderer as regards the conditions under which he was to deliver the goods has previously been considered in relation to the release of the security. It remains for me to analyse the second part of the first preliminary question by which, in my opinion, the national court requests interpretation of Article 5 of Regulation No 1824/80.

That article provides that, if the tenderer is unable to deliver the goods within the

18 — Referred to in footnote 14 above, paragraph 32.

escribed time-limit as a result of the late ailability of the vessels to be used for sea ansportation, the resulting costs are to be orne by the intervention agency.

48. According to the case-file, most of the goods were not loaded onto a sea-going vessel until 6 September and the remaining 300 tonnes were not loaded until nearly a month later. The successful tenderer states that the vessels were made available by the agent after 31 August, that is to say outside the time-limit, and it therefore claims from the intervention agency BFR 168 169 by way of storage costs. The intervention agency counters by saying that the successful tenderer could only discharge its obligation to deliver the goods between 1 and 31 August after shipment on board a sea-going vessel. The successful tenderer ought therefore to have fixed the timing of delivery with the agent.

49. The question is thus whether the economic consequences to which late loading aboard gave rise should be borne by the successful tenderer or the intervention agency. To that end, it must be determined whether the agent made the sea-going vessels available in good time.

50. I believe that Article 5 of Regulation No 1824/80 had the very specific purpose of preventing a situation in which a successful tenderer who had fulfilled his obligations under the contract or the recipient country must bear costs arising from problems beyond their control, such as the impossibility for the agent to make the necessary transport available from the nominated sea port in August 1980.

51. As I explained above, the effect of the conditions laid down in Regulation No 1824/80 and the notice of invitation to tender was that the obligations of the successful tenderer with regard to delivery were not restricted to bringing the goods to a nominated port within a specified time-limit and then to ask the agent to make a vessel available for two days later but required him to fix the timing of delivery with the agent.

52. Since the successful tenderer twice refused vessels which the agent had offered for shipment in August and since it had not fixed the timing of deliveries with the latter, it found itself in the situation where, once the goods were at the port of Antwerp, there was no vessel immediately available, I consider that the charges for storing the goods from 1 September until the entire consignment could be loaded aboard must be borne by the successful tenderer.

53. In its observations, Maas claims that the Court should order the defendant to pay the costs. I must point out in this respect that, since proceedings in a reference for a preliminary ruling are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs, pursuant to Article 104 of the Rules of Procedure of the Court of Justice, is a matter for that court.

54. Finally, Maas applied for legal aid in the amount of BFR 25 000 pursuant to the second subparagraph of Article 104(5) of the Rules of Procedure. That article provides:

'In special circumstances the Court may grant, by way of legal aid, assistance for the purpose of facilitating the representation or attendance of a party.'

During the proceedings no special circumstances have become apparent to justify the grant, by way of legal aid, of assistance for the purpose of facilitating the representation or appearance of the applicant.

Conclusion

I. On the grounds set out above, I therefore propose that the Court give the following reply to the questions submitted by the Rechtbank van Eerste Aanleg, Brussels:

(1) Under Article 6(1) of Commission Regulation (EEC) No 1824/80 of 11 July 1980 opening an invitation to tender for the mobilization of common wheat as food aid for the Republic of Benin, the operations which the successful tenderer was required to perform within the prescribed time-limit, on pain of the forfeiture of the security provided, were as follows:

— to deliver 5 000 tonnes of common wheat in bulk, in the vicinity of the vessel, to the port of shipment specified, in this case Antwerp;

— to set down the goods at the place nominated by the agent for Benin, with whom the timing of delivery was to be settled;

— to carry out the delivery operations between 1 and 31 August 1980;

— to complete the customs export formalities for the products; and

— to deliver goods meeting the requirements laid down in Article 7 of Regulation No 1824/80, that is to say, that the common wheat was to be of fair and sound merchantable quality and at least correspond to the standard quality for which the reference price was fixed.

Articles 6 and 7 of that regulation are to be read together such that the security can be forfeited if there is even a minor failure to comply with the quality standards, even where the consignee concerned makes no observations or reservations whatever in this regard.

(2) As regards the question of determining who is to bear the costs of storing the goods, Article 5 of Regulation No 1824/80 is to be interpreted as meaning that the tenderer to which the contract at issue was awarded incurs liability for the delay in shipment on board where, although required to deliver the goods between 1 and 31 August 1980 and to fix the timing of delivery with the agent, the tenderer twice refused vessels which the agent offered and advised the agent on 29 August 1980, when the goods were at the port of shipment, that the latter should make a vessel available for loading by 1 September 1980 at the latest.

II. As regards the applicant's other claims made in the proceedings:

(1) Since proceedings in a reference for a preliminary ruling are, for the parties to the main proceedings, a step in the proceedings pending before the national court, the decision on costs is, pursuant to Article 104 of the Rules of Procedure of the Court of Justice, a matter for that court.

(2) Maas' application for legal aid cannot be granted since the existence of special circumstances has not become apparent during the proceedings, as required by Article 104(5) of the Rules of Procedure of the Court of Justice.