OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 22 January 1987 *

Mr President,
Members of the Court,

The case before the tribunal de première instance [Court of First Instance], Brussels, and the Société pour l'exportation des sucres (hereinafter referred to as 'the company' or 'the successful tenderer') and the Office belge de l'économie et de l'agriculture (OBEA) concerns the quality of a consignment of sugar supplied by the Community as food aid to the United Nations Relief and Works Agency for Palestine Refugees (hereinafter referred to as 'UNRWA').

Following an invitation to tender issued by the OBEA the company was instructed to supply the donee agency with a quantity of 755 tonnes of sugar of quality 2 (or standard quality).

After checks were carried out it was found that the sugar supplied was quality 3 because the colouring of the solution exceeded by 0.7 points the margin of 6 points which was the maximum limit for quality 2, albeit all the other criteria satisfied the standards for quality 2.

The company was not however informed of that defect until after the sugar had arrived at the port of Ashdod (Israel) and had been accepted by UNRWA.

The award at issue was made on the basis of Commission Regulation No 434/82 of 25 February 1982 [1] on a standing invitation to tender for the mobilization of Community white sugar for UNRWA, as amended by Commission Regulation No 939/82 of 21 April 1982. [2]

The penalties provided by the regulation in case any of the terms of the tender are not satisfied are set out with great clarity at the beginning of the Report for the Hearing. I should like to refer to that Report also for particulars of the facts, the arguments of the parties and the wording of the three questions put by the tribunal de première instance, Brussels.

I shall also follow the Report for the Hearing in taking the first two questions together.

The first two questions

The first question asks essentially when the quality control provided for in Article 9 (5) of the regulation must be carried out and up to what time the quality of the sugar may be contested.

Article 9 (5) provides that quality control must be made 'at the time of loading'.

To make that possible the supplier is responsible for informing the competent authority of the exporting Member State as soon as possible of the name of the vessel and the date of loading (Article 15 (1) (a)).

Finally, Article 15 (3) provides that 'if the sugar is of a quality lower than the standard

* Translated from the French.

1 — Official Journal L 55 of 26 February 1982, p. 34.

2 — Official Journal L 111 of 24 April 1982, p. 13.

quality it shall be rejected at the tenderer's risk'.

It may be reasonably inferred from those provisions taken together that the control must in principle be effected:

(i) when the goods to be delivered are ready for loading;

(ii) at such a time that it is still possible for the result of the analyses to be known before the vessel raises anchor so that the goods may be rejected before its departure.

The regulation makes no provision for a case such as the present one, where the results of the analyses are not known until after the vessel sets sail or even after the goods are distributed.

It is nevertheless possible, by way of interpretation, to ascertain the answer in such a case on the basis of the following factors.

Article 1 (2) of the regulation provides that 'the sugar must be of standard quality as defined in Article 1 of Regulation (EEC) No 793/72'.

It is on that basis that the successful tenderer is regarded as having submitted his tender and it is on that express condition that the contract was awarded to him.

The first duty of the tenderer is therefore to make certain himself that the sugar which he is preparing to supply actually meets that requirement.

Quality control at the time of loading cannot relieve him of that responsibility. As the Belgian Government and the OBEA point out, the control provided for by the regulation was not established in the interest of the tenderer but in the interest of the donor, the Community, and the consignee, UNRWA.

In a judgment of 5 December 1985 [3] the Court confirmed that principle in the following terms:

'The supervision exercised in this connection [by the Member States] has neither the aim nor the effect of discharging the successful tenderer in any way whatever from his responsibilities arising from the tender.'

In the second place it is not the responsibility of the recipient of the food aid to check or certify observance of the condition relating to the category to which the sugar to be supplied must belong.

As has been seen, the regulation expressly provides that the control must be carried out at the time of loading. It is logical that it should be the agency charged by the Community with the task of the practical implementation of food aid which should check that the product complies with the criteria laid down.

Moreover, it is not at all certain that all the developing countries or recipient bodies have laboratories equipped to carry out the necessary analyses.

The certificate to be supplied by the recipient of aid under Article 10 (1) cannot therefore relate to that aspect. Its object is solely to certify that the sugar *has been delivered* 'in accordance with the prescribed conditions' as laid down in Article 9, in particular in the quantities provided for, on the date agreed and in the bags specified.

It is reasonable that the recipient of aid should also check whether the goods have been damaged in the course of transport. It is in that sense that in my opinion the

3 — Case 124/83 *Direktoratet for Markedsordningerne* v *Corman & Fils* [1985] ECR 3777, paragraph 21.

phrase 'in good and sound condition' which appears in the certificate issued by UNRWA should be understood. The object of that certificate is not therefore to certify that the sugar supplied is of quality 2.

That limited check carried out on behalf of the donor does not have the effect of creating legal ties between the successful tenderer and the third-party recipient of the aid. The latter can in no way be compared with a purchaser who has 'accepted' goods.

In the third place it is clear that the quality of the goods, especially in the context of a food-aid operation, is an absolutely essential aspect of the contract awarded. It is accordingly inconceivable that the quality should no longer be open to challenge if the result of the analyses is not available until after the vessel has set sail or even after distribution of the aid.

As the Commission, in my opinion rightly, observes, it would be too easy if the successful tenderer could, by negligence or deliberately, fail to fulfil his obligation to inform the competent agency in good time of the date of departure of the vessel and thus escape any challenge as regards the quality of the goods supplied by alleging a so-called 'acceptance' of the goods by the donee.

For the reasons stated above, it must remain possible to dispute the quality of the goods also where it is as a result of the negligence or default of the competent agency itself that the results of the analyses are not supplied until after the vessel sails.

Even at that stage the competent agency must therefore still be able to reject the goods, which would mean in particular refusal to pay the agreed price.

Like the Commission, I nevertheless consider that such negligence on the part of the competent agency may give rise to a claim for damages on the basis of the law of the country where the award was made.

That, it seems to me, ought to be the case in particular where the quality is not challenged until after the food aid has been distributed to the ultimate beneficiaries, in the present case the Palestine refugees.

In that case it is no longer possible 'to reject the goods' in the sense of restoring them to the successful tenderer in order that he may, for example, try to sell them in the country where they have been unloaded.

It seems to me that in the present case such compensation has taken place amicably since the OBEA agreed to pay for the sugar on the basis of its actual value.

I therefore propose that the first two questions be answered as follows:

'Articles 1, 9, 10 and 15 (3) of Commission Regulation (EEC) No 434/82 of 25 February 1982, as amended by Commission Regulation (EEC) No 939/82 of 21 April 1982, must be interpreted as meaning that the quality control of sugar to be delivered as food aid must be carried out in such a way that the results may be known before the product leaves the territory of the exporting Member State.

When the sugar delivered is of a quality inferior to the standard quality the competent agency must under Article 15 (3) refuse provisional and final payment of the agreed price provided for under Article 10 (1) even if it was not aware thereof until after distribution of the product and in spite of the other conditions for payment, in particular certification by the recipient under the third subparagraph of Article 10 (1), being satisfied.'

Third question

Should the security be forfeited even if the sugar has in fact been distributed to those for whom it is intended and has been consumed by them without adverse effect? If so, is total forfeiture of the security not contrary to the principle of proportionality where the sugar delivered failed to satisfy only one of several criteria as to quality?

That is what the Belgian court is asking in its third question.

In that respect I should like first of all to make two general observations.

The Community has known cases where products supplied as food aid have proved to be defective in quality. The Commission has learned its lesson and has made the regulations relating to monitoring the quality of products to be delivered more rigorous.

In the present case it is true that the defect in the sugar delivered was not such as to prevent its use by the consumers in complete safety.

Care however must be taken not to open up a breach in the system and create the impression among future tenderers that without too much risk they need not take seriously the criteria as to quality adopted by the Commission.

In previous food-aid operations the Commission had prescribed only quality 3. If it now requires the superior quality it is no doubt because it thinks it has good reasons for so doing.

In the second place definition of the quality of the product is intended also to maintain equality between all tenderers. If the competent agencies of the Member States were to start agreeing to pay for goods which did not meet the prescribed requirements the price corresponding to their actual quality without exacting any penalty for improper performance of the contract, the tendering system would be distorted.

Such an attitude might encourage suppliers to tender from the start at a price lower than that normally charged for the standard quality because from the outset they were intending to deliver only a lower quality. They would thus obtain an unfair competitive advantage over tenderers intending to observe the condition laid down.

The following textual arguments militate against the release of the security in the present case.

1. Article 15 (3) of the regulation provides that if the sugar is of a quality lower than the standard quality it is to be rejected at the tenderer's risk.

The Commission thus wished to rule out all possibility that goods which did not meet the conditions might be delivered.

It does indeed follow from Article 9 (5) (control at the time of loading) and the scheme of the regulation that goods should normally be rejected before they leave the territory of the Member State. In that way they may if necessary be replaced at the last moment by goods which comply with the rules.

If that is, however, impossible the goods are simply rejected. The security must be forfeited for the contract has not been performed correctly.

Similarly, if as a result of the need to replace the goods or for any other reason they cannot be delivered within the prescribed period, Article 15 (2) applies, which provides that 'without prejudice to Article 7 (3)' the price accepted is to be reduced by 0.12 ECU per 100 kg of sugar per day. That means that with regard to quantities which arrive late the whole security is forfeited even if the delay is only minimal.

If all the goods arrive late the whole security is forfeited even if the sugar is subsequently consumed by the beneficiaries.

The regulation is thus obviously based on the principle that infringement of the conditions of the contract affecting all the goods involves the forfeiture of the whole security.

If it was not possible to reject the goods before the vessel sails because the results of the analyses were not available and the goods which do not comply with the requisite quality have arrived at their destination and have been consumed, equity, or if necessary the princples of non-contractual liability, require that they should be paid for at their actual value. However, because there was an improper performance of the contract awarded, the security must be forfeited.

In other words, I consider that because the product was paid for at its actual value, sufficient account was taken of the fact that it had been consumed.

2. Article 7 (5) provides that 'the security shall be released when final payment is made'.

Where, as in the present case, the goods are not paid for on the basis of the price fixed at the time of the award of the contract but on the basis of an amicable arrangement, there is no 'final payment' within the meaning of Article 7 (5) and the security cannot therefore be released.

3. Finally, Article 7 (3) (as amended by Regulation No 939/82) provides that 'the security for tender shall be forfeited . . . in respect of the quantity of sugar which the successful tenderer has not delivered to the port of unloading . . . in accordance with the prescribed conditions'.

I have already stated that in my opinion the term 'in accordance with the prescribed

conditions' in the third subparagraph of Article 10 (1) refers to conditions other than the intrinsic quality of the goods since observance of that condition must in principle be checked and any deficiency rectified before the vessel leaves.

That expression is however not used in Article 7 (3) in connection with the certificate which has to be issued by UNRWA but in a more general context. It therefore seems to me possible to rely on it to show that the security does not have to be released if it is the whole of the quantity delivered which does not meet the prescribed conditions.

That is the position in the present case.

The tribunal de première instance, Brussels, wonders however whether in the present case loss of the entire security is compatible with the principle of proportionality since the failure to fulfil the requirements concerns only one of the criteria laid down.

Let me say in the first place that the criteria (a) to (d) inclusive adopted in relation to the standard quality (or quality 2) by Regulation No 793/72 of the Council of 17 April 1972 fixing the standard quality for white sugar (Official Journal, English Special Edition 1972 (I), p. 299) are the same as the criteria (a) to (d) inclusive defined in relation to sugar of category 3 by Article 11 of Regulation No 1280/71 of the Commission of 18 June 1971 laying down detailed rules for the buying-in of sugar by intervention agencies (Official Journal, English Special Edition 1971 (II), p. 381).

The difference between the two categories of sugar is thus based on the four additional criteria in Article 1 (e) of Regulation No 793/72. In the present case it is thus *one criterion out of four* which *is not satisfied.*

Is it possible to consider that the deficiency in question which, according to the experts, would be of account only if the sugar had to be used for the manufacture of lemonade, may be disregarded in this case? I do not think so.

In its wisdom the Community legislature decided that sugar was of quality 2 only if it satisfied a set of criteria. It therefore seems to me difficult for the Court to draw a distinction between them and to assign to them a greater or lesser degree of importance according to the circumstances.

To hold today that the result of the analysis made according to the 'Icumsa method' may be overlooked in the circumstances of the present case may lead tomorrow to holding that another criterion is inessential in the case, for example, of a sale by tender of sugar intended for the chemical industry.

Inevitably all the principles of classification of sugar would be at issue.

Let us now see what lessons we may draw in this case from the decisions of the Court on the principle of proportionality.

In its judgment of 23 February 1983 in *Fromançais*[4] the Court held that: 'In order

4 — Case 66/82 [1983] ECR 395, paragraph 8 at p. 404. See also Case 122/78 *Buitoni* v *Fonds d'orientation et de régularisation des marchés agricoles* [1979] ECR 677, paragraph 16 at p. 684, and the judgment of 22 January 1986 in Case 266/84 *Denkavit France* [1986] ECR 149, paragraph 17.

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.'

In the present case the aim pursued is *important:* it is to ensure that the tenderer actually delivers sugar of the prescribed quality.

The first recital in the preamble to the regulation expressly states that 'white sugar should be of standard quality as defined in Council Regulation (EEC) No 793/72 of 17 April 1972 fixing the standard quality for white sugar'.

We are undoubtedly confronted with one of those 'principal obligations' the breach of which, as the Court has held in a line of decisions,[5] may be penalized by the loss of the entire security.

The means employed, security equivalent to 7% of the value of the contract, *is consonant,* in my opinion, with that objective.

The employment of that means may also be regarded as *necessary* for the achievement of the objective since the bare rejection of the goods (and their return or the payment of their actual value) could not have a sufficiently *dissuasive effect* since it would not involve a real financial loss. It is important that the tendering procedure should be conducted correctly. Only the threat of the loss of the security can effectively contribute to this.

Would the dissuasive effect be ensured as regards the future if for example only half the security, that is equivalent to 3.5% of the value of the contract, were forfeited? It may be doubted.

One final factor, and not the least, to be taken into account is the extreme severity which the Court has shown in the majority of its judgments when it was a question of infringement of a principal obligation.

The judgment which is most similar to the present case is that delivered on 2 December 1982 in the aforementioned Case 272/81 (*RU-MI* v *Forma*).

It was concerned with the validity of a regulation on the granting by tender of special aid for skimmed-milk powder intended as feed for animals other than young calves.

The regulation laid down several rules for denaturing a product, only one of which had not been properly complied with. Since the national court found that the denaturing departed only very slightly from the generally recognized standard it queried whether the regulation infringed the principle of proportionality inasmuch as it enabled the same sanction to be applied both where no denaturing at all had taken place and where denaturing had been carried out but not wholly in the prescribed manner.

5 — See Case 122/78 above; Case 240/78 *Atalanta Amsterdam* v *Produktschap voor Vee en Vlees* [1979] ECR 2137; Case 272/81 *Société RU-MI* v *Forma* [1982] ECR 4167; Case 66/82 above and Case 15/83 *Denkavit Nederland BV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171.

The Court held that 'the Commission was legally justified in adopting provisions which entail withholding of the aid and loss of the security for failure to fulfil the principal obligation laid down in the tendering procedure *and was not obliged to vary the severity of the measure in question according to the gravity of the tenderer's failure* to comply with that obligation. Such a measure cannot be regarded as out of proportion to the objective pursued'.

In another judgment of the same date on a request for a preliminary ruling (Case 273/81 *Société laitière de Gacé* v *Forma* [1982] ECR 4193) the Court showed similar severity.

In both cases the product had been used for its intended purpose and the good faith of the traders was not at issue.

For all those reasons it seems to me that a strict interpretation is also required in the present case and I propose that the Court should answer the third question as follows:

'Articles 15 (3) and 7 (3) and (5) of the aforementioned regulation must be interpreted as meaning that the security is forfeited in respect of the quantities of sugar delivered which are not of standard quality.

Consideration of Article 7 (3) of the same regulation has disclosed no factor of such a nature as to affect its validity.'