OPINION OF ADVOCATE GENERAL LENZ

delivered on 9 February 1993 *

Mr President,
Members of the Court,

A — Facts

1. In order to reply to the question referred for a preliminary ruling by the Verwaltungsgericht (Administrative Court) Frankfurt am Main it is necessary to interpret the concept of *force majeure* in the context of Regulation (EEC) No 262/79 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs [1] and, in the alternative, to consider the principle of proportionality.

2. In the main proceedings the plaintiff brought an action against the forfeiture of part of a security in respect of the processing of butter. In accordance with its tender of 22 September 1987 in response to the 155th invitation to tender, the plaintiff bought 62 000 kg of butter from the defendant for processing in accordance with Regulation No 262/79. It duly processed a batch of 20 000 kg into 16 300 kg of concentrated butter. The subsequent fate of that batch and the administrative formalities associated therewith gave rise to the dispute.

3. The plaintiff sold the concentrated butter in question, via an undertaking acting on its behalf, to an Italian processing undertaking. The latter processed the concentrated butter in batches, and notified the processing of each batch to the competent supervisory body, the Ministry for Agriculture and Forestry (ICRF) in Rome. The last notification was made on 23 May 1988.

4. In accordance with the second indent of Article 8 of Regulation No 262/79 as amended by Regulation (EEC) No 453/85, [2] the successful tenderer for the intervention butter has a period of ten months in which to process the butter, calculated from the final day for the submission of tenders, which in the case of the 155th invitation to tender was 22 September 1987.

5. After the last processing notification had been received by the competent controlling body around two months before this time-limit expired, the Director of the ICRF confirmed to the District Customs Office in Verona that the concentrated butter had been duly processed before 22 July 1988. The confirmation itself was not issued until 18 February 1989, and on 31 March 1989 the District Customs Office in Verona released the T5 control copy, which finally reached the defendant on 6 April 1989.

* Original language: German.

1 — Commission Regulation (EEC) No 262/79 of 12 February 1979 (OJ 1979 L 41, p. 1), as amended by Commission Regulation (EEC) No 3021/85 of 30 October 1985 (OJ 1985 L 289, p. 14).

2 — Commission Regulation (EEC) No 453/85 of 21 February 1985 amending Regulation No 262/79 (OJ 1985 L 52, p. 40).

6. In view of these circumstances, the plaintiff was unable to present the defendant with proof that the butter had been duly processed by means of the T5 control copy accompanying the consignment within the 18-month time-limit from the final date for the submission of tenders, as laid down in Article 22(4) of Regulation No 262/79, [3] in other words before 22 March 1989.

7. A significant administrative delay of almost nine months occurred at the ICRF. In this regard it must be pointed out that from October 1988 onwards the plaintiff made regular and, towards the end of the time-limit, even weekly requests to the ICRF via the processing undertaking on the spot for the case to be processed. [4]

8. After the ICRF eventually sent the confirmation to the District Customs Office in Verona, requests for the prompt processing of the operation were also made regularly to that authority on behalf of the plaintiff before the Customs Office finally made it impossible to produce proof within the time-limit by not releasing the T5 control copy until 31 March 1989.

9. Although the District Customs Office had been made aware of the urgency of the case and had informed the Italian processing undertaking that the control copy had been sent to the defendant in the main proceedings on 16 March 1989 under number 8952, it was not received until 6 April 1989, two weeks after the time-limit had expired.

10. In view of this delay, the defendant in the main proceedings declared the security for 20 tonnes of butter forfeit, but subsequently refunded 85% of the security, so that ultimately 15% of the security was forfeit. This action was based on Article 22(4) of Regulation No 262/79 as amended by Regulation No 3021/85, which states:

'Except in cases of *force majeure*, the processing security referred to in Article 16(2) shall be forfeit in proportion to the quantities for which the proof specified in Regulation (EEC) No 1687/76 has not been produced within 18 months, calculated from the final day for submission of tenders referred to in Article 12(2). However, if proof is furnished within 18 months calculated from the date specified in the first subparagraph, 85% of the amount forfeited shall be refunded.'

11. The plaintiff in the main proceedings lodged an administrative appeal against forfeiture of the security and claimed a refund of the amount retained. It asserted that tardy processing by the Italian authorities constituted a case of *force majeure* within the meaning of Article 22(4) of Regulation No 262/79.

12. The national court clearly inclines to the view that this constitutes a case of *force*

3 — In the version of Regulation No 3021/85, cited above.

4 — The national court assumes that it was the intermediary in Germany, in other words the plaintiff's direct contractual partner, that made representations, whereas the plaintiff's representative states that it was the processing undertaking that did so. In any case, one or other of those undertakings acted in the plaintiff's interests.

majeure. In order to decide the dispute, it considers that the following questions should be answered:

'1. Is there a case of *force majeure* within the meaning of Article 22(4) of Commission Regulation (EEC) No 262/79 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1979 L 41, p. 1) when:

(a) the failure to respect the time-limit for the production of proof is due to the fact that the administrative authorities of another Member State have delayed so long in verifying that the butter has been used in conformity with the regulation, issuing the confirmation on the control copy and returning the control copy to the customs office of departure or the corresponding central body that the eight-month time-limit laid down by the legislator for the confirmation of the processing by the administrative authorities is exceeded to a significant extent, and

(b) the agent established in the other Member State of the export undertaking mandated by the purchaser of the intervention goods to effect the transaction has repeatedly, from a time some eight months before the expiry of the time-limit for producing proof, and at weekly intervals for part of that period, requested the administrative authorities of the other Member State to confirm the utilization of the goods in conformity with the regulation and to return the control copy, and

(c) the purchaser of the intervention goods has failed to make application as provided for in detail in Article 14 of Commission Regulation (EEC) No 1687/76 of 30 June 1976 (OJ 1976 L 190) for other documents to be accepted as equivalent following the non-return of the control copy to the customs office of departure or the corresponding central body within three months of the expiry of the time-limit fixed for the completion of the transaction in question?

If the first question is answered in the negative:

2. Is Article 22(4) of Commission Regulation (EEC) No 262/79 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1979 L 41, p. 1) invalid in so far as it provides that, except in cases of *force majeure*, the processing security is to be forfeited even where the failure to respect the time-limit for producing proof is to be ascribed to reasons beyond the control of the successful tenderer?'

13. Reference is made to the Report for the Hearing for a fuller account of the facts in the main proceedings, the relevant legislation and the submissions of the parties.

B — Opinion

1. *The concept of* force majeure

14. In order to reply to the questions put by the national court, it is first necessary to examine whether in the circumstances described a case of *force majeure* exists for the purchaser of the intervention butter within the meaning of Article 22(4) of Regulation No 262/79. If so, the eighteen-month time-limit would not apply, so that

on those grounds alone the security would have been unjustifiably declared forfeit. Only if the events described do not constitute *force majeure* does the question of the proportionality of the measure arise.

15. The Court can rely on an extensive body of case-law on the concept of *force majeure*. [5] As early as 1968, in its judgment in *Schwarzwaldmilch*, [6] the Court held that, as the concept of '*force majeure*' is not identical in the different branches of law and the various fields of application, the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect.

16. Although under its Rules of Procedure [7] and in areas falling within the ECSC Treaty [8] the Court has already had occasion to consider the concept of *force majeure*, many of the judgments on this matter relate to the application of regulations in the agricultural domain. [9]

17. As the Court has consistently held, the concept of *force majeure* must be understood in the sense of unusual and unforeseeable circumstances beyond the trader's control, the consequences of which could not have been avoided even if all due care had been exercised. [10]

18. As a rule, the Court assumes that the concept of *force majeure* is not limited to cases of objective impossibility. It has sometimes deviated from this viewpoint, but on those occasions it has based the definition of the concept strictly on the relevant provisions. [11] Those few judgments are not such as to suggest a fundamental change in the case-law, as even the Court's most recent judgments are consistently based on the wider definition of the concept of *force majeure*. [12]

19. In *Theodorakis* v *Greece*, [13] for example, the Court held, citing earlier case-law, 'that the concept of *force majeure* is not limited to cases of absolute impossibility. However, the Court has also consistently held that, whilst the concept does not presuppose absolute impossibility, it nevertheless requires the non-performance of the act in question to be due to circumstances beyond the control of the person claiming *force majeure* which are abnormal and unforeseeable and of which

5 — For a representative selection, see the judgments in Case 4/68 *Schwarzwaldmilch* v *Einfuhr-und Vorratsstelle für Fette* [1968] ECR 377, Case 158/73 *Kampffmeyer* v *Einfuhr-und Vorratsstelle Getreide* [1974] ECR 101, Case 64/74 *Reich* v *Hauptzollamt Landau* [1975] ECR 261, Case 6/78 *Union Française de Céréales* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 1675, Case 42/79 *Milch-, Fett-und Eierkontor* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1979] ECR 3703, Case 20/84 *De Jong* v *VIB* [1985] ECR 2061, Case 124/83 *Direktoratet for Markedsordningerne* v *Corman* [1985] ECR 3777, Case 266/84 *Denkavit France* v *Forma* [1986] ECR 149, Case 109/86 *Theodorakis* v *Greece* [1987] ECR 4319, Case 296/86 *McNicoll and Others* v *Minister for Agriculture* [1988] ECR 1491, Case 71/87 *Greek State* v *Inter-Kom* [1988] ECR 1979, Case 199/87 *Jensen* v *Landbrugs-ministeriet* [1988] ECR 5045 and Case C-338/89 *Organisationen Danske Slagterier* [1991] ECR I-2315.

6 — Cited above in footnote 5, p. 385.

7 — Judgment in Case 284/82 *Busseni* v *Commission* [1984] ECR 557.

8 — *Denkavit France*, cited above in footnote 7, and Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78 and 39, 31, 83 and 85/79 *Valsabbia* v *Commission* [1980] ECR 907.

9 — See footnote 5.

10 — *Denkavit France*, cited above in footnote 5, paragraph 27.

11 — *Milch-, Fett-und Eierkontor* (cited above in footnote 5), paragraph 10, and *De Jong*, ibid., paragraph 16.

12 — *Theodorakis* (cited above in footnote 5), paragraph 6 et seq.; *McNicholl*, ibid., paragraph 11; *Organisationen Danske Slagterier*, ibid., paragraph 16.

13 — Cited above in footnote 5.

the consequences could not have been avoided despite the exercise of all due care'. [14]

20. In order to establish whether *force majeure* applies in the present case it is therefore necessary to adopt the system which Advocate General Capotorti set out in his Opinion in the *Valsabbia* case, [15] namely that *force majeure* consists of an objective element and a subjective element. [16]

21. The objective element is present in the case of unusual circumstances independent of the will of the person concerned. A circumstance which is 'independent of the will of the person concerned' is an event which is beyond his influence.

22. The tardiness of the Italian authorities constitutes an event beyond the influence of the plaintiff in the main proceedings. Even repeated attempts to influence the administrative procedure through the intermediary of a contracting partner on the spot failed, which is to be considered as further proof of objective circumstances beyond its control.

23. The delays must also be unusual events, the occurrence of which was to be considered improbable. I believe I can state that the Court applies a strict criterion with regard to this aspect. In the case of fault on the part of the *contracting partner* of the person concerned, and even criminal conduct, the Court has not accepted that the events are unforeseeable, but has emphasized instead, no doubt in the sense of imputing responsibility, that a businessman must choose his partners with care and can exert considerable influence on compliance with obligations by means of the wording of the contract. [17]

24. In the Opinion I delivered in *Denkavit France* [18] I expressed the view that the loss of a control copy in the course of the exchange of many such documents between administrations in connection with the granting of monetary compensatory amounts 'cannot be regarded as so unusual or unforeseeable an event as to be improbable'. [19] The Court did not share that view.

25. The subject-matter of *Denkavit France* (loss of a control copy during exchanges of documents between administrations) and the legal situation to which it related (granting of monetary compensatory amounts) were different from those in the case to be decided here, so that the point of view I adopted then

14 — At paragraph 7. See also *Organisationen Danske Slagterier*, ibid., in which reference is made to the judgment in Case C-334/87 *Greece* v *Commission* [1990] ECR I-2849 (summary publication only).

15 — Cited above in footnote 8.

16 — See also Commission notice C(88) 1696 concerning '*force majeure* in European agricultural law' (88/C 259/07) (OJ 1988 C 259, p. 10).

17 — For example, the Court views the fraudulent conduct of a duly authorized agent of a firm involved in a transaction as 'not a risk which could in no way have been foreseen' in the sense of *force majeure*; *Milch-, Fett-und Eierkontor*, paragraph 10, and *De Jong*, paragraph 18, both cited above in footnote 5.

18 — Cited above in footnote 5, at 150.

19 — *Denkavit France*, cited above in footnote 5, at 158.

does not prejudice my opinion in the present case.

26. The concept of 'maladministration' used as a determining criterion both by the Commission in Notice C(88) 1696 [20] and by the parties to the proceedings is, in my opinion, an appropriate criterion for defining the unforeseeable nature of occurrences in the context of *force majeure*. This assessment is based on the view that a trader must be entitled to assume that the administration, which in turn is bound by law and by the applicable provisions, will act lawfully.

27. In contrast to the situation in transactions under private law with business partners or agents, the trader can normally have no influence on the form of legal relations between himself and the authorities. Instead, he is subject to rules which apply objectively and must be able to rely on the administration, for which the same rules apply, fulfilling its obligations.

28. In those cases in which the Court has taken a view on the role that maladministration by the authorities plays in ascertaining that a case of *force majeure* exists, maladministration alone was never the sole cause of the non-occurrence of the desired outcome, which instead was the responsibility of another economic agent. [21]

20 — Cited above in footnote 16.

21 — See, for example, *De Jong*, cited above in footnote 5.

29. In view of the foregoing considerations, I am of the opinion that the period of more than ten months taken by the Italian authorities to perform operations for which the law allows them a maximum of eight months (time-limit of 18 months for the production of proof less the time-limit of ten months for processing the goods) should be regarded as maladministration and hence as an unforeseeable occurrence within the meaning of the definition of *force majeure*. In my view it is immaterial whether it is in the final analysis the ICRF or the District Customs Office in Verona which bears partial or sole responsibility for the delays, as both are State authorities whose activity is outside the sphere of responsibility of the plaintiff in the main proceedings.

30. As the objective element of *force majeure* is therefore to be considered to be present, it remains to be established whether the subjective requirement is also fulfilled, in other words whether the trader did everything possible to avoid the consequences of the deficiency in the conduct of the authorities.

31. It is known that the plaintiff caused representations to be made to the competent authorities at regular, brief intervals. As the Commission has rightly pointed out, it is for the national court examining the case to judge whether the care exercised corresponds to that of a conscientious businessman. In the light of the available information, I am inclined to answer that question in the affirmative.

32. Finally, the national court itself raised the question whether the exercise of due care would have required the plaintiff to apply for other documents to be accepted as equivalent when it became clear that the T5 control copy would arrive late.

33. I believe that I can deal with that question succinctly. In my opinion, the provision in question is not applicable in the present case. It states as follows:

'Where a control copy ... is not returned to the customs office of departure or relevant central body within three months

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owing to circumstances beyond the control of the party concerned, the latter may make application to the competent authorities for other documents to be accepted as equivalent, stating the grounds for such application and furnishing supporting documents. Such supporting documents must include confirmation from the customs office which *has verified* or *caused to be verified* the use and/or destination of the products that the use and/or destination specified has been complied with.' [22]

34. First, this provision places no obligation on the party concerned to obtain equivalent documents but merely gives him the possibility of doing so. Secondly, recognition of the documents presupposes that verification by the customs office has already taken place. Thirdly, it would probably have taken no less time to process the application for the acceptance of equivalent documents than to send the T5 control copy.

35. Institution of the acceptance procedure was therefore no more likely to succeed in producing due proof of processing of the goods in time than persistent representations to the authorities handling the operation.

36. I am consequently of the opinion that a case of *force majeure* within the meaning of Article 22(4) is involved.

2. *The concept of proportionality*

37. Only if the Court should be of a different opinion will it necessary to examine the validity of Article 22(4) in the light of the principle of proportionality. As the Court has consistently held, compliance with that principle requires first that the means be applied to achieve the intended aim and correspond to the importance of that aim and

22 — My emphasis.

secondly that the means used be necessary in order to achieve it. [23]

38. In my opinion, it is unimportant whether forfeiture of the security in part or in whole in order to ensure compliance with the processing obligations or respect for the administrative formalities is proportional where any irregularities are attributable to the purchaser.

39. However, if the irregularities are not attributable to the purchaser, as I have maintained to be the case in the circumstances of the dispute in the main proceedings, the means employed are not only unnecessary to achieve that aim but are objectively inappropriate. What is the sense of exerting pressure on the purchaser of the goods, who has an interest in the due performance of the administrative formalities, when he is unable to have any influence on this?

40. In another context the Court has already ruled that the loss of a T5 control copy owing to procedural flaws which are beyond the control of the person concerned must not have effects which are unfavourable to him. [24]

41. In the event of maladministration on the part of the administrative authorities concerned, forfeiture of the security would, in my opinion, not accelerate the production of proof by the trader and hence in any case would be unnecessary and consequently disproportionate.

C — Conclusion

42. In view of the above considerations, I propose that the Court should reply as follows to the questions referred by the national court:

There is a case of *force majeure* within the meaning of Article 22(4) of Commission Regulation (EEC) No 262/79 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs (OJ 1979 L 41, p. 1) when:

23 — Judgements in Case 66/82 *Fromançais* v *Forma* [1983] ECR 395, paragraph 8, Case 125/83 *OBEA* v *Corman* [1985] ECR 3039, paragraph 36, and Case C-118/89 *Lingenfelser* [1990] ECR I-2637, paragraph 12.

24 — Judgment in Case 302/81 *Eggers* v *Hauptzollamt Kassel* [1982] ECR 3443, paragraph 8.

(a) the failure to respect the time-limit for the production of proof is due to the fact that the administrative authorities of another Member State have delayed so long in verifying that the butter has been used in conformity with the regulation, issuing the confirmation on the control copy and returning the control copy to the customs office of departure or the corresponding central body that the eight-month time-limit laid down by the legislator for the confirmation of the processing by the administrative authorities is exceeded to a significant extent and

(b) the purchaser of the intervention goods or a business partner acting on his instructions and in his interests has made persistent requests to the competent authorities for the operation to be processed well before the expiry of the time-limit for the production of proof.