of its processing and their uniform distribution throughout the concentrated butter, it does so for the purpose of enabling the intervention butter sold at a reduced price to be distinguished from other butter until its final use and of thus preventing it from being diverted from its intended use. In view of this risk, it is necessary to interpret that provision as meaning that it requires the tracer products to be uniformly distributed not only throughout the heated concentrated butter but also throughout the cooled concentrated butter.

Article 22(5) of the same regulation is to be interpreted as meaning that it is for the competent national authority to prove that the conditions laid down in Article 5 of the regulation have not been fulfilled and, on the other hand, it is for the national court to determine, in accordance with its national law, whether the taking of a sample during the transport of the concentrated butter and the results of the analysis of that sample may be used to establish such an infringement.

2. Since the processing security required by Regulation No 262/79 was instituted in order to ensure that the purchaser of public stock butter intended for processing complies with one of his principal obligations, namely the incorporation in the butter of certain products determined on the basis of its intended use and thus enabling it to be distinguished from other butter, breach of this obligation in the absence of *force majeure* may be penalized by total forfeiture of that security without such forfeiture constituting a breach of the principle of proportionality. *A fortiori*, Article 22(5) of the regulation does not infringe this principle inasmuch as it provides for the forfeiture only of that part of the security corresponding to the batch in respect of which the purchaser has not fulfilled his obligation is to be forfeit, and for only partial forfeiture of the security in the event of a shortfall of less than 20% in the quantity of the tracer products to be incorporated.

REPORT FOR THE HEARING
in Case C-87/92 *

I — Facts and legal background

1. The scheme for butter processing is set out in Commission Regulation (EEC) No 262/79 of 12 February 1979 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). Pursuant to that regulation intervention agencies may, by means of a standing invitation to tender, sell butter intended in

* Language of the case: German.

particular for the manufacture of pastry products and ice-creams at a reduced price.

2. This system contains, *inter alia*, the following features:

(a) obligation to process all the butter awarded into concentrated butter (Article 5(1) of the said Regulation No 262/79);

in this respect Article 5(2) provides that:

'In the course of this processing and in the same establishment the following must be incorporated to the exclusion of all other products and in such a way as to ensure uniform diffusion of the ingredients, per tonne of concentrated butter:

— if the concentrated butter is to be processed into formula A or formula C products as specified in Article 4(1) and (3)(a) respectively: the products listed in Annex I;

— if the concentrated butter is to be processed into formula B products as specified in Article 4(2): the products listed in Annex II.';

(b) the lodging by the successful tenderer of a security as a guarantee for the processing (Article 16 of the said Regulation No 262/79);

in this respect Article 22(5) provides that:

'Where the processing into the products referred to in Article 4 has been carried out in such a way that the conditions referred to in Article 5 have been only partially complied with, the security shall be forfeit in respect of the batch concerned.

However, if the infringement established relates only to the products to be added and involves a shortfall of less than 20% in relation to the proportions laid down in Annexes I and II in respect of those products, the security shall be forfeit in an amount not exceeding 25%.'

3. In May 1980, Hoche GmbH (hereinafter referred to as 'Hoche') acquired, by process of tender under the said Regulation No 262/79, 28 128 kg of butter at a reduced price. The security amounting to DM 122 245.75 was furnished in the form of bank guarantee.

4. On 2 June 1980, during transport of the goods to Italy, the German customs authorities took a 250g sample from one pack in the rear part of the lorry. The analysis revealed the presence of only 375g of beta-sitosterol instead of the required 480g per tonne and 49g of vanillin instead of the required 250g per tonne. Moreover, these tracer products were not uniformly distributed throughout the sample. In 1986, the Bundesanstalt für landwirtschaftliche Marktordung (Federal Office for the Organization of Agricultural Markets) (hereinafter 'the BALM'), informed Hoche that the security lodged in the form of bank guarantee was forfeit.

II — The questions referred to the Court

5. On hearing Hoche's appeal on a point of law against that decision of the BALM, the Bundesgerichtshof, by order dated 5 February 1992, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1. Is Article 5(2) of Commission Regulation (EEC) No 262/79 to be interpreted as meaning that the tracer products to be incorporated must be uniformly diffused throughout the cooled concentrated butter?

2. Is Article 22(5) of Regulation No 262/79 to be interpreted as meaning that the security is to be forfeit if the processor does not prove that the conditions of Article 5 have been fully complied with? Is it in any event for the Bundesanstalt für landwirtschaftliche Marktordnung ... to prove non-compliance with the conditions where the customs authorities which had previously authorized the removal of the processed product from the processing establishment took from the goods, during transport, a sample which could not be used to established an overall result and did not announce the result of that check until after the goods were exported?

3. Having regard to the principle of proportionality, is only part of the security lodged by the processor to be forfeit under Article 22(5) of Regulation No 262/79 if the tracer products are not uniformly diffused throughout a processed batch of cooled concentrated butter or were not incorporated in a sufficient quantity, but the whole batch has been exported to Italy and there used in compliance with the regulation?'

6. In its order for reference the Bundesgerichtshof points out that:

'In the present proceedings, the plaintiff seeks a declaration that the security is not forfeit. Its argument is essentially as follows: it complied with all the conditions of Regulation No 262/79, and in particular incorporated sufficient quantities of the tracer products into the concentrated butter. Uniform diffusion of the products throughout the cooled concentrated butter is not required under Article 5(2) of the regulation, and was technically difficult in 1980. The taking of a single sample from the 1 150 packs is insufficient to allow any conclusion to be drawn as to the composition of the packs from which no sample was taken. The plaintiff does not have to provide proof that the processing was in compliance with the regulation; it is rather for the defendant to prove non-compliance with the processing requirements if it claims that the security is forfeit. However, even if non-compliance with the requirements is to be assumed because the plaintiff should have demonstrated that the processing did comply with the regulation,

the burden of proof has been reversed because the defendant or the customs authorities, as the case may be, have by their actions deprived the plaintiff of the possibility to adduce proof. On the same grounds, the security should in any event be held to be forfeit only in part. Moreover, the principle of proportionality calls for a limited forfeiture of the security, since the aim of Regulation No 262/79 was achieved, and was not seriously endangered by the non-uniform diffusion of the tracer products.'

Further on the Bundesgerichtshof states:

'The first question relevant to the decision is whether Article 5(2) of Regulation No 262/79 requires the uniform diffusion of the tracer products throughout the cooled concentrated butter. If not, the sole issue would be whether the plaintiff incorporated sufficient quantities of those products and mixed them in properly. The case would have to be referred back to the court below for further clarification. If, however, the question is to be answered in the affirmative, the security could be forfeit under Article 22(5) of Regulation No 262/79 if non-uniform diffusion were to be assumed; if that point could not be elucidated, the further question would arise of the burden of proof in that regard ...

(a) The question raised has not yet been decided by the Court of Justice of the European Communities. The judgments referred to by the parties (Case 272/81 *RU-MI* v *FORMA* [1982] ECR 4167 and Case 124/83 *Direktoratet for Markedsordningerne* v *Corman* [1985] ECR 3777) concern different facts not comparable with those in the present case.

(b) The wording of Article 5(2) does not give an unambiguous answer. On the one hand, the products are to be incorporated "per tonne of concentrated butter", which could imply uniform diffusion throughout the cooled butter. On the other hand, it is also stated that the products are to be incorporated "in the course of... processing ... and in such a way as to ensure uniform diffusion of the ingredients"; from which it might be concluded that the requirement of uniform diffusion applies only at the processing stage. The aim of the provision — to prevent the improper use of butter purchased at reduced prices — might, however, constitute an argument in favour of an affirmative answer to the question raised. But that aim does not unconditionally require complete uniformity of diffusion, as is clear from the fact that the sample taken by the customs authorities made it possible, without further investigation, to prove that the tracer products had been incorporated.'

The Bundesgerichtshof continues:

'If the answer (to question 1) is in the affirmative and the plaintiff bears the burden of proof, then this court may give a final decision. If the answer is in the negative, or if it is in the affirmative but the burden of

proving that the diffusion in the cooled butter was not uniform lies on the defendant, then the case must be referred back to the court below to determine whether sufficient quantities were incorporated.

Under Article 22(5) of Regulation No 262/79, the security is to be "forfeit" if the conditions referred to in Article 5 are not complied with. That wording suggests rather that the defendant bears the burden of proof, since the provision regulates the occurrence of a legal consequence — the forfeiture of the security — by linking it to specific conditions. It is generally accepted legal usage that in a case of that kind it is for the party relying on the occurrence of the legal consequence to its own advantage to prove the conditions. In the present case, that party is the defendant.'

Similarly, the Bundesgerichtshof points out that:

'... a number of the circumstances stressed by the plaintiff in this specific case could plead in favour of the burden of proof falling on the defendant. The customs authorities consented to the removal of the processed product from the plaintiff's establishment for the purpose of export to Italy, without making their own verification. Only during transport was a sample taken, and it was not until several weeks later, when the concentrated butter had already been exported, that the plaintiff was informed that the result of the analysis of that sample gave grounds for suspecting that the processing conditions had not been complied with. The lapse of that period was obviously bound to make it more difficult for the plaintiff to produce proof, especially since but for the improperly taken sample it would not have been under any obligation to provide proof at all.'

III — Procedure

The order for reference was lodged at the Court Registry on 17 March 1992.

7. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the Commission of the European Communities, represented by Peter Gilsdorf, Principal Legal Adviser, and Dierk Booss, Legal Adviser, acting as Agents, assisted by W. G. Grupp of the Brussels Bar, by the BALM, represented by Hinrich Thieme, Rechtsanwalt, Frankfurt am Main, and by Hoche, represented by Cornelia Kienlein, Rechtsanwältin, Nürnberg.

8. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By order of 25 January 1993 the Court assigned the case to the Fourth Chamber.

IV — Summary of the written observations submitted to the Court

9. In respect of the first question, the BALM remarks that the incorporation of the tracer products referred to in Article 5(2) of the said Regulation No 262/79 can only be carried out during the processing stage. The wording of this provision shows that the

incorporation must result in a 'uniform diffusion' of the ingredients throughout the processed butter, that is to say, the cooled butter. That conclusion is clearly confirmed by the aim of the provision. In its judgment in Joined Cases 66/81 and 99/81 *Pommerehnke* [1982] ECR 1363 the Court specified that the conditions laid down by the regulation were to be interpreted so as to prevent any possibility of the concentrated butter being diverted from its intended use. Not only the adding of certain tracer products but also their uniform distribution are to ensure that the aim of the regulation is attained, namely to guarantee efficient supervision. Therefore, also in the BALM's view, the uniform diffusion of the tracer products is not only necessary at the processing stage. The BALM goes on to refer to the Court's judgment in Case 272/81 *RU-MI* [1982] ECR 4167. According to that case-law non-uniform mixing of the tracer products constitutes an infringement of the Community provisions on aid.

10. As for the second question, the BALM argues that there is no general principle that the competent intervention agency bears the burden of proving improper processing when declaring forfeiture of the security. A uniform diffusion of the tracer products is a prerequisite for the receipt of aid and entitlement to the release of the security, so that it is Hoche which is required to prove that the conditions attached to its supposed right to the release of the security have been satisfied. It is clear from the judgment of the Court in Case 124/83 *Corman* [1983] ECR 3777 that the Court, contrary to what the Bundesgerichtshof contends, is not concerned with determining the question of who is asserting a right. Moreover, in that case the Court held that the successful tenderer remains responsible for the use to which the butter is finally put and liable for the conduct of subsequent purchasers. The successful tenderer remains bound by that obligation even if he has sold the butter. If the successful tenderer remains bound until the butter is put to its final use and if it is still possible to forfeit the security notwithstanding the fact that the infringement was committed after completion of the customs formalities, the inspections carried out and the taking of samples cannot shift the burden of proof. In any event the regulation requires that the tracer products be uniformly distributed throughout the consignment, so that in respect of the tracer products, the same composition will be found in any place and no matter what the quantity. Therefore the disputed analysis of only one sample is sufficient for a finding that the required proof has not been adduced.

11. On the third question the BALM notes that the Court has consistently held that forfeiture of the security may be contrary to the principle of proportionality only if the penalty exceeds what is proportionate and necessary for attaining the desired objective of the rules. In accordance with the same case-law it is necessary to distinguish between primary and secondary obligations. In cases of infringement of a primary obligation, however trivial, the Court has held that forfeiture of the whole of the security was consonant with the principle of proportionality. The said Regulation No 262/79 was adopted

to ensure that the butter was not diverted from its intended use by imposing on the purchaser certain processing rules. These rules have the nature of primary obligations. Forfeiture of the whole security is, by reason of its deterrent effect, such as to make it possible to attain the objective sought, namely the proper processing of the intervention butter into concentrated butter. Any other method, in particular forfeiture of only part of the security, would be an insufficient deterrent. It is irrelevant that the butter bought was finally used as intended. The security is not only linked to compliance with the intended use but also to the processing methods prescribed by the regulation. What matters is that all risks of abuse are automatically avoided. That is why, in accordance with the aims and objectives of Article 5(2) of the said Regulation No 262/79, the serious risk of improper use of concentrated butter deficient in terms of added quantities and of the uniform diffusion of the tracer products is sufficient to justify forfeiture of the whole security.

12. The BALM suggests that the following replies be given to the questions referred to the Court:

'1. The concept of "uniform diffusion" of the tracer products referred to in Article 5(2) of Regulation (EEC) No 262/79 must be interpreted as meaning that the added tracer products must be mixed in a uniform manner in order to show, in any part of the processed product, a perfect and quantitatively regular diffusion of the tracer products throughout the cooled, finally processed and concentrated butter.

2. Article 22(5) of Regulation (EEC) No 262/79 must be interpreted as meaning that the security is forfeit when the successful tenderer does not establish that the conditions laid down by Article 5(2) of Regulation (EEC) No 262/79 are completely satisfied. That is the case where customs authorities have consented to the seizure of the processed concentrated butter from the processing establishment of the successful tenderer and equally the case where the administrative authorities have taken a sample during completion of customs formalities for the butter produced to the customs by the successful tenderer and where the result of this check has been communicated to the parties concerned only after the goods have been exported.

3. Total forfeiture of the whole of the security under Article 22(5) of Regulation (EEC) No 262/79 is not contrary to the principle of proportionality when the tracer products were not uniformly distributed throughout the processed concentrated butter or were only added in insufficient quantities, even though the whole batch was exported abroad and was used for the manufacture of pastry products, ice-cream and other foodstuffs within the meaning of Regulation (EEC) No 262/79.'

13. *Hoche* submits that it received through another butter processor a letter from the EAGGF dated 5 August 1991, in which the latter states that non-uniform distribution of the tracer products is only a secondary obligation, non-compliance with which cannot be 'penalized' by total forfeiture of the security but only by a 15% maximum reduction

of the financial aid. Hoche also produces a copy of an EEC report on a research project — Regulation (EEC) No 150/86/14.1 determination of fat content of milk — dated 15 December 1986 by the Bundesanstalt für Milchforschung (Federal Office for Research on Milk Products), Kiel, Institute of Chemistry and Physics. According to that report, there are problems of analysis for certain tracer products. The expert's report requested by the court of first instance also proved that when concentrated butter is cooled and solidified, it may happen that the tracer products are no longer present and that their uniform distribution throughout the fat in the liquid state is not necessarily retained in cooled concentrated butter.

14. In respect of the first question, the *Commission* remarks that the purpose of incorporating minimum quantities of the products referred to in Annexes I and II of the said Regulation No 262/79, is to make it possible to distinguish intervention butter at a reduced price from other butter, in order to prevent the improper use of intervention butter. The requirement for the incorporation of tracer products has the advantage that these products can be separated from concentrated butter only with enormous difficulties and are thus a permanent indication of the origin of the concentrated butter. In accordance with the sixth recital in the preamble to the said Regulation No 262/79 concentrated butter is subjected to several control requirements from the time the butter leaves storage until processing. Thus, in view of the risks of the improper use of intervention butter occurring not only during processing into concentrated butter but also until the final processing stage, uniform distribution of the tracer products throughout the cooled concentrated butter is indispensable. This requirement is also embodied in the wording of Article 5(2) of the said Regulation 262/79 which refers only to concentrated butter irrespective of its form.

15. For technical reasons an absolutely uniform distribution is not possible. The requirement is for a relatively uniform diffusion obtained by using mixers during melting. In this respect, Annexes I and II of Regulation No 262/79 mention minimum quantities. The minimum quantities selected are to make it simpler to establish proof and guarantee the feasibility of a system of identification.

16. As for the second question, the Commission argues that Regulation No 262/79 does not contain rules on the burden of proof. It infers from the Court's case-law that the burden of proof rests on any party who seeks to rely on a legal consequence in his own favour, in this case the BALM.

17. Although Regulation No 262/79 provides for control measures by the competent authorities of the Member States, the detailed methods of taking samples are not given. Article 21 of the regulation requires that checks be carried out frequently and without notice during the course of incorporation of the tracer products into the concentrated butter. It follows that inspection during transport was not envisaged.

18. In its judgment in Case 272/86 *Commission* v *Greece* [1988] ECR 4875 the Court held that in cases where the party on whom the burden of proof rests produces sufficient facts showing that the conditions laid down by a regulation have been satisfied, it is not sufficient for the other party simply to deny them. That party must provide a reasoned refutation of the facts presented and the consequences thereof. Otherwise the allegation must be regarded as substantiated. Taking a sample even during transport cannot affect its composition. This taking of a sample of only 250g affects the weight of the evidence only to a negligible extent, since the level of uniform distribution is, in such a batch, hardly different from that of a heavier batch. In these circumstances the sample taken is still sufficiently representative and therefore of such nature as to reveal whether there is non-compliance with the conditions referred to in Article 5(2) of Regulation No 262/79. It was therefore for Hoche to provide a reasoned refutation of the consequences resulting from the analysis.

19. In respect of the third question, the Commission is of the opinion that it is necessary to draw a distinction between cases in which non-compliance with obligations leads to consequences in addition to loss of the financial advantage and this case in which only the advantage is lost. Since the security corresponds only to the amount of a discount allowed on the market price, its forfeiture represents only reinstating the purchase price corresponding to the market situation.

20. The obligation to incorporate sufficient quantities of tracer products into concentrated butter constitutes a principal obligation within the meaning of the Court's case-law. Non-compliance with that obligation is such as to jeopardize attainment of the final purpose, namely the manufacture of pastry products, ice-cream and other foodstuffs. There is a risk of concentrated butter with no tracer products or insufficient tracer products being resold at the normal market price and thus assisting the unjust enrichment of the successful tenderer. Because of the impossibility of separating them from concentrated butter, incorporation of these products offers the best protection as compared with other control methods. This condition is indispensable for the proper application of an intervention measure and at present can be guaranteed only by furnishing security. Therefore, there is no disproportion between the end and the means.

21. Even if the Court were to reach the conclusion that the obligation of identification is only a secondary obligation, the rules in question are not contrary to the principle of proportionality. In accordance with Article 22 of Regulation No 262/79 the security is forfeit in respect of the batch concerned only if the conditions referred to in Article 5 are not satisfied. Moreover, the second sentence of the said Article 22(5) limits this forfeiture of the security since, in the case of a shortfall

of less than 20% in relation to the proportions laid down in Annexes I and II, the security is to be forfeit only in an amount not exceeding 25%. Therefore, the rules of Article 22(5) of Regulation 262/79 are not contrary to the principle of proportionality.

22. In reply to the questions referred to the Court the Commission suggests the following answers:

'(1) Article 5(2) of Regulation (EEC) No 262/79 must be interpreted as meaning that the tracer products must be uniformly distributed also throughout the cooled concentrated butter.

(2) Article 22(5) of Regulation (EEC) No 262/79 must be interpreted as meaning that if the administrative authorities have produced sufficient information making it possible to establish that the conditions referred to in Article 22(5) of Regulation (EEC) No 262/79 are satisfied, the security is forfeit if the processor does not produce contrary evidence showing that the conditions referred to in Article 5(2) of Regulation (EEC) No 262/79 are fully met.

(3) Article 22(5) of Regulation (EEC) No 262/79 is not contrary to the principle of proportionality.'

P. J. G. Kapteyn
Judge-Rapporteur