2. Where protein products acquired under Regulation No 563/76 have been resold on the basis of contracts made before that regulation entered into force, there is a rule of Community law to the effect that the amount of the security lodged pursuant to a demand made on the basis of that regulation may not be repaid even if the demand was challenged in accordance with national law and annulled on the ground that the regulation was invalid. Where, on the other hand, protein products bought subject to the provision of security have been resold under contracts made after the entry into force of the said regulation and the demand for security was challenged in accordance with national law and annulled on the ground that the regulation was invalid, no rule of Community law prevents repayment of the security.

Neither the fact that security lodged pursuant to Regulations Nos 563/76 and 677/76 has been declared forfeit nor the time of its forfeiture is relevant under Community law to the repayment of the security.

REPORT FOR THE HEARING
delivered in Case 199/86 *

I — Facts and procedure

A — *Background*

1. In order to reduce stocks of skimmed-milk powder by increasing its use in animal feed, Regulation No 563/76 linked the grant to manufacturers of animal feedingstuffs of certain Community aid for the use of protein products and the entry into free circulation in the Community of certain products used in the manufacture of compound animal feedingstuffs to the obligation to buy quantities of skimmed-milk powder held by intervention agencies. In order to ensure observance of that obligation the grant of aid and admission into free circulation were made subject either to proof of the purchase of skimmed-milk powder or to the prior lodging of security which would be lost in the event of failure to honour the obligation to purchase.

2. By judgments of 5 July 1977 in Cases 114/76, 116/76 and 119-120/76 [1977] ECR 1211, 1247 and 1269, the Court, in answer to questions referred by various national courts for a preliminary ruling, held that Regulation No 563/76 was invalid because the price at which the skimmed-milk powder had to be purchased was so disproportionate to market

* Language of the Case: German.

conditions that it constituted a discriminatory distribution of the burden of costs between different agricultural sectors and moreover was unnecessary in order to attain the objective in view, namely the disposal of stocks of skimmed-milk powder.

3. Following the declaration that Regulation No 563/76 was invalid many actions were brought in the Member States against the national authorities for the refund of security lodged on the basis of the regulation. One of those cases gave rise to a preliminary ruling by the Court on 13 May 1981 (Case 66/80 *International Chemical Corporation* v *Amministrazione delle Finanze dello Stato* [1981] ECR 1191).

4. That case was concerned, *inter alia*, with the question whether traders could claim before a national court a right to a refund based on Community rules in order to obtain repayment of sums paid pursuant to Regulation No 563/76, which had been declared invalid, even where the sums reclaimed had not been paid by the party directly but by his suppliers, to whom he had reimbursed the amounts.

5. In that respect the Court's answer was negative. It considered Article 5 of Regulation No 563/76 which provided that:

'In the case of contracts concluded before the date of entry into force of this regulation, the successive buyers of the products referred to in Articles 2 and 3, or of protein products processed therefrom, shall bear the burden of the costs arising under the arrangements laid down in this regulation',

and held that:

'The existence during the period in which Council Regulation No 563/76 was applied of a scheme specially designed with a view to spreading the economic effects of the obligations which it imposed destroys the basis of an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone. In this regard it does not matter whether the operator has actually passed on the charge or whether he has decided not to do so for reasons connected with the financial policy of his undertaking. Recovery is in itself ruled out *a fortiori* if the operator was not himself bound to pay the charge in question which he advanced voluntarily or refunded to his suppliers.'

B — *The main proceedings*

6. In 1976 Raiffeisen Hauptgenossenschaft eG, the plaintiff in the main proceedings, after lodging security in the amount of DM 1 251.84 with the BALM, the defendant in the main proceedings, imported and put into free circulation goods covered by Regulation No 563/76. It did not, however, buy skimmed-milk powder.

7. The plaintiff in the main proceedings lodged an administrative appeal against the decision fixing the security and brought an action before the administrative court when that appeal was rejected. During the course of the proceedings the Court of Justice declared Regulation No 563/76 invalid, and the plaintiff submitted that since the regulation was invalid the obligation to purchase skimmed-milk powder and to lodge security were unlawful. It added that it had not been able to pass on to its customers a charge equal to the amount of the security. The administrative court upheld the claim.

8. The defendant appealed, arguing that according to the judgment of the Court in Case 66/80 an action for repayment of the security was unfounded since the scheme was specially designed with a view to spreading the economic effects of the obligations imposed by Regulation No 563/76. The Hessischer Verwaltungsgerichtshof (Higher Administrative Court, Hesse) allowed the appeal and dismissed the action on the basis of the judgment in Case 66/80.

9. Meanwhile the security was forfeited by a decision of the defendant against which an administrative appeal is pending.

10. The plaintiff appealed against the judgment of the Hessischer Verwaltungsgerichtshof, seeking annulment of the defendant's decision fixing the security and release of the security.

11. By an order of 22 May 1986, which was received at the Court Registry on 31 July 1986, the Bundesverwaltungsgericht stayed the proceedings until the Court should have given a preliminary ruling on the following questions:

'(1) Is there a rule of Community law to the effect that a demand for the provision of security which

(a) was issued pursuant to Council Regulation (EEC) No 563/76 of 15 March 1976, and

(b) has been challenged by means of national legal procedures and has therefore not become definitive

should not be annulled although it would be liable to be annulled under the provisions of national law on the ground that Council Regulation No 563/76 has been held invalid?

Should Question 1 be answered in the negative:

(2) Is there a rule of Community law to the effect that security lodged pursuant to a demand which

(a) was issued on the basis of Council Regulation No 563/76, and

(b) has been challenged by means of national legal procedures and in the event annulled on the ground that Council Regulation No 563/76 is invalid

should nevertheless not be released?

Should Question 2 be answered in the affirmative:

(3) (a) Does that rule prevent the security from being released only where the security was declared forfeit before delivery of the judgment in which the Court of Justice declared Council Regulation No 563/76 invalid, or

(b) Does the rule also prevent the security from being released where the security was declared forfeit after Council Regulation No 563/76 was declared invalid?

Should Question 3 (a) be answered in the affirmative:

(4) (a) May security — in this instance security lodged pursuant to Council Regulation No 563/76 — become forfeit only when the demand

pursuant to which the security was lodged is no longer assailable and has therefore become definitive, or

(b) May the security become forfeit even though legal proceedings concerning the legality of the demand are still pending?

(5) (a) Do the legal consequences of the forfeiture of security ensue only if the security has been declared forfeit by decision of an authority, or

(b) Do the legal consequences of the forfeiture of the security ensue immediately upon fulfilment of the conditions governing forfeiture under the relevant legislation without its being necessary for an authority to decide that the security is forfeit?

Should Question 4 (b) be answered in the affirmative:

(6) Is there a rule of Community law determining the legal consequences which follow if the demand pursuant to which security that has already become forfeit was lodged is subsequently annulled as being unlawful?'

12. Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 27 October 1986 by the plaintiff in the main proceedings, represented by Mr Gündisch, Rechtsanwalt, acting as Agent, and on 29 November 1986 by the Commission of the European Communities, represented by its Legal Adviser Peter Karpenstein, acting as Agent.

13. 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.

14. By a decision of 20 May 1987 the Court assigned the case to the Sixth Chamber.

II — Written observations submitted to the Court

15. The first question seeks to determine whether there is a rule of Community law which prevents the annulment of a demand for the provision of security which would otherwise be annulled under national law because the legal basis for it, namely Regulation No 563/76, is invalid.

16. The plaintiff in the main proceedings claims there is no such rule of Community law. Its first argument is based on the judgment of the Court of 21 September 1983 in Joined Cases 205 and 215/82 *Deutsche Milchkontor GmbH and Others* v *Federal Republic of Germany* [1983] ECR 2633, according to which the recovery of aid wrongly paid is governed by national law, subject to certain limits imposed by Community law. That rule should apply in the present case.

17. The plaintiff in the main proceedings considers that the judgment of the Court in Case 66/80 which is the authority for the Bundesanstalt's contrary argument does not apply here since the facts and relevant national provisions in that case were different.

18. With regard to the facts, the plaintiff in Case 66/80 did not challenge the demands for the provision of security in time and

further was not able to prove that it had not passed the charge imposed on it on to subsequent stages of the economic process. In the present case the plaintiff did challenge the decisions and was not able to pass on the charge.

19. From the legal point of view the difference between the two cases lies in the fact that under Italian law it is possible to claim the refund of sums wrongly paid to public authorities even if no action has been brought within the 10-year limitation period whereas under German law there is no such possibility where the payment was based, as in the present case, on an administrative measure which was not challenged within a period of one month. If therefore the Court were to hold in the present case that Community law prevented annulment, in accordance with German law, of a demand for the provision of security, the plaintiff in the main proceedings would have no right of action against an administrative measure imposing a charge on it on the basis of an invalid regulation. The Court's judgment ruling Regulation No 563/76 invalid would therefore have no effect.

20. Finally, the plaintiff in the main proceedings suggests that there might be a conflict between Community law and fundamental rights laid down in the German constitution should the Court answer the first question in the affirmative.

21. The Commission states that there is no general principle of Community law to the effect that security demanded by the national authorities on the basis of a Community regulation subsequently declared invalid which is challenged in good time in accordance with the national law cannot be annulled or released. It observes, however, that the objective of the first two questions is to determine whether in the present case a different answer may be inferred either from Regulation No 563/76 or from the judgment of the Court in Case 66/80.

22. The Commission observes that Regulation No 563/76 simply fixes the conditions governing the lodging of security and the cases in which it may be released. It is Regulation No 677/76 (Official Journal 1976, L 81, p. 23) that sets out the terms on which securities may be released or declared forfeit. There is nothing in those regulations to permit the conclusion that an unlawful demand made pursuant to them for the provision of security cannot be annulled.

23. The Commission further considers that in its judgment in Case 66/80 the Court clearly intended that the issue whether measures fixing security on the basis of Regulation No 563/76, subsequently declared invalid, may be annulled should be determined according to national law.

24. It therefore proposes that the first question should be answered in the negative.

Question 2

25. This question is put in the event that the first question should be answered in the negative; it seeks to determine whether the release of security lodged on the basis of a decision subsequently declared invalid may be refused.

26. The plaintiff in the main proceedings states that the release of the security is the logical and necessary consequence of the

annulment of its legal basis. It considers that the judgment of the Court in Case 66/80 does not stand in the way of a negative answer to this question.

27. The Commission states that Regulation No 677/76 assumes the validity of Regulation No 563/76 and therefore simply fixes, in Article 10, the conditions governing the release of the security which has been validly lodged. Regulation No 677/76 is therefore of no assistance in determining whether security lodged on the basis of Regulation No 563/76 should be released in the event that the latter regulation should be declared invalid. The Commission considers, however, that some assistance may be drawn from Article 5 of Regulation No 563/76 as interpreted by the Court in its judgment in Case 66/80.

28. It may be inferred from that judgment that in respect of commercial contracts entered into before the entry into force of Regulation No 563/76 a specific Community rule was established, namely Article 5, which had in any event to be observed until Regulation No 563/76 had been declared invalid. According to that rule, in the case of contracts concluded before Regulation No 563/76 entered into force there is no foundation for the release of security lodged on the basis of that regulation, as was decided in Case 66/80.

29. On the other hand, with regard to contracts concluded after Regulation No 563/76 entered into force the general rule remains applicable; the matter is governed by national law and there is no principle of Community law to prevent the release of security. It is for the national courts to decide whether to require evidence that the charges arising from the security have not been passed on to the purchaser. In any event Community law does not require such evidence and should national courts do so they must observe the limits set by the Court, in particular in the judgment of 9 November 1983 in Case 199/82 *Amministrazione delle Finanze dello Stato* v *SpA San Giorgio* [1983] ECR 3595.

Question 3

30. The third question is asked in the event that the second question should be answered in the affirmative. It seeks to determine whether the non-release of the security depends on when it was declared forfeit, namely before or after the judgments of the Court which ruled Regulation No 563/76 invalid.

31. The plaintiff in the main proceedings does not answer that question or the following questions since it takes the view that by reason of the answers to the first two questions no answer is called for.

32. The Commission considers that the time when the authorities responsible for applying Regulations Nos 563/76 and 677/76 declared forfeit the security lodged under those regulations is irrelevant to the question of the release of the security in issue in the main proceedings. The decisive issue is solely the Council's intention, expressed in Article 5 of Regulation No 563/76, to make the purchasers of protein feedingstuffs bear the burden of the costs arising from the security system. It is true that the distribution of costs defined in Article 5 related solely to contracts already concluded when the regulation entered into force, but in relation to such existing contracts it covered both the simple

provision of security and the amount ultimately paid if the security was forfeited. In the Commission's opinion there is no fundamental difference between the two cases: both represent the repayment of a charge which Regulation No 563/76 imposed on the importer. Since the costs arising from the regulation were to be passed on to third parties, according to the express intention of the Community legislature, the Commission takes the view that the judgment of the Court in Case 66/80 precluded any refund in both cases in so far as existing contracts are concerned. The expression 'securities . . . declared forfeit' used by the Court is not a term of art.

Questions 4, 5 and 6

33. Neither the plaintiff in the main proceedings nor the Commission submitted observations on those questions.

C. Kakouris
Judge-Rapporteur