considers that there is such a case of hardship is, however, always at liberty to refer to the Court for a preliminary ruling any question on the interpretation and the validity of the Community measure concerned, the answer to which it considers necessary to enable it to give judgment.

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT
delivered on 26 September 1985 *

Mr President,
Members of the Court,

I. Introduction

This case concerns first of all the relationship between two Commission regulations (on the sale by intervention agencies of beef and veal which they have bought in) and a Council regulation which amended the exchange rates to be applied in agriculture. In the second place it involves a point of law arising from a transition period; it arose because the Council regulation was enacted in the period from 30 March 1981 to 30 April 1981 in which beef sales regulated by one of the Commission regulations took place. As an indirect result of the Council regulation but also owing to the two Commission regulations, the prices applying to tenders submitted after the entry into effect of the Council regulation on 6 April 1981 were lower than those applying to tenders submitted before that date. The plaintiff in the main proceedings was in the group which had submitted tenders before 6 April 1981. Since the plaintiff was thus in a more unfavourable position than its competitors who had not submitted tenders until or after 6 April, the question arises whether that result is contrary to any general principle of Community law other than a principle of law regarding transitional periods.

The wording of the relevant regulations, the facts of the case before the national court, the course of the national proceedings and the questions submitted by the national court as well as the written observations submitted to the Court are, in my view, essential for a proper understanding of this case which at first sight appears relatively complex. For the most part I have based my summary of those matters on the Report for the Hearing. However, since the chronology of events is, in my view, also important for a proper understanding of the case, I have added some further points.

II. The relevant regulations

II.1. The main proceedings concern the forfeiture of a security in the framework of the common organizations of the agricultural markets. The security was lodged under Commission Regulation No 2173/79 of 4 October 1979 on detailed rules of

* Translated from the Dutch.

application for the disposal of beef bought in by intervention agencies (Official Journal 1979, L 251, p. 12). That regulation concerns the sale of products which are purchased in accordance with, in particular, Regulation No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187).

Article 2 of Regulation No 2173/79 reads as follows:

'(1) The purchase application shall be submitted to the intervention agency in writing. It shall be deemed valid for consideration on the day when the security specified in paragraph (2) is received.

(2) ...

The application must be supported by a security in favour of the intervention agency.

...'

Article 3 reads as follows:

'(1) The intervention agency shall deem valid for consideration each day all complete applications . . . .

(2) Save in exceptional circumstances applications shall be accepted within five working days following their submission until stocks are exhausted.

(3) The intervention agency shall, within the time-limit provided for in paragraph (2), notify each applicant of the decision taken on his application.'

Article 5 reads:

'The exchange rate applied to sale prices fixed in advance in ECU shall be the representative rate in force on the day on which the application is deemed valid for consideration under Article 3 (1).'

Article 15 provides that the security shall be 50 ECU per tonne.

As regards the forfeiture of the security, *Article 16* provides:

'(1) If the purchaser does not pay for the product within the time-limit specified in Article 18 (1) the contract shall, without prejudice to the provisions of paragraphs (2) and (3), be cancelled by the intervention agency in respect of the quantity not paid for.

(2) Except in cases of *force majeure* the security shall be forfeit:

...

(b) In total, if the quantity paid for is less than 60% of the quantity covered by the contract.

...'.

It is also pointed out in the *first recital* of the preamble to the regulation that:

'. . . products bought in by intervention agencies pursuant to Articles 5 and 6 of Regulation (EEC) No 805/68 must be disposed of in such a way as to avoid disturbance of the market and to ensure equal access to the products and equal treatment of purchasers.'

The *11th recital* of the preamble to the regulation states that:

'So that these operations may be carried out expeditiously, it should be laid down that the rights and obligations involved in a sale contract or a tender must be exercised or fulfilled within certain time-limits.'

II.2. The purchase application in question in this case was submitted in accordance with Commission Regulation No 713/81 of 19

March 1981 on the sale at a price fixed in advance of certain boned beef and veal held by certain intervention agencies (Official Journal 1981, L 74, p. 27).

Article 1 of that regulation reads as follows:

'(1) During the period 30 March to 30 April 1981 the sale shall take place of approximately:

...

— 4 000 tonnes of boned beef and veal held by the German intervention agency and put into store before 1 November 1980,

...

(3) The qualities and prices of this meat are given in Annex I.

(4) Sales shall take place in accordance with the provisions of Regulation (EEC) No 2173/79 and in particular Articles 2 to 5 thereof.

...'.

In *Annex 1* the price for the silversides of young steers is fixed at 3 675 ECU per tonne (equivalent at that time to DM 10 112.68 per tonne).

II.3. On 1 April 1981 the Council adopted Regulation No 850/81 amending Regulation No 878/77 on the exchange rates to be applied in agriculture (Official Journal 1981, L 90, p. 1). It increased the 'green' rate for the German mark. That meant that from 6 April 1981 the price of a tonne of the meat which the applicant wished to buy dropped from DM 10 112.68 to DM 9 763.01.

The *fifth recital* of the preamble to the regulation reads as follows:

'... when that rate is adjusted account must be taken of the effects of the operation, particularly on prices; ... therefore, provision must be made for the new rate to take general effect after a reasonable lapse of time, to coincide as a rule with the beginning of the new marketing year or the date of an adjustment in prices, although it should take effect immediately in certain cases.'

III. The relevant facts and the course of the national proceedings

III.1. On *23 March 1981*, as is stated in the second recital in the preamble to Council Regulation No 850/81, the rates of a number of national currencies were changed within the European Monetary System.

On *27 March 1981* the plaintiff in the main proceedings, Firma Karl-Heinz Neumann (hereinafter referred to as 'Neumann'), submitted to the defendant, the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the organization of agricultural markets, hereinafter referred to as 'the Bundesanstalt'] in accordance with Regulation No 713/81 an application to purchase silversides of young steer (*Jungbullenunterschalen*). In accordance with that regulation Neumann deposited a security of 50 ECU per tonne. At the hearing the Court was told that the security was also lodged on 27 March, but it was impossible to establish this for certain.

Regulation No 850/81 was then adopted on 1 April 1981, published on 4 April 1981 and entered into effect on *6 April 1981*.

The sale of the products took place in accordance with Regulation No 713/81 at a price fixed in advance of 3 675 ECU per tonne. The Bundesanstalt accepted the bid by a 'confirmation of sale' dated *7 April 1981*.

All of Neumann's competitors, who did not submit their purchase applications until *6 April 1981* or after that date, profited from the new 'green' rate for the German mark introduced by Regulation No 850/81. In those circumstances Neumann realized that

if the old exchange rate was applied it could not sell the intervention goods without making a loss. It therefore gave formal notice that it would not fulfil its obligations to take delivery of and pay for the goods. The Bundesanstalt thereupon re-offered for sale the quantity of beef intended for Neumann. Neumann and a sister firm made a new offer (at the new exchange rate) which the agency accepted. Neumann thus managed to obain the goods at a cheaper price and to remain competitive on the market. However, the Bundesanstalt considered that it had to forfeit the security because Neumann had not fulfilled the original obligation to purchase. Save on the points set out above, there is no certainty about the contents and dates of correspondence and other contacts between Neumann and the Bundesanstalt after 1 April 1981.

In an action brought before the Verwaltungsgericht Frankfurt am Main Neumann challenged the legality of the decision to forfeit the security it had furnished.

III.2. In the course of that action the Verwaltungsgericht stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

(1) Must the fifth recital in the preamble to Council Regulation (EEC) No 850/81 of 1 April 1981 amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture, (Official Journal L 90, p. 1) be construed as meaning that when altering the exchange rates the Council also intended to avoid hardship caused to persons buying commodities from intervention agencies under Commission Regulation (EEC) No 713/81 of 19 March 1981 (Official Journal L 74, p. 27) owing to the fact that they lodged their purchase applications before 6 April 1981 and as a result have to pay a higher price than their competitors who submitted applications after 6 April 1981?

(2) Is there a general principle of objective unfairness (*sachliche Unbilligkeit*) in Community law so that an applicable provision of Community law may not be applied if it causes hardship to those concerned which the Community legislature would clearly have sought to avoid if it had envisaged that case when enacting that provision?

In its order for reference the Verwaltungsgericht observes that as a matter of codified Community law the Bundesanstalt was right to forfeit the security since Neumann had not fulfilled its obligation to take delivery of and pay for the beef which arose upon its receipt of the 'confirmation of sale' of 7 April 1981. That obligation was not discharged in any other way. Nor could Neumann plead *force majeure* because, in view of Article 5 of Regulation No 2173/79, it ought to have expected a change in the exchange rates after it had lodged its purchase application. It also knew from Article 5 that only the exchange rate in force on the date of receipt of its application could be applied in its case.

However, the Verwaltungsgericht considers that there are other reasons why the Bundesanstalt may not exercise its powers under Article 16 (2) of Regulation No 2173/79.

In the view of the Verwaltungsgericht, the Council clearly wished to take account of the effects of the adjustment of the exchange rates on prices. The explanation for this can only be that the agricultural prices fixed by the Community are meant to

afford the producers and traders concerned a stable basis for their calculations. It was also for that reason that the new rate was in principle to enter into force at the beginning of the new marketing year, since adjustments in the reference prices (target prices, intervention price and so forth) are always made at that time so that a secure basis of calculation for a period lasting beyond one marketing year is not provided for in the agricultural market organizations in any case. However, this applies only to prices which are fixed throughout the marketing year and not to prices whose adjustment or maintenance does not depend on the changeover from one marketing year to the next. The latter prices include the sale prices fixed in advance for commodities held by intervention agencies. Such prices are not related to a marketing year but are fixed for the duration of a particular sale operation — in the present case from 30 March to 30 April 1981 (Article 1 (1) of Regulation No 713/81).

However, According to the Verwaltungsgericht, the fifth recital of the preamble to Regulation No 850/81 indicates that the Council wished to take account not only of the stability of prices that are linked to the marketing year; in other cases, too, the new exchange rate was meant 'as a rule' to come into force at the time when prices were adjusted. The Verwaltungsgericht is therefore inclined to answer the first question in the affirmative.

As regards the second question, the Verwaltungsgericht observes that since it is virtually certain that the fifth recital in the preamble to Regulation No 850/81 must be regarded as evidence that the Council intended to avoid the very problem with which Neumann was confronted as a result of the change in the exchange rates, the fact that it must still pay all the security constitutes a case of objective unfairness in German law. In such a case German revenue law expressly provides that the debt is discharged (Paragraph 163 of the *Abgabenordnung* [Tax Code] 1977). Objective unfairness within the meaning of Paragraph 163 of the *Abgabenordnung* exists where it can be assumed from the express or presumed intention of the legislature that if it had been required to address itself to the problem it would have resolved it on equitable principles.

In the view of the Verwaltungsgericht, that principle is simply a specific application of the principle of proportionality recognized by the Court. However, the Court has rejected a claim for the discharge on grounds of objective unfairness of a debt due under public law (judgment of 28 June 1977 in Case 118/76 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1117). But that judgment does not exclude the possibility that an unwritten principle of Community law, possibly developed after that judgment, applies to such claims.

IV. The written submissions submitted to the Court

IV.1. *The first question*

Neumann observes with regard to the first question that under Article 177 of the EEC Treaty no interpretation can be requested of recitals in the preamble to a Community regulation since they have no external legal effect which is necessary for a Community measure to be susceptible of interpretation under that article. According to the established case-law of the Court, it is necessary in such a case to extract the elements of Community law which, having regard to the subject-matter of the dispute, require an interpretation or an assessment of their validity as the case may be.

Since the intervention agency did not give a decision on the purchase application within the period laid down in Article 3 of Regulation No 2173/79, Neumann suggests that the question should read as follows:

'Must Council Regulation (EEC) No 850/81 of 1 April 1981, amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture, read in conjunction with the first sentence of Article 3 (2) of Commission Regulation (EEC) No 2173/79 of 4 October 1979, be construed as meaning that the purchaser is no longer bound by his purchase application and the security may no longer be forfeited if the intervention agency did not give a decision on the application within a period of five working days and if in that period the exchange rates are changed in such a way that the buyer must then pay a higher price than his competitors who did not submit their bid until after 6 April 1981?'

In Neumann's view, the starting point is Article 5 of Commission Regulation No 2173/79. Under that article the exchange rate to be applied to sale prices fixed in advance in ECU is the representative rate in force on the day on which the application is deemed valid for consideration under Article 3 (1). However, that provision presupposes that the intervention agency has in fact taken a decision to accept the application within the period laid down in Article 3 (2). The first and 11th recitals in the preamble to Regulation No 2173/79 show that those provisions are meant to provide equal treatment and legal certainty and ensure that transactions are carried out expeditiously. It follows that applications in respect of which the period for acceptance laid down in the first sentence of Article 3 (2) of Regulation No 2173/79 has expired may have no legal effect as against the applicant nor be detrimental to him.

If in such a case the exchange rates are changed in the meantime to the disadvantage of the buyer, there is also a breach of the principle of good faith and of the principle of legality.

Neumann also points out that on certain conditions Community law allows buyers in other sectors in the event of a change in the exchange rate to cancel contracts which are still unperformed. What is expressly provided for in those provisions should *a fortiori* apply in the event that the intervention agency does not give a decision on the application within the prescribed period.

Consequently, Neumann submits that the first question should be answered as follows:

'Council Regulation (EEC) No 850/81 of 1 April 1981, amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture, read together with the first sentence of Article 3 (2) of Commission Regulation No 2173/79 of 4 October 1979, on detailed rules of application for the disposal of beef bought in by intervention agencies and repealing Regulation No 216/69, must be construed as meaning that the buyer is no longer bound by his purchase application and a security may no longer be forfeited if the intervention agency has not given a decision on the purchase application within the period laid down in the first sentence of Article 3 (2) of Commission Regulation No 2173/79 and if in the meantime a change has occurred in the exchange rates which means that the buyer must pay a higher price than his competitors who did not submit their bid until later — after 6 April.'

In case the Court should consider that the recitals in a preamble to a Community regulation may also be susceptible of interpretation under Article 177 ofthe EEC Treaty, Neumann suggests the following answer:

'The fifth recital of the preamble to Council Regulation (EEC) No 850/81 of 1 April 1981, amending Regulation (EEC) No 878/77 on the exchange rates to be applied in agriculture, must be construed as meaning that, when altering the exchange rates, the Council also intended to avoid hardship caused to persons buying commodities from intervention agencies under Commission Regulation (EEC) No 713/81 of 19 March 1981 owing to the fact that they lodged their purchase applications before 6 April 1981 and as a result must pay a higher price than their competitors who lodged their bid after 6 April 1986.'

The *Commission* observes that the reasoning by which the Verwaltungsgericht came to the conclusion that in inserting the aforesaid recital the Council wished to avoid situations such as that which occurred in this particular case is not quite clear. The conclusions which the Verwaltungsgericht believes it may draw from the fifth recital of the preamble to Regulation No 850/81 are wrong for a number of reasons.

First of all, it is difficult to see why the fact that the new exchange rate did not come into force immediately could justify Neumann's refusal to take delivery of the beef duly bought at the old exchange rate. If the new exchange rate had not come into force on 6 April 1981, then the old rate, by which Neumann would have been bound in any case, would logically have applied. Even in that case it would still have been necessary to declare the security forfeit pursuant to Article 16 of Regulation No 2173/79 which is perfectly clear on this point.

Secondly, the distinction drawn by the Verwaltungsgericht between institutional prices and other prices is fundamentally wrong. As its title indicates, Regulation No 850/81 does not concern the prices to be applied in a specific sector but the exchange rates to be applied in agriculture. That is also the reason why the annexes to the regulation deal only with the relationship between the ECU and the various national currencies as well as the dates from which the new exchange rate is applicable to the various agricultural sectors. In the actual provisions of the regulation there is no reference at all to prices.

Finally, the Verwaltungsgericht overlooks the fact that in 1981 the date on which Regulation No 850/81 entered into force coincided exactly with the beginning of the beef marketing year. According to the first paragraph of Article 4 of Regulation No 805/68, that began on the first Monday in April. Since in 1981 the first Monday in April fell on the sixth day of that month, the rule in the last indent of Annex III, No 1, of Regulation No 850/81 (according to which the new exchange rate is to apply from that date 'in all other cases') is not a derogation in the beef sector from the rule stated in the fifth recital but, on the contrary, an application of that rule.

Since Regulation No 850/81 has nothing to do with price regimes — the institutional prices for beef in 1981/82 were fixed in Council Regulation No 898/81 — it clearly cannot make any distinction between 'important' and 'unimportant' prices on which the Verwaltungsgericht based its reasoning. As an impartial reading of the

regulation shows, the entry into force of the new exchange rates therefore applied to all prices expressed in ECU.

The fifth recital in the preamble to Regulation No 850/81 is therefore simply stating that when adjusting the 'green' rates on 1 April 1981 the Council wanted to continue to adhere to the principles which it had observed for a long time, namely:

(i) to take account when adjusting those rates of the effects of their adjustment on the structure of national prices which fall if the national currency is revaluated against the ECU (which, for political reasons, is difficult to get accepted) and which rise in the converse case (which may lead to undesirable inflation);

(ii) to make the adjustment of the 'green' rates coincide as far as possible with the beginning of the marketing year when as a general rule prices are adjusted in any case;

(iii) to adjust the 'green' rates for countries with 'strong' currencies (in the past, mainly Germany and the Netherlands) only when common prices are adjusted because this is the only way to prevent a fall in agricultural producers' incomes.

Many Council regulations, containing the same recitals almost word for word, have been based on those principles. It has never been suggested that the adjustment of the exchange rates on the fixed dates relates only to guide prices and intervention prices and not also to other sale or purchase prices fixed within the framework of the relevant market organization.

The Commission therefore suggests that the Court should reply to the first question as follows:

'Neither Regulation No 850/81 nor the fifth recital of the preamble to that regulation may be interpreted as meaning that the Council wished to avoid hardship which may arise from the fact that a buyer of commodities held in intervention, for which he submitted, before the entry into force of Regulation No 850/81 and pursuant to Commission Regulation No 2173/79, a binding offer to purchase, remains bound by the exchange rate between the ECU and the national currency on which that offer was based.'

IV.2. *The second question*

Neumann shares the opinion of the Verwaltungsgericht that the Court has not hitherto recognized a principle of objective unfairness in Community law. In its judgment of 18 June 1977 in Case 118/76 *(Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1177) the Court probably rejected at that time the existence of such a principle in Community law as it then stood. However, the Court should now examine whether there are grounds in this case for recognizing that principle.

The aim of any legal order based, like the Community legal order, on the rule of law must be to avoid any hardship which the legislature would clearly have sought to avoid if it had envisaged such an eventuality when enacting the legislation; therefore the legal principle of objective unfairness must be considered to exist in Community law. Such rules are necessary in order to

maintain confidence in the law and to provide the assurance that it accords with justice.

Neumann therefore suggests that the national court must be given the criteria for determining when and the conditions on which the principle of objective unfairness is applicable. The second question should therefore be answered as follows:

'The principle of the rule of law inherent in the EEC Treaty must be interpreted as comprising a general legal principle of objective unfairness. That principle must be interpreted as meaning that a provision that is in force may not be applied if it leads to hardship which the Community legislature would clearly have sought to avoid if it had envisaged that situation when enacting the provision and its application would no longer be compatible with the concepts of law and justice.'

The *Commission* points out that, as the Verwaltungsgericht itself states, the waiver of a claim for reasons of equity can in principle only be considered if it is to be inferred from the express or presumed intention of the legislature that if it had envisaged hardship in a particular case it would have adopted an equitable solution. As is clear from the Commission's observations on the first question, that condition is not fulfilled in this case and for that reason alone the second question need not be answered.

In the *Balkan-Import-Export* judgment the Court did not recognize the existence of a principle of law, applicable throughout Community law, allowing the administrative authorities or courts, following the example of German law, to waive a debt due under the law in force if its recovery appeared to them to be objectively unfair. In the Commission's view, what was stated on that occasion remains entirely relevant, at least as far as concerns the existence of a general principle of law. Since that judgment there has been some development in derivative Community law, but the legislative provisions havealways been restricted in their scope of application to quite specific duties. To prevent abuses, some regulations either defined in detail the situations in which it might be decided to waive a debt on equitable grounds or gave the Commission sole power to decide those cases in which a request for repayment or waiver on equitable grounds was not *prima facie* unjustified.

Should the Court take the view that the second question must be answered, the Commission suggests that it should be answered to the effect that there is no general principle in Community law which would allow national authorities to derogate from a rule of Community law on grounds of objective fairness.

V. Answers to the questions

1. *Preliminary observations*

Before I myself examine the questions raised, I consider it useful to make the following preliminary observations.

In the first place I consider it regrettable that the Bundesanstalt für landwirtschaftliche Marktordnung has not exercised its right to submit written observations in this case and to participate in the oral procedure. If it had done so, it could have been of great assistance in clarifying the actual course of events. More so than in most references for a preliminary ruling, knowledge of a number of facts is, in my view, vital in this

case for answering the questions raised. I am referring in particular to the dates and contents of correspondence and other contacts which took place between Neumann and the Bundesanstalt between 1 April 1981 (the date on which Council Regulation No 850/81 was enacted) and the date on which the security was declared forfeit: the latter date did not become clear at the hearing but was presumably after April judging by the notice of objection dated 9 July. I conclude from the documents that the Bundesanstalt agreed in any event to a new offer from Neumann after 6 April 1981. I also deduce from the documents that in the face of the many other applications submitted on 6 April (which, according to the information provided by the Commission, far exceeded the quantity available) the Commission gave the new application the priority laid down in Regulation No 2173/79 on the basis of the original application of 27 March. However, according to Neumann, the parties are in dispute over the question whether the Bundesanstalt had already agreed before 6 April to the cancellation of the application of 27 March (without the loss of the security) and its replacement on or after 6 April by a new application for the same quantity of the commodity concerned. If the Bundesanstalt did indeed give its agreement from the outset, the question arises whether it could, much later, go back on its agreement by forfeiting the security deposited for the cancelled application of 27 March. Since the exact course of events is not certain, it will, however, be difficult for the Court when answering the second question to proceed on the basis of a specific hypothesis. The Commission also regretted at the hearing that the relevant facts have not been sufficiently established.

Secondly, I am surprised that no questions have been asked on two points which I consider relevant to the decision to be given in the main proceedings.

The first point is whether the sales effected by the Bundesanstalt pursuant to Title I of Commission Regulation (EEC) No 2173/79 are governed by German contract law or by German administrative law. As far as I am aware, the practice of the Member States on this point is not uniform. In those Member States in which contract law is applied, the application of the principle of good faith or another principle of civil law governing the conclusion and/or performance of contracts might have provided a solution. According to Neumann's statements at the hearing, the Verwaltungsgericht takes the view, however, that only principles of administrative law apply. It seems to me that differences of view on this point may lead to considerable differences in the ways in which disputes about the sale transactions in question are resolved. Questions on the interpretation of the applicable national law of contract may not, of course, be submitted to the Court. On the other hand, I consider the question whether sales such as those in question in this case are in principle governed by the civil law of the Member States or by the administrative law of the Member States and of the Community is a question of Community law relevant to the uniform application of Community law. Since no question has been raised on this

point and the parties to the main proceedings, the Commission and the Government of the Member States have not therefore been able to submit any written or oral observations on the point, the Court will not be able to rule upon it in this case. For those same procedural reasons I will not express my view on this question either.

A second relevant point on which no question has been raised is the possible applicability in this case of the prohibition of discrimination laid down in Article 40 (3) of the EEC Treaty. In my view the point arises from the fact that Neumann's application of 27 March 1981 was not accepted until 7 April. However, the point has nothing to do with the fact that the five-day period laid down in Article 3 (2) of Regulation No 2173/79 was exceeded. The problem I have in mind would have arisen even if the application had not been submitted until 1 or 2 April and a decision on it given on 7 April. It arises in fact solely from the fact that the date on which the application was accepted, 7 April, was after the date of 6 April when Council Regulation No 850/81 entered into force. It is not disputed that the application of the provisions of Regulation No 2173/79 (including the exchange rates in force on 27 or 30 March) to Neumann's application meant that Neumann had to pay a much higher price for the meat which it purchased than its many competitors whose applications of 6 April were accepted on 7 April. It is also undisputed that this disadvantage was so considerable that the possibility of selling the meat without making a loss was considerably restricted if not totally ruled out. That question, abstractly formulated, is therefore whether measures of common agricultural policy, within the meaning of Article 40 (3) of the EEC Treaty, or implementing decisions conflict with the prohibition of discrimination laid down in that provision if they have the effect that, after a change in the representative rates, undertakings whose applications submitted in accordance with Article 2 of Commission Regulation No 2173/79 were accepted on the same day pursuant to Article 3 of that regulation must pay very different prices and as a result the competitive positions of those undertakings when reselling the products concerned are very different. The relevance of such a question is underlined by the first recital of the preamble to Regulation No 2173/79, quoted above, which appears to refer implicitly to Article 40 (3) of the EEC Treaty. As far as I have been able to ascertain, such a question has not been raised in any previous case. Since it has not been raised in this case either, the Court will be unable to answer it for the same procedural reasons which I mentioned with regard to my first point.

Nevertheless, I consider it necessary to mention those two points because they show that a satisfactory solution to the dispute before the national court does not entirely depend on the questions it has raised in these proceedings.

After making those preliminary observations I shall now examine the questions raised.

2. *The first question*

2.1. *The formulation of the question.* As regards the national court's first question, I agree in principle with Neumann's point that recitals in a regulation's preamble cannot by themselves have any legal effect. Therefore they cannot be interpreted in isolation by the Court pursuant to Article 177 of the EEC Treaty. However, that objection is easily met by taking the

question to mean that the national court wishes to know from the Court whether 'Council Regulation (EEC) No 850/81 of 1 April 1981 ... (Official Journal 1981, L 90, p. 1) must, having particular regard to the fifth recital of its preamble, be construed as meaning that when altering the exchange rates the Council also intended to avoid hardship caused to persons buying commodities from intervention agencies under Commission Regulation (EEC) No 713/81 of 19 March 1981 (Official Journal 1981, L 74, p. 27) owing to the fact that they lodged their purchase applications before 6 April 1981 and as a result have to pay a higher price than their competitors who lodged their applications after 6 April 1981'. However, I can find no evidence in the order for reference to support Neumann's suggestion that the question should also be regarded as referring to the point concerning the exceeding of the time-limit when its application was accepted. As far as can be seen, this point was not raised until the procedure before the Court was in progress and had not been raised in the main proceedings. Nor has it anything to do with the interpretation of Regulation (EEC) No 850/81 since the question whether the delay in dealing with Neumann's application might have been unlawful can be answered only on the basis of the Commission regulation concerned. I shall examine this point in more detail later on.

2.2. *Examination of the question.* When answering this question it is important to state first of all that the Commission has rightly pointed out that the Council regulation alters only the 'green rates'. This change in the exchange rates to be applied in agriculture may have very different effects on the dozens of price-fixing measures and other market-organization measures applied in the agricultural sector. In practice those effects depend on the substance of the market-organization measures and on the new price rules for the new marketing season which are usually introduced on 6 April. It appears from the annexes to the regulation that in most Member States the new exchange rates enter into force on a later date only in the fishery sector. The few exceptions to this rule in Germany's case are not relevant.

According to the Commission's statements at the hearing, the reasons why the Council regulation in question entered into force on 6 April are directly linked to the possibility of applying on that date, when the new price policy is determined, certain means of offsetting undesirable decreases or increases in prices which might occur in certain Member States (whose currencies are revalued or devalued) as a result of the amended exchange rates. At any rate, I too take the view that when exercising its discretion the Council must, in view of such policy considerations, be allowed a wide discretion in determining the date of the entry into force of regulations such as that in question.

Nor would it have been of any assistance to Neumann if the Council regulation had entered into force on the day on which it was adopted, that is on 1 April. In that case its application would again have been accepted, in accordance with the Commission regulation, only on the basis of the 'green' exchange rates in force on 27 March or 30 March. The only thing which would have assisted it would have been for the regulation to have been made retroactive to 23 March 1981, the date on which the general exchange rates were adjusted. However, according to the Court's case-law, such retroactive effect is acceptable

only if expressly provided for. It cannot be accepted on the basis of hardship such as that which the Verwaltungsgericht deduces from the fifth recital of the preamble to the Council regulation. Besides, as I have pointed out, such retroactive effect would certainly have been very disadvantageous in other cases to the producers concerned. Moreover, a Council regulation such as Regulation No 850/81, which makes uniform adjustments to the exchange rates in agriculture, cannot by its nature provide explicit or implicit solutions for neutralizing its effects on the price level of agricultural products which vary greatly from one price regime to another, from commodity to commodity and from Member State to Member State.

Finally, the Commission was, in my view, right to point out that the Council may only make amendments to Commission regulations — such as Regulation No 713/81 — determining prices of agricultural commodities in certain kinds of transactions (in this case the sale of commodities held in intervention) when express provisions to that effect exist. In my view, this follows from the division of powers between the Council and Commission, although, unlike the Commission, I consider reliance on the third indent of Article 155 of the Treaty insufficient in this regard. The scope of the Commission's own powers of decision provided for in Article 155 also depends, in the agricultural sector, on decisions of the Council.

In my view, the first question of the Verwaltungsgericht must be answered in the negative for the aforementioned reasons alone. However, in its written and oral observations the Commission has put forward still further arguments for answering the question in the negative. Amongst those arguments I consider in particular its interpretation of the fifth recital in the preamble to Regulation No 850/81 to be important. In its view, that recital is simply stating that when adjusting the 'green' rates on 1 April 1981 the Council wanted to continue to adhere to the principles which it had observed for a long time, namely:

(i) to take account when adjusting those rates of the effects of their adjustment on the structure of national prices which fall if the national currency is revaluated against the ECU (which, for political reasons, is difficult to get accepted) and which rise in the converse case (which may lead to undesirable inflation);

(ii) to make the adjustment of the 'green' rates coincide as far as is possible with the beginning of the new marketing year when as a general rule prices are changed in any case;

(iii) to adjust the 'green' rate for countries with 'strong' currencies (in the past, mainly Germany and the Netherlands) only when common prices are adjusted because this is the only way to prevent a fall in agricultural producers' incomes.

Many Council regulations, containing the same recitals almost word for word, have been based on those principles. According to the Commission, it has never been suggested that the adjustment of the exchange rates on the fixed dates relates only to guide prices and intervention prices and not also to other sale or purchase prices fixed within the framework of the relevant market organization. In my view, that interpretation is acceptable in every respect.

3. *The second question*

Answering the second question raised by the Verwaltungsgericht presents considerable difficulties, as the Commission also admitted at the hearing.

Actually I agree with the Commission that such a broadly formulated variant of a general principle of fairness in Community law must be rejected by the Court. First of all, I agree that the reasons for rejecting it are *mutatis mutandis* the same as those which induced the Court in Case 118/76 (*Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1177) to reject the application of a principle of fairness in case it might affect the proper application of important substantive provisions of Community law (concerning in that case the levying of monetary compensatory amounts on imports of agricultural products from a non-member country). Secondly, I agree with the Commission that it cannot be deduced from the Court's later decisions, in particular its judgment in Case 113/81 (*Otto Reichelt GmbH* v *Hauptzollamt Berlin-Süd* [1982] ECR 1957) that the Court has changed its view so fundamentally that an affirmative answer to the second question might be justified. That case concerned only the much narrower question whether the national customs authorities might apply national law to a claim for a remission on equitable grounds of customs duties charged in excess of the amount due. The Court answered that question in the affirmative, following Mrs Advocate General Rozès, but with the proviso that the conditions for such remission had to be the same as those applied to claims for the remission of charges imposed under national law. Nothing in that judgment suggests that the Court had any intention to adopt a fundamentally different position from that adopted in the *Balkan-Import-Export* case. The decision is entirely concerned with the specific legal and factual circumstances of that particular case. In particular, the decision recognizes no general principle of fairness in Community law; it merely recognizes that in a specifically defined case an effect supplementing Community law may be given to a rule of fairness recognized in national law, provided that it is applied as it normally would be applied in national law to similar cases. Finally, I agree with the Commission that the recognition of a general principle of fairness of the kind referred to in the national court's second question which would apply even *contra legem* would jeopardize the uniform application of Community law to an unacceptable degree because of the different way in which the principle would probably be applied in the Member States. Since a principle of objective unfairness or *sachliche Unbilligkeit* of the kind referred to by the national court was developed only in Germany and, according to the order for reference, only in a specific area of the law, this well illustrates the danger that the law might be applied differently in the various Member States. Therefore, in my view, the second question, framed as it is in general terms, must be answered in the negative.

However, having rejected a principle formulated in such general terms as those used by the Verwaltungsgericht, I do not consider that the matter can rest there. In the first place, it does not rule out the recognition in Community law of a principle of fairness applying *infra legem*, that is to say in those cases in which Community law itself provides a basis for it. In the Commission's view, it is clear from the order for reference that the Verwaltungsgericht asked the second question only in case the first question was answered affirmatively. In my opinion, support for the

Commission's view can indeed be found in the first ground for referring the second question stated by the Verwaltungsgericht on page 6 of its order. The first sentence of the second paragraph of the statement of grounds for referring the second question also points in the same direction. However, the wording of the question itself does not suggest such a narrow interpretation, which would make an answer superfluous if the first question were answered in the negative. Precisely because the first question must, in my view, be answered in the negative, the second question should, owing to the circumstances of the particular case, also be answered with regard to cases in which the aforesaid principle is applied *contra legem.*

However, decisions to apply a principle of fairness in order to rectify or supplement Community law will be possible only in precisely defined cases.

For possible applications of the principle in general, Neumann, besides referring to the fundamental principles of the rule of law, has referred in particular to the Court's decisions in which pleas based on the principle of protecting legitimate expectation and the principle of proportionality have been upheld.

In my view, it is not possible to deduce from the concept of the rule of law, as understood in the various Member States, any generally recognized principle of fairness which could be applied even *contra legem* (in this case, as acknowledged by the Verwaltungsgericht on page 4 of its order, in clear derogation from Article 5 of Regulation No 2173/79. Nor can I find any support for such a principle in Community law. As the Commission again explained at the hearing, the tendency is rather for hardship clauses to be inserted in individual Community regulations which, for the sake of uniform application, are applied by or under the supervision of the Commission subject ultimately to control by the Court.

In my view, it is also impossible in this case to rely on the principle of legitimate expectation. In view of the changes made to the exchange rates on 23 March 1981, Neumann ought to have taken account on 27 March (when it submitted its application) of the probability that those changes would also lead to changes in the representative rates. In the case of Germany in particular, Neumann should therefore have reckoned with a fall in prices which would not apply in its case by virtue of Article 5 of Regulation No 2173/79. As I have pointed out, it has not been established that the Bundesanstalt induced Neumann legitimately to believe that it would be prepared to cooperate in converting the old application into a new application (to which the new exchange rates would apply) without forfeiting the security. The Court may not therefore make that assumption when answering the second question. The plea based on the principle of legitimate expectation recognized in the Court's decisions must therefore fail as well.

There remains the argument based on the principle of proportionality constantly recognized in the Court's decisions and also mentioned in the order for reference. That principle has in fact been applied in the Court's decisions concerning the forfeiture of securities and the fining of steel undertakings and even *contra legem* when this was judged necessary, or at least as a supplement to instruments of Community law. For examples of cases concerning the forfeiture of securities I refer to the Court's judgments in Case 11/70 (*Internationale Handelsgesellschaft mbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125), Case 122/78 (*Buitoni SA* v *FORMA* [1979] ECR 677) and

especially Case 240/78 (*Atalanta Amsterdam BV* v *Produktschap voor Vee- en Vlees* [1979] ECR 2137). Although in its judgments in Case 147/81 (*Merkur* [1982] ECR 1389), Case 272/71 (*Rumi* v *FORMA* [1982] ECR 4167) and Case 66/82 (*Fromançais SA* v *FORMA* [1983] ECR 395) the Court did not consider that there had been a breach of the principle of proportionality, it did assume that such a principle was valid. The specific facts of those cases are so different from the facts of this case that the Court's refusal to recognize a breach of the principle of proportionality in them provides no precedent for this case.

As far as the fining of steel undertakings is concerned, departure from the scale of fixed fines used by the Commission was considered justified on the basis of the principle of proportionality in *inter alia* Cases 179/82 *Lucchini* v *Commission* [1983] ECR 3083, 188/82, *Thyssen* v *Commission* [1983] ECR 3721, 270/82, *Estel* v *Commission* [1984] ECR 1195, 8/83, *Bertoli* v *Commission* [1984] ECR 1649 in which equitable grounds are mentioned, and 9/83 *Eisen und Metall AG* v *Commission* [1984] ECR 2071).

In this case, the application of the principle of proportionality falls to be considered with particular regard to Article 16 of Regulation No 2173/79. As the national court admits on page 4 of its order, this case was rightly not assumed to be one of *force majeure*. The security was therefore forfeited in full under Article 16 (2) (b). The ground of forfeiture relied upon in accordance with that provision was that Neumann had not fulfilled the sale contract which arose upon acceptance of its application and in particular had refused to pay the purchase price. This is clear from the Bundesanstalt's letter of 27 November 1981 which Neumann produced to the Court at its request on 18 July 1985 and in which the notice of objection of 9 July 1981 was rejected. As I stated earlier, the date on which the security was declared forfeit is not clear.

I do not consider the question whether the application was accepted by the Bundesanstalt one or — as Neumann maintains — four days after the expiry of the five-day period laid down in Article 3 (2) relevant for the application of the principle of proportionality in this case. In this regard Neumann ought to have claimed that the contract was invalid on the ground that the period was exceeded. However, the Verwaltungsgericht has not raised any question on this point. Moreover, I agree with the Commission that it cannot be concluded from that provision that the aforesaid period is like an exclusion period after the expiry of which acceptance of an application would no longer be possible. As I recently explained in another case (Case 125/83 *Office belge de l'économie et de l'agriculture* v *Nicholas Corman & Fils SA* Opinion of 9 May 1985, paragraph 4.4, in which the principle of proportionality was also concerned), very strict conditions laid down in the Court's case-law must be met before a prescribed period may be assumed to be preclusive.

On the other hand, I consider that there is indeed a breach of the principle of proportionality if a security is forfeited in full although it is clear that the intervention agency concerned has suffered no or at any rate a substantially smaller loss as a result of substitute sales to the applicant in circumstances such as those of this case.

I therefore suggest that the Court should answer the second question of the Verwaltungsgericht in the terms set out below. As far as possible I have related the answer to the facts of the specific case and in addition, like Advocate General Reischl in the *Balkan-Import-Export* case, expressly left open the question of future development of the law.

'Although no general legal principle of objective unfairness, such as that referred to in the question, exists in Community law, at least as it stands at present, it does recognize a principle of proportionality which precludes the full amount of the security from being forfeited for revocation or non-performance of a sale contract concluded under Article 3 of Regulation No 2173/79 despite the fact that the unperformed sale contract was replaced shortly afterwards by one or more other sale contracts with the co-operation of the intervention agency. In such a case the amount to be forfeited must be determined in proportion to the loss actually suffered by the intervention agency. However, in the determination of the loss, fair account may be taken of storage costs, any loss of interest and a proportion of the general administrative costs incurred as a result of the conversion of the unperformed contract into one or more other contracts.'

VI. Conclusion

To sum up I suggest that the Court should answer the two questions submitted by the Verwaltungsgericht as follows:

(1) Council Regulation No 850/81 of 1 April 1981 must, having particular regard to the fifth recital of its preamble, be construed as meaning that when altering the exchange rates in that regulation the Council did not intend to avoid hardship caused to persons buying commodities from intervention agencies under Commission Regulation (EEC) No 713/81 of 19 March 1981 (Official Journal 1981, L 74, p. 27) owing to the fact that they lodged their purchase applications before 6 April 1981 and as a result have to pay a higher price than their competitors who lodged their applications after 6 April 1981.

(2) Although no general legal principle of objective unfairness, such as that referred to in the question, exists in Community law, at least as it stands at present, it does recognize a principle of proportionality which precludes the full amount of security from being forfeited for revocation or non-performance of a sale contract concluded under Article 3 of Regulation No 2173/79 despite the fact that the unperformed sale contract was replaced shortly afterwards by one or more other sale contracts with the cooperation of the intervention agency. In such a case the amount to be forfeited must be determined in proportion to the loss actually suffered by the intervention agency. However, in the determination of the loss, fair account may be taken of storage costs, any loss of interest and a proportion of the general administrative costs incurred as a result of the conversion of the unperformed contract into one or more other contracts.