REPORT FOR THE HEARING
delivered in Case C-155/89 *

I — Facts and procedure

1. *Legal background*

In various sectors the common organizations of the market for agricultural products provide for the grant of export refunds aimed at facilitating the exportation of the products concerned to non-member countries. Those refunds are intended to cover the difference between the Community prices and the prices charged on the world market.

Under that system, the Commission, relying on its powers under the basic regulations on the common organization of the markets and the regulations laying down in each sector the general rules on the grant of export refunds and the criteria for fixing the amount thereof, adopted Regulation (EEC) No 2730/79 of 29 November 1979 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1989, L 317, p. 1). Normally, the refunds, the amount of which varies according to the country of destination, are not paid until the traders concerned furnish proof that the goods have been imported into the non-member country in question. However, Article 25 of Regulation No 2730/79 provides for the possibility of advance payment by the Member States of the whole or part of the amount of the refund on completion of the customs export formalities, and consequently before the products actually leave the customs territory of the Community. The grant of those advances is subject to the provision of security corresponding in value to the advance paid, increased by 15%.

The security thus provided is forfeited if the trader does not furnish proof that the product in question has been imported into the non-member country in respect of which the refund is provided. According to Article 20 of Regulation No 2730/79, such proof must be furnished by the production of the following documents:

(a) the customs document relating to the entry formalities for home use, or a certified true copy or photocopy thereof, or the customs entry certificate made out on a standard form (Article 20(3)(a) and (b));

(b) a copy or photocopy of the transport document (Article 20(5)).

Article 20(4) also lists a series of 'substitute' documents which may constitute proof of importation into a non-member country where the customs document or the customs entry certificate cannot be produced owing to circumstances beyond the control of the exporter or if those documents are considered inadequate. There are no

* Language of the case: French.

exceptions to the obligation to submit a copy of the transport document.

Article 31(1) of Regulation No 2730/79 provides that entitlement to payment of the refund is lost unless the relevant documents are submitted within six months following the date on which customs export formalities were completed, except in cases of *force majeure*. However, Article 31(2) provides that an extension of time may be granted for the submission of the customs document or entry certificate referred to in Article 20(3) or the 'substitute' documents referred to in Article 20(4) provided that 'the exporter has acted with all due diligence to obtain them within [the prescribed] periods'.

Furthermore, the six-month period provided for in Article 31(1) of Regulation No 2730/79 was raised to one year by Article 1(4) of Commission Regulation (EEC) No 1663/81 of 23 June 1981 amending for the fifth time Regulation No 2730/79, amending for the second time Regulation (EEC) No 798/80 and amending Regulation (EEC) No 52/81 as regards in particular the period for submission of the documents necessary for certain payments to be made (Official Journal 1981, L 166, p. 9). According to the provisions of Article 2, that regulation entered into force on 1 July 1981. However, the extended time-limit of 12 months is to be applied at the request of the parties concerned in respect of transactions for which the time-limit of six months expired after 1 January 1981. Furthermore, the possibility of granting an extension of time pursuant to Article 31(2) of Regulation No 2730/79 was subsequently extended to the submission of the transport document by Article 1(14) of Commission Regulation (EEC) No 568/85 of 4 March 1985 amending for the 10th time Regulation No 2730/79 (Official Journal 1985, L 65, p. 5). Those provisions entered into force on 7 March 1985 but, pursuant to Article 2 of that regulation, 'at the request of those concerned ... [they] shall apply to cases pending'. Finally, it must be borne in mind that Regulation No 2730/79 has now been replaced by Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1987, L 351, p. 1).

2. *Background to the dispute*

Philipp Brothers SA, a company incorporated under French law, obtained from the Belgian intervention agency, the Office central des contingents et des licences (hereinafter referred to as 'the OCCL') two licences for exportation to non-member countries: one dated 23 January 1981, relating to a quantity of 2 428 571 kg of common wheat for Finland (the Finnish transaction), and the other dated 28 January 1981, relating to a consignment of 4 571 429 kg of common wheat for Norway (the Norwegian transaction). On 18 March 1981 Philipp Brothers received from the OCCL advances corresponding to the total amount of the refunds fixed in advance in respect of the two transactions, namely BFR 4 351 899 and BFR 8 298 816 respectively. By way of security for those advances, Philipp Brothers provided, through the Banque Vernes in Paris and the Banque Bruxelles Lambert in Brussels, two guarantees the amount of which was higher than that fixed by Article 25 of Regulation No 2730/79, which is equal to 115% of the refunds paid in advance.

As from 1 April 1981 the Banque Bruxelles Lambert requested the OCCL to release the two securities. The security relating to the Norwegian transaction was released on 24 April 1981. In the case of the Finnish transaction, the bank asked on four occasions for the security to be released; on each occasion, the OCCL stamped the request with the words 'Document to be cancelled' but the security was not in fact released until 3 February 1982.

On 10 August 1981, finding that it was not in possession of the documents needed for the release of the securities, the OCCL asked Philipp Brothers to produce them. Since it did not receive any reply, on 27 August 1982 the OCCL sent Philipp Brothers a 'final statement' in which it demanded the reimbursement of the advances paid, plus 15%. On 17 September 1982 S. G. S. Van Bree, agent for Philipp Brothers, sent to the OCCL the customs documents relating to the entry formalities for home use. However, although the document relating to the Norwegian transaction was forwarded in the form of a certified true copy, the document relating to the Finnish transaction was forwarded in the form of a mere copy. Moreover, by letter of 24 December 1982, S. G. S. Van Bree transmitted to the OCCL a copy of the transport documents, pointing out that the originals had been sent on 19 August 1981.

On 22 March 1983 the OCCL informed Philipp Brothers that it would maintain its demand for repayment on the ground that it had received the documents out of time, that the Finnish document was in the form of a mere copy and not a certified true copy and that, even if it were shown that the original transport documents had been sent to the OCCL on 19 August 1981, they had been dispatched after the expiry of the six-month period laid down in Article 31(1) of Regulation No 2730/79. Furthermore, by letter of 15 April 1983 it refused the request made on 1 April by the advisers to Philipp Brothers for an extension of time in order to put their documents in order.

Since the OCCL had been unable to secure from the Banque Bruxelles Lambert payment of the securities provided, which it had released as a result of what it described as an administrative error, the Belgian State, represented by its Minister for Economic Affairs, instituted proceedings against Philipp Brothers in the tribunal de grande instance (Regional Court), Paris. By judgment of 28 January 1987, that court dismissed the action brought by the Belgian State, essentially on the ground that the time-limit for the submission of supporting documents had been raised to one year by Regulation No 1663/81, that although the agent for Philipp Brothers did not produce the documents until after the expiry of that time-limit, Article 20(4) of Regulation No 2730/79 authorizes the production of substitute documents by an exporter who has been unable to produce the originals owing to circumstances beyond his control, and that Article 31(2) of that regulation provides for the grant of an unspecified extension of time where the exporter shows that he has acted with all due diligence, as in this case.

The Belgian State appealed against that judgment to the Court of Appeal, Paris.

3. *Questions submitted for a preliminary ruling*

Taking the view that the dispute raised problems concerning the interpretation and validity of provisions of Community law, by

interlocutory judgement of 3 February 1989 the Court of Appeal, Paris, decided pursuant to Article 177 of the EEC Treaty to stay the proceedings until the Court of Justice had given a preliminary ruling on the following questions:

'(1) Does release of the security provided for in Article 25 of Regulation (EEC) No 2730/79 of 29 November 1979 by the national intervention agency of a Member State which has paid an advance on an export refund have the effect of discharging an exporter from all or part of his obligations, particularly as regards the form of and the time-limit for submitting the proof required in order to qualify for the refund?

(2) Is any error whatsoever on the part of the administration capable of enabling the scope of the decision releasing the security to be called in question?

(3) Must a request for the grant of an extension of time, as provided for in Article 31(2) of the aforesaid regulation, be made before the expiry of the normal time-limit within which the documents must be submitted if entitlement to the refund is not to be lost?

(4) Does Article 31(2) of the aforesaid regulation make the grant of an extension of time for the submission of substitute customs documents conditional on a finding of *force majeure*?

(5) Does Article 31(2) of the regulation apply by analogy to the submission of transport documents in respect of the exported products?

(6) In the event of a negative answer to Question 5, is Article 31(2) of the aforesaid regulation valid in the light of the principle of proportionality inasmuch as that provision discriminates between two categories of proof?

(7) Are Articles 25 and 31 of the aforesaid regulation valid in the light of the principle of proportionality inasmuch as they require an exporter to repay a refund received in advance, plus 15%, where proof of exportation, transport and entry for home use has not been submitted in due time, even though the operation has actually been carried out?'

It is apparent from the grounds of the order for reference that, in the national court's view, release of the security by a national intervention agency may involve prior verification of the documents relating to payment of the refund to ensure that they are in order and, consequently, granting exemption from or mitigating the obligations imposed on the exporter. Furthermore, it is not apparent from Article 31(2) of Regulation No 2730/79 that the grant of an extension of time is subject to a finding of *force majeure*, or that such an extension cannot be applied by analogy to the submission of the transport documents, or that the request for an extension must be made before the expiry of the normal period if entitlement to the refund is not to be lost. Finally, the national court points out that the fundamental obligation to be guaranteed by the provision of security, where an advance is paid on a refund, is the actual exportation of the agricultural products in question which must lead to their entry for home use in the country of destination. Accordingly, it may seem contrary to the principle of proportionality to penalize the failure to submit, within a mandatory time-

limit, the proof required under the regulation that an operation has actually been carried out by a penalty equal to the amount of the refund, plus 15%. Similarly, it may be contrary to the principle of proportionality to allow an extension of time to be granted for the submission of the customs documents and to deny such an extension for the submission of the transport document.

4. *Procedure*

The order for reference was received at the Court Registry on 2 May 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by the Belgian State, the appellant in the main proceedings, represented by Benoît Cambier and Luc Cambier, of the Brussels Bar, by Philipp Brothers, the respondent in the main proceedings, represented by Jean-François Bellis and Jean-Yves Art, of the Brussels Bar, and by François Sage, of the Paris Bar, and by the Commission of the European Communities, represented by its Legal Adviser, Denise Sorasio.

By decision of 6 December 1989, adopted pursuant to Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Sixth Chamber. On 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. However, it requested the Commission of the European Communities to reply in writing to a number of questions concerning the purpose and interpretation of certain amendments to Regulation No 2730/79, on which this dispute turns, and of certain provisions of Regulation No 3665/87, which replaced it. The Commission answered those questions within the period set by the Court.

II — Summary of the written observations submitted to the Court

1. *Effects of the release of the security (first and second questions)*

The *Belgian State*, the appellant in the main proceedings, observes that in this case the securities were released as a result of a misapprehension concerning their nature. Since the securities provided on account of Philipp Brothers were higher than the amount required for the operations in question, the OCCL was under the impression it was dealing with overall securities, provided in respect of several operations carried out by the same exporter, as opposed to specific securities relating to a clearly identified operation. Accordingly, the OCCL released the two securities not after verifying whether the documents relating to the contested operations were in order but at the time when the balance of the securities provided by Philipp Brothers was sufficient guarantee for the operations in progress.

According to the Belgian State, the Court has held in a line of decisions that release of the security cannot discharge a trader from his obligations under the relevant provisions. In its judgment of 5 December 1985 in Case 124/83 *Direktoratet for Markedsordningerne* v *Corman* [1985] ECR 3777, which was concerned with the release of a security designed to guarantee the processing of a consignment of butter, the Court held that

an action against the trader for failure to fulfil his obligations is not barred by application of the principle of legal certainty once the security has been released. In this case, the security is merely a lien guaranteeing repayment of the advances received plus 15%, which constitutes the penalty for failure to comply with obligations under the regulation. Its release does not entail the waiver of a penalty of that kind.

In its aforesaid judgment of 5 December 1985 *Corman*, the Court recalled that Article 8 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy requires the Member States to recover sums lost as a result of irregularities or negligence. It follows that the only consequence of an erroneous decision to release the security is to deprive the intervention agency of that lien guaranteeing reimbursement of the sums received and payment of the 15% increase in the event of failure to comply with obligations under the relevant provisions.

The first two questions should therefore be answered as follows:

'Release of the security does not discharge a trader from his obligations under the regulation; the only effect of an erroneous decision to release the security is to deprive the body making payment of that lien which guarantees reimbursement of the sums received, in the event of non-compliance with the rules.'

Philipp Brothers, the respondent in the main proceedings, contends that this case can be distinguished from *Corman* in one fundamental respect: in *Corman* it was established that the trader had failed to fulfil his primary obligation, namely the processing of butter, whereas in this case it is clear that the exporter has properly discharged his primary obligation, fulfilment of which is essential to the attainment of the objectives of the Community rules: the products have been exported, transported and imported with a view to their entry for home use in the non-member country concerned. The obligation to submit the documents relating to payment of the refund within a given period is, on the other hand, a secondary obligation whose sole aim is to make it possible to verify that the primary obligation has been properly fulfilled.

Consequently, if at the time when the intervention agency claims to have released the security by mistake the exporter establishes that the products were properly exported and entered for home use in the non-member country concerned, there is no longer any reason to seek payment of a sum equivalent to the security. The aim of prior verification by requiring the submission within a given period of the documents relating to payment is to prevent fraud and, in those circumstances, there is no risk of fraud when proof is furnished that the primary obligation has been fulfilled.

Philipp Brothers therefore suggest that the first two questions submitted by the Court of Appeal, Paris, should be answered as follows:

'Where it is established that the agricultural products have actually been exported and entered for home use in the non-member countries concerned, release of the security has the effect of discharging an exporter

from his obligation to submit the documents relating to payment of the refund in the form and within the time-limit prescribed by Regulation No 2730/79.'

The *Commission* emphasizes that the purpose of the system of securities established by Regulation No 2730/79 is to guarantee the repayment of the financial advantage gained by a trader who receives an advance where he fails to furnish proof of completion of the operation conferring entitlement to that advantage within the time-limit laid down. Forfeiture of the security is not therefore in the nature of a penalty imposed on the trader but constitutes the loss of an unfair advantage.

Regulation No 2730/79 clearly imposes an obligation on the Member States not to release the security unless the trader complies with certain conditions which are expressly listed. It follows that if the national intervention agency releases the security without establishing that the trader has fulfilled his obligations, that has no effect on the scope of the trader's obligations. In the light of the purpose of the security, which is to ensure that the trader does not acquire an unfair advantage, and more generally in the light of the structure of the system of export refunds, it is incumbent on the Member State concerned to use all the means at its disposal to recover sums unduly paid where, by wrongly releasing the security, it removed the guarantee for the amounts advanced under the Community budget. On that point, the Commission also refers to Article 8 of Regulation No 729/70 on the financing of the common agricultural policy which requires Member States to recover sums lost as a result of irregularities or negligence and which provides that the Member States are to bear the financial consequences thereof in the absence of such recovery.

The Commission therefore suggests that the first two questions should be answered as follows:

'Release of the security provided for in Article 25(1) of Commission Regulation No 2730/79 by the national intervention agency of a Member State which has paid an advance on an export refund does not have the effect of discharging an exporter from all or part of his obligations, particularly as regards the form of and the time-limit for submitting the proof required in order to qualify for the refund. In the event of an error on the part of the national intervention agency resulting in release of the security where the conditions laid down by the Community rules have not been complied with, the Member State is required to recover from the trader the amount provided for in Article 25(1) by all the legal means at its disposal.'

2. *The time-limit within which a request for the grant of an extension of time must be made (third question)*

The Belgian State recalls that, according to Article 31(1) of Regulation No 2730/79, 'entitlement to payment of the refund shall be lost' unless the documents are submitted within the prescribed period. Similarly, it considers that any application for an extension of that period must be made before its expiry.

The less restrictive solution adopted by the Court in its judgments of 30 January 1974 in Case 158/73 *Kampffmeyer* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 101 and of 28 May 1974 in Case 3/74 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Pfützenreuter* [1974] ECR 589 can be explained by the

specific features of those cases. In any event, the Court pointed out in the second of those judgments that traders must substantiate their claims in the fullest possible manner.

The answer to the third question should therefore be as follows:

'A request for the grant of an extension of time, as provided for in Article 31(2) of Regulation No 2730/79 must, if entitlement to the refund is not to be lost (Article 31(1) of the regulation), be made before the expiry of the normal time-limit.'

Alternatively:

'A request for the grant of an extension of time made after the expiry of the normal time-limit within which the documents must be submitted if entitlement to the refund is not to be lost is admissible only if it was impossible for the trader, on account of *force majeure*, to make that request within the prescribed period.'

Philipp Brothers points out that there is nothing in Regulation No 2730/79 which requires an exporter to apply for an extension of the time-limit before its expiry. Furthermore, it will generally be difficult for an exporter to show before the expiry of the prescribed period that it is impossible for the import document to be submitted within that period. If the exporter were under an obligation to apply for an extension of the period before its expiry, he would frequently run the risk of being deprived of the benefit conferred upon him by Article 31(2) of Regulation No 2730/79.

Philipp Brothers therefore suggests that the Court should apply to this case the solution it adopted in the aforesaid judgment of 30 January 1974 (*Kampffmeyer*) and answer the third question as follows:

'A request pursuant to Article 31(2) of Regulation No 2730/79 may be made after the expiry of the period within which the documents must be submitted if entitlement to the refund is not to be lost.'

The Commission points out in the first place that, according to Article 1(4) of Regulation No 1663/81, the period prescribed for the submission of documentary evidence has been extended to 12 months for all transactions in respect of which the six-month period had not yet expired on 1 July 1981. The question concerning the conditions for the grant of an extension of time should therefore be understood as relating to the possibility of obtaining extensions of more than 12 months.

Next, the Commission refers to the trader's obligation to furnish proof that he has acted with all due diligence to obtain the customs document or equivalent documents within the prescribed period. This means that, except in the highly specific circumstances of *force majeure*, a trader is required to apply to the competent intervention agency for the grant of an extension of time before the expiry of the normal period of 12 months. The concept of diligence encompasses any step which a trader may usefully take. It would surely occur to a normally diligent trader to apply for the grant of an extension of time, which does not raise any particular difficulty.

The third question should therefore be answered as follows:

'Since it is incumbent on a trader to show that he has acted with all due diligence, he must apply for the grant of an extension of time, as provided for in Article 31(2), once he finds that it is impossible for him to obtain the requisite documents within the 12-month period, and in any event before its expiry.'

3. *The conditions for the grant of an extension of time (fourth question)*

With regard to the fourth question, the Belgian State, Philipp Brothers and the Commission all take the view that Article 31(2) of Regulation No 2730/79 makes the grant of an extension conditional not on the existence of a case of *force majeure* but on the trader's having acted with all due diligence in order to obtain the requisite documents within the prescribed period.

The Belgian State emphasizes that the concept of impossibility of submitting the documents notwithstanding the fact that the trader concerned has acted with all due diligence is broader than the concept of *force majeure.*

Philipp Brothers and the Commission argue, along similar lines, that Article 31(1) of the regulation treats the existence of a case of *force majeure* as an automatic exception to loss of entitlement to the refund. Consequently, the rule set out in Article 31(2) must necessarily apply to cases other than that of *force majeure.* Furthermore, the Court has consistently held that in order to establish a case of *force majeure* a trader cannot confine himself to showing that he has acted diligently in order to obtain a given document. The proof which he is required to furnish is far more substantial in scope and relates to the existence of unforeseeable and abnormal circumstances, beyond his control, the consequences of which he was unable to avoid notwithstanding the degree of care which a prudent trader is expected to exercise.

4. *The grant of an extension of time for the submission of the transport documents (fifth and sixth questions)*

With regard to the possibility of applying by analogy Article 31(2) of Regulation No 2730/79 to the submission of the transport documents, the Belgian State points out that the latter provision derogates from the general principle that the documents must be produced within the usual time-limits. The provision must therefore be strictly interpreted and its application cannot be extended to the transport documents, which it does not mention expressly.

That interpretation is also in conformity with the rationale of the provision in question, which is designed to take into consideration the difficulties that exporters may encounter in obtaining the import document from the authorities of a non-member country. No such difficulty should arise in obtaining the transport documents, the production of which depends on persons governed by private law who have contractual links with the exporter.

That objective distinction justifies the differences in the rules governing the period prescribed for the submission of those documents and precludes any discrimination. Furthermore, Article 31(1) takes account of situations in which an exporter has been prevented by *force majeure* from submitting the transport document within the mandatory time-limit.

Accordingly, the answer to the fifth and sixth questions should be as follows:

'Article 31(2) of Regulation No 2730/79 cannot be applied by analogy to the submission of the transport documents relating to the exported products; the different rule governing the time-limit for the submission of customs documents is not discriminatory and in no way contravenes the principle of proportionality.'

Philipp Brothers draws attention to the fact that in all cases in which the set of documents has to include the import document, it must also contain a copy of the transport document. That follows from Articles 10 and 20 of Regulation No 2730/79. Although Article 31(2) of Regulation No 2730/79 provides for the possibility of granting an extension of time only in respect of the import document, it would be absurd to confine oneself to a literal interpretation.

Two situations may be considered:

(a) either the export and import documents are lodged within the prescribed period and the transport document is the only document missing; in those circumstances it would have to be acknowledged that the goods were transported from the territory of the Community to that of the non-member country concerned and it would be contrary to the principle of proportionality to decide that the security is forfeit because the transport document has not been produced within the prescribed period; or

(b) the exporter does not submit the import document within the normal time-limit and he obtains an extension of time to that end; in those circumstances, since the final date for the regularization of the administrative situation is deferred, it would also be contrary to the principle of proportionality not to grant an extension of the period prescribed for the submission of the transport document since such an extension would not give rise to any disadvantage.

Moreover, the Community authorities have acknowledged that it was absurd to restrict the application of Article 31(2) to the import documents. Article 1(14) of Regulation No 568/85 extended the possibility of granting more time to the submission of the transport documents. Similarly, Article 47(4) of Regulation No 3665/87, which replaced Article 31(2) of Regulation No 2730/79, authorizes the grant of an extension of time on the same conditions as those applicable to the submission of the customs documents and the transport documents.

Philipp Brothers therefore suggests that the fifth and sixth questions should be answered as follows:

'Article 31(2) of Regulation No 2730/79 applies by analogy to the submission of the transport documents.'

According to the Commission, it is immediately apparent from Article 31(2) that the grant of an extension of time is provided for only in respect of the submission of the customs documents or equivalent documents. It follows that, except in the event of *force majeure*, the national authorities are not entitled to grant

an extension for the submission of the transport document.

Even if the sixth question refers to the principle of non-discrimination, that principle applies only as between persons subject to legislation and not in relation to procedural rules which are applicable without distinction to all the traders in question. The problem of the validity of the distinction between two categories of proof amounts essentially to the question whether the principle of proportionality has been contravened inasmuch as no exception other than *force majeure* is permitted to the obligation that the transport documents must be submitted within the prescribed period if entitlement to the refund is not to be lost.

The distinction between the customs documents and the transport documents is based on the fact that the former must be countersigned by the customs authorities of the non-member country of importation when the goods are entered for home use. The Community trader has no means of exerting pressure on the authorities if they overlook those formalities. Furthermore, the goods may be entered for home use after the expiry of the period prescribed for the submission of the documents relating to payment, for instance where the goods are stored for several months in a customs warehouse. However, as far as the transport document is concerned, in the case of a cif sale the exporter retains a copy since he arranges for the transport; in the case of an export on a fob contract, where the cost of transport is borne by the purchaser, the exporter may stipulate in the contract with the purchaser that he be supplied with a certified true copy of the transport document.

In the light of that fundamental difference, the application of different rules to the submission of the two types of documents is in no way contrary to the principle of proportionality.

The fifth and sixth questions may therefore be answered as follows:

'Article 31(2) precludes the grant of an extension of time for the submission of the transport document referred to in Article 20(5). Consideration of the questions raised by the national court has disclosed no factor of such a kind as to affect the validity of Article 31 of Commission Regulation No 2730/79.'

5. *The validity of Articles 25 and 31 of Regulation No 2730/79 in the light of the principle of proportionality (seventh question)*

The Belgian State maintains that in its judgments on the observance of the principle of proportionality the Court has already laid down certain rules whose application in this case makes it possible to reject the objections of illegality raised against Articles 25 and 31 of Regulation No 2730/79.

It is true that, in its judgments of 20 February 1979 in Case 122/78 *Buitoni* v *Forma* [1979] ECR 677 and of 24 September 1985 in Case 181/84 *Man Sugar* v *IBAP* [1985] ECR 2889, the Court considered total forfeiture of the security to be excessive in the case of traders who had not furnished proof of exportation or importation. However, the Court relied on the notion that the rules relating to import and export licences do not confer any

financial advantage on traders but are intended to make it easier for the national agencies and the Community authorities to acquire full details concerning transactions on agricultural markets.

In this case, the grant of export refunds constitutes a considerable financial advantage for exporters, justifying the imposition on them of binding obligations, the infringement of which is penalized by forfeiture of all their rights and advantages.

Furthermore, in its judgments of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125 and in Case 25/70 *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster* [1970] ECR 1161, the Court held that the provision of a mandatory time-limit is neither disproportionate nor excessive where exceptions are laid down in favour of traders who find themselves in circumstances amounting to *force majeure*. In this case, Articles 25 and 31 of Regulation No 2730/79 in fact contain special rules which take account of the situation of traders who find themselves in circumstances constituting *force majeure* by exempting such traders from forfeiture of the 15% increase where the product reaches another destination or where proof of exportation cannot be furnished and by providing for the grant of an extension of time for the submission of documentary evidence.

In its judgment of 22 January 1986 in Case 266/84 *Denkavit France* v *Forma* [1986] ECR 149, the Court took the view that the imposition of a mandatory time-limit of six months for the submission of applications for payment of monetary compensatory amounts was a necessary measure and one that was not disproportionate. That case exhibits a number of striking analogies with this case as regards, in particular, the length of the prescribed period, the existence of exceptions in cases of *force majeure* and the aims pursued by the rules concerned. Those rules relate to the grant of substantial financial advantages to traders, which explains the thoroughness with which the documents are processed. The Belgian Government therefore considers that the solution adopted by the Court is wholly appropriate to this case.

It therefore suggests that the Court should answer the seventh question as follows:

'Articles 25 and 31 of Regulation No 2730/79 are in conformity with the principle of proportionality.'

Philipp Brothers points out that Article 25 of Regulation No 2730/79 imposes the penalty of forfeiture of the security for failure to fulfil two different obligations, namely the obligation to export the goods and the obligation to furnish the prescribed proof within a specified period. However, the two obligations are manifestly of unequal importance since fulfilment of the first is essential to the achievement of the objectives pursued by the rules in question, namely the sale of Community products on the markets of non-member countries, whilst the second is of a secondary nature and is designed to permit the regularization of administrative situations as swiftly as possible.

However, the effect of applying Article 25(2) is to penalize more severely the failure

to fulfil the secondary obligation, given that a trader who exports only part of the products in respect of which an advance was granted is required to repay only part of the advance, calculated in proportion to the quantities not exported, whereas an exporter who has duly exported the stipulated quantities, but furnishes proof after the expiry of the time-limit, is under an obligation to repay the advance in its entirety, plus 15%.

In the first case, repayment of the advance does not constitute a penalty but is the normal consequence of failure to discharge the obligation. However, repayment of the advance where proof of exportation has been submitted out of time entails a substantial financial loss for the trader who has to bear the difference between the price of the products on the Community market and the lower price at which he was able to sell them in the non-member country concerned.

It follows from the Court's case-law (judgments of 20 February 1979 in *Buitoni*, cited above, of 24 September 1985 in *Man Sugar*, cited above, and of 27 November 1986 in Case 21/85 *Maas* v *BALM* [1986] ECR 3537) that where Community rules draw a distinction between the principal obligation, fulfilment of which is necessary in order to achieve the objective pursued, and a secondary obligation, which is essentially of an administrative nature, those rules cannot, without contravening the principle of proportionality, penalize the infringement of the secondary obligation as severely as the infringement of the principal obligation.

The position thus adopted by the Court is directly applicable to this case, which is very similar to *Buitoni*. In both cases, the same penalty is imposed for failure to discharge two obligations of unequal importance; the secondary obligation consists in compliance with a time-limit for the submission of proof of fulfilment of the principal obligation; that time-limit is dictated exclusively by considerations relating to sound administration; an exception is provided to the application of the penalty in the event of *force majeure*; the penalty imposed for failure to discharge the principal obligation is proportionate to the size of the infringement, whereas the penalty for failure to discharge the secondary obligation is a fixed penalty.

However, this case differs markedly from the situation considered by the Court in its judgment of 22 January 1986 in *Denkavit France*, cited above. In that case, the setting of a mandatory time-limit for the submission of the documents relating to payment of monetary compensatory amounts was justified not only on grounds of proper administration but also, indirectly, by the need to avoid distortion of competition. Furthermore, on that occasion, the Court adjudicated only on the compatibility of time-barring claims with the principle of proportionality, and not on whether the penalty imposed for non-compliance with the time-limit was lawful.

Finally, the Community authorities themselves have implicitly acknowledged that Article 25(2) of Regulation No 2730/79 was not in conformity with the principle of proportionality since Article 48(3) of Regulation No 3665/87 replaced the fixed penalty which formerly applied with a penalty varying in accordance with different criteria.

Philipp Brothers therefore suggests that the seventh question should be answered as follows:

'Article 25(2) of Regulation No 2730/79 is not valid inasmuch as it penalizes failure to submit the documents relating to payment of the refund within the period prescribed by Article 31 of the regulation by requiring the exporter to repay the advance granted to him.'

The Commission considers that the seventh question as formulated does not take full account of the legislation on whose validity the Court is asked to adjudicate. In the first place, the 15% increase is not chargeable where the requisite proof cannot be furnished as a result of *force majeure*; similarly *force majeure* enables a trader to avoid the barring of his claim in the event of the documents being submitted out of time. Secondly, the national court is apparently presupposing that it has been established that the products in question were entered for home use in Finland and Norway. However, the information in the file indicates that the documents specified in the regulation, which alone would constitute unequivocal proof in that regard, have never been submitted. Accordingly, the question of the validity of the obligation to repay the advance, plus 15%, arises solely in the event of the documentary evidence having been submitted out of time and in the absence of circumstances constituting *force majeure*.

It follows from the Court's case-law, and in particular from its judgment of 23 February 1983 in Case 66/82 *Fromançais* v *Forma* [1983] ECR 395, that rules which provide for identical consequences where an operation has not been carried out or where it is not carried out within the prescribed period may be regarded as being in conformity with the principle of proportionality. Furthermore, the distinction drawn by the Court, in terms of the consequences, between the time-limits for carrying out the operations themselves and the time-limits for the submission of documentary evidence, and the non-validity of provisions penalizing the second possibility more severely than the first, relate to sanctions which are additional to the loss of income resulting from the removal of the financial advantage to which the trader would have been entitled if he had complied with his obligations under the regulation (judgments of 20 February 1979 in *Buitoni*, cited above, and of 21 June 1979 in Case 240/78 *Atalanta Amsterdam* v *Produktschap voor Vee en Vlees* [1979] ECR 2137). This case is concerned with the grant of the advantage itself, namely the export refund, plus a percentage which takes account of the financial advantage resulting from payment of the advance.

As regards that increase, it is clear from the Court's judgment of 18 November 1987 in Case 137/85 *Maizena* v *BALM* [1987] ECR 4603 that a rate of 15 to 20% cannot constitute an infringement of the principle of proportionality.

Finally, the Commission refers to the Court's judgment of 22 January 1986 in *Denkavit France* and comes to the conclusion that a provision barring claims where the documents relating to payment have been submitted out of time is valid, if the requirement concerning compliance with a mandatory time-limit is based on grounds of proper administration and is justified by the concern to avoid differences of treatment and distortion of competition between traders. In this case, since the 12-month period appears to be reasonable and an express reservation is made in cases

of *force majeure*, the provisions in question are not such as to contravene the principle of proportionality.

The following answer should therefore be given to the seventh question:

'Consideration of the questions raised by the national court has disclosed no factor of such a kind as to affect the validity of Articles 25 and 31 of Commission Regulation No 2730/79.'

III — The Commission's answers to questions from the Court

The Court requested the Commission to give a written answer to the following questions:

'(1) The Court has found that Article 1(14) of Commission Regulation (EEC) No 568/85 of 4 March 1985 amending for the 10th time Regulation (EEC) No 2730/79 (Official Journal 1985, L 65, p. 5) and Article 47(4) of Commission Regulation (EEC) No 3665/87 of 27 November 1987 laying down common detailed rules for the application of the system of export refunds on agricultural products (Official Journal 1987, L 351, p. 1) permit the grant of an extension of time for the submission of the transport documents. Can the Commission explain to the Court why it amended the rules on that point?

(2) The Court has also found that Article 48 of Regulation No 3665/87 attaches consequences less serious than forfeiture of the security to the submission of proof out of time, at any rate where the time-limits laid down have not been exceeded by more than six months. Can the Commission explain the purpose of these new rules?

(3) Can the Commission state which files, in its view, "are still open" within the meaning of the third paragraph of Article 51 of Regulation No 3665/87?'

In its reply, which was received at the Court on 15 January 1990 and registered on 16 January 1990, the Commission stated, with regard to the first question, that it considered it advisable to bring the system of time-limits for the submission of the transport documents into line with the system of proof of the goods' arrival at their destination, for reasons connected with the processing of the documents relating to payment of the refunds. It became apparent that the obligation to submit the transport document before the document attesting to the goods' arrival at their destination made the processing of the documents more complicated for the national authorities. They had to be processed twice, that is to say first in order to verify compliance with the time-limits for the submission of the transport documents and then to verify compliance with the other time-limits and to check the information in the file.

In reply to the second question, the Commission stated that, in the light of past experience, it has proved possible without jeopardizing the proper functioning of the system of export refunds to graduate the

severity of the consequences of submitting documentary evidence out of time, provided that the delay is limited to a short period of time, in order to introduce a degree of flexibility in the system for the benefit of traders.

In reply to the third question, the Commission expressed the opinion that the phrase 'files [that] are still open' must be interpreted as covering cases in which the national authorities have not yet given a decision with regard to payment. It follows from Regulation No 3665/87, and in particular in the light of Article 48(2) of that regulation, which was extended by the third paragraph of Article 51 to exports in respect of which 'the relevant files are still open', that the national authorities were under an obligation to make, where appropriate, a graduated reduction in the refund referred to in the reply to the second question in all cases in which the time-limits for submitting the documents relating to payment had not expired when Regulation No 3665/87 entered into force.

G. F. Mancini
Judge-Rapporteur