OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 2 May 1990 *

Mr President,
Members of the Court,

A — Facts

1. The case on which I shall give my Opinion today is a reference for a preliminary ruling made by the Verwaltungsgericht (Administrative Court) Frankfurt am Main (Federal Republic of Germany). It concerns the application and interpretation of provisions of Community law designed to promote the disposal of butter under the common organization of the market in milk and milk products.

2. On the basis of Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products,[1] the Commission adopted Regulation (EEC) No 262/79 on the sale of butter at reduced prices for use in the manufacture of pastry products, ice-cream and other foodstuffs[2] and Regulation (EEC) No 1932/81 on the granting of aid for butter and concentrated butter for use in the manufacture of pastry products, ice-cream and other foodstuffs.[3]

3. Regulations Nos 262/79 and 1932/81 are designed, respectively, to promote the disposal of intervention butter and market butter through the grant of aid. Contracts are awarded under both regulations by way of standing invitations to tender. On 21 May 1985, the Commission, for reasons of market policy, that is to say in order to achieve a significant reduction in stocks of intervention butter, lowered the minimum selling price for intervention butter from ECU 1.15 to 1.05 and raised the costs for butter-processing from ECU 0.14 to 0.16, with the result that the price of butter leaving the cold store came to ECU 0.89 per kg as opposed to the previous price of ECU 1.01 per kg.[4] This action resulted in a considerable disparity between the prices of market butter and intervention butter. Even taking into account the aid granted for the processing of market butter, it became 10.65% more expensive than intervention butter.

4. The plaintiff in the main proceedings, Hoche GmbH, a butter processor (hereinafter referred to as 'the plaintiff'), took part in March, April and May 1985 in a number of tendering procedures for the grant of processing aid under Regulation No 1932/81. For that purpose it was required, in each case, to lodge a tendering security. Under the terms of individual invitations to tender Nos 76 to 81, the plaintiff undertook to process 1 672 tonnes of butter into concentrated butter.

* Original language: German.

1 — Council Regulation of 27 June 1968 (OJ, English Special Edition 1968 (I), p. 176).

2 — Commission Regulation of 12 February 1979 (OJ 1979, L 41, p. 1).

3 — Commission Regulation of 13 July 1981 (OJ 1981, L 191, p. 6).

4 — ECU 1.15 — 0.14 = 1.01, as against ECU 1.05 — 0.16 = 0.89 = price payable.

5. It was economically more advantageous at that time to purchase market butter than intervention butter, in view of the aid available. However, following the price change by the Commission in May 1985, it ceased to be profitable to process market butter, since the resulting concentrated butter could no longer be offered at competitive prices without the processor incurring a loss. The plaintiff therefore decided not to comply with the undertaking to process market butter which it had given pursuant to the tendering procedures for the grant of aid and instead supplied its needs with intervention butter. It fulfilled the obligations to purchase market butter which it had already undertaken, but placed this butter, which amounted to 735.7 tonnes, in storage. As a result, it did not lodge processing security in respect of this quantity of butter.

6. In September 1985, the Commission adopted, with effect from 21 September 1985, Regulation (EEC) No 2661/85 derogating from Regulations Nos 262/79 and 1932/81.[5] According to the preamble to that regulation, it was intended to widen the scope of the measures designed to achieve a balance between the price at which intervention butter was sold and the aid for market butter, to the advantage of intervention butter (second recital in the preamble). This was done by releasing tenderers in individual invitations to tender Nos 76 to 81 organized pursuant to Regulation No 1932/81 from their obligations on condition that the tenderers in question were awarded contracts for intervention butter in respect of quantities of butter equivalent to 25% more than those for which they had originally undertaken obligations (Article 1 of Regulation No 2661/85).

5 — Commission Regulation of 20 September 1985 (OJ 1985, L 252, p. 13).

7. The plaintiff made use of the opportunity to convert. However, in view of the fact that this opportunity only arose in so far as the processing periods had not expired, the plaintiff was only partially able to take advantage of the opportunity to convert. In the case of quantities for which there was no possibility of conversion and in respect of which the plaintiff had not lodged a processing security, the tendering security was declared forfeit under Article 12 of Regulation No 1932/81. The forfeiture of the security is the subject of the administrative dispute in the proceedings before the national court.

8. That court takes the view that the decisions declaring the security forfeit are covered by Article 12(1) of Regulation No 1932/81 and that normally it would therefore have no hesitation in dismissing the action. In the present case, however, a special situation has arisen owing to the fact that the risk incurred by every participant in a tendering procedure was, on the adoption of Regulation No 2661/85, practically eliminated for a number of the operators who had participated in individual tendering procedures Nos 76 to 81. However, since this was not the case in equal measure for all operators awarded contracts under individual tendering procedures Nos 76 to 81, the national court considers that the forfeiture of the plaintiff's security constitutes a breach of the principles of proportionality and equal treatment which must where appropriate be taken into account in applying Article 12 of Regulation No 1932/81. For those reasons, the national court has referred the following questions to the Court of Justice:

'(a) Is Article 12(1) of Commission Regulation (EEC) No 1932/81 of 13 July 1981 invalid because it does not prevent forfeiture of the tendering security where an undertaking was, in 1985,

awarded contracts in individual tendering procedures Nos 76 to 81, but instead of lodging processing security purchased and lawfully processed a quantity of intervention butter sold under Commission Regulation (EEC) No 262/79 of 12 February 1979 equivalent to the contract quantity, prior to the entry into force of Commission Regulation (EEC) No 2661/85 of 20 September 1985?

If the above question is answered in the negative:

(b) In the circumstances set out in Question (a), is the application of Article 12(1) of Regulation (EEC) No 1932/81 suspended in the individual case?'

9. For details of the procedure before the national court and the facts, submissions and arguments of the parties I would refer to the Report for the Hearing.

B — Opinion

Question (a)

10. The national court first calls in question the validity of Article 12(1) of Regulation No 1932/81, because it is uncertain as to the legality of that provision in view of its possible breach of the principle of proportionality and the prohibition on discrimination. I shall therefore examine first of all those reservations which are based on the principle of proportionality.

11. Article 12(1) of Regulation No 1932/81 lays down in general terms the grounds on which tendering security lodged in respect of a tendering procedure for the grant of aid for butter and concentrated butter may be declared forfeit. That provision consists of an exhaustive enumeration of three grounds for forfeiture, worded as follows:

'1. Except in cases of *force majeure*, the tendering security shall be forfeit in respect of any quantity for which the tenderer:

(a) withdrew the tender after the closing date for the submission of tenders, as specified in Article 4(2) and (3),

or

(b) in the case of butter:

did not, within the period prescribed, process the butter into the products referred to in Article 2(1)(a);

(c) in the case of concentrated butter:

did not, within the period prescribed, lodge the processing security referred to in Article 7(2).'

12. The ground for forfeiture set out in subparagraph (c) above represents the situation in the present case. It is not disputed that the plaintiff did not lodge any processing security, as it had decided for business reasons to refrain from processing and wished to avoid increasing its losses still further.

13. The forfeiture of the security by the Bundesanstalt für landwirtschaftliche Markt-

ordnung (Federal Office for the Organization of Agricultural Markets), the defendant in the main proceedings, is the clear legal consequence of the plaintiff's action under Article 12(1) of Regulation No 1932/81.

14. That legal consequence could only be disproportionate if the means used, here the compulsory lodging of security, was out of proportion to the objective pursued thereby. In this regard it must be assumed that a measure is proportionate if the means employed to achieve the objective pursued are appropriate and do not go beyond what is necessary to achieve it.[6] The provisions relating to tendering security are designed to ensure that tenders are made in earnest and to prevent manipulation of the tendering procedure by means of sham tenders. In addition to ensuring that tenders are serious, provision must also be made to make sure that the butter is processed in the manner intended and within the stipulated periods. That objective is evident in Article 12(1) of Regulation No 1932/81. Article 12(1)(b) of Regulation No 1932/81 concerns the immediate processing of butter into the products prescribed by the regulation, while Article 12(1)(c) provides for step-by-step processing.

15. The production of concentrated butter from butter is no more than an intermediary stage towards the final processing. As the various stages do not necessarily have to be carried out by the same processor, the obligation to lodge security is geared to the processing procedure. In the case of concentrated butter, separate processing security is required, and only when this is lodged can the tendering security be released. In this way, continuity of the processing obligations can be ensured without interruption.

16. The plaintiff in the main proceedings did not comply with its obligations to process butter into concentrated butter and to lodge processing security. The forfeiture of the tendering security is thus quite simply the penalty imposed for contravening the purpose served by that security.

17. The national court has itself stated that it would have had no hesitation 'under normal circumstances' in dismissing the action. The 'particular situation' which makes forfeiture of the security appear disproportionate only arose through the adoption of Regulation No 2661/85, whose provisions go beyond the pricing decisions of the Commission and temporarily call in question the objective behind the processing of market butter, if they do not in fact partially suspend it.

18. A derogating regulation of this type, however, which applies only to a limited number of specific circumstances, is not of such a nature as to call in question the validity as a whole of the general rules, that is to say, those deriving from Regulation No 1932/81. Even where the actual legal consequences ultimately appear disproportionate, the rules on how to avoid such results must be capable of being derived from the derogating or transitional provisions.

6 — See the judgment of 18 November 1987 in Case 137/85 *Maizena* v *BALM* [1987] ECR 4587, paragraph 15.

19. Even considering the particular circumstances of this case, I feel it would be incorrect to rule that Article 12(1) of Regulation No 1932/81 is generally invalid. Notwithstanding the procedural possibilities open to the Court of Justice to limit the legal effects of a declaration of invalidity as regards its subject-matter or its application in time,[7] it would be inappropriate to declare Article 12(1) of Regulation No 1932/81 invalid, since, apart from the situations covered by Regulation No 2661/85 and the effects on Regulation No 1932/81 resulting therefrom, there is no doubt as to the present and future validity of Article 12(1) of Regulation No 1932/81.

20. The above considerations are also valid in the event that forfeiture of the tendering security may in certain circumstances be regarded as a breach of the principle of equal treatment. Since such a breach of superior principles of law would also be the result of the entry into force of Regulation No 2661/85, the alleged illegality cannot be inherent to the general legal rule and consequently cannot lead to its invalidity.

21. The national court itself takes the view that a declaration of invalidity in respect of Article 12(1) of Regulation No 1932/81 would not be satisfactory.[8] For that reason, in the event that the first question is answered in the negative, it submits a second question designed to apply the principle of proportionality in the individual case on grounds of fairness and justice.

7 — On the applicability of the second paragraph of Article 174 of the EEC Treaty in the context of Article 177 of the EEC Treaty, see the judgment of 15 October 1980 in Case 145/79 *Roquette Frères* v *French State* [1980] ECR 2917.

8 — See the first sentence in the observations of the national court on Question (b).

Question (b)

22. *1.* With this question, the Court of Justice is confronted, and not for the first time, with the issue of whether Community law recognizes the existence of a general principle of fairness. The Court of Justice first decided, in its judgment in Case 118/76,[9] that a national customs authority was not entitled to waive charges due under Community law on grounds of natural justice. It went on to rule that there was no basis in Community law for the waiver of monetary compensatory amounts on grounds of natural justice.

23. The Court of Justice held in a later judgment in Case 299/84[10] that Community law does not recognize any general legal principle to the effect that a Community provision that is in force may not be applied by a national authority if it causes the person concerned hardship which the Community legislature would clearly have sought to avoid if it had envisaged that eventuality when enacting the provision.

24. The national court aptly points out that the Court of Justice there held that a general principle of objective unfairness did not exist on the ground that it would otherwise have the effect of leaving the courts and tribunals of the Member States free to decide in individual cases whether or not they were to apply a provision of Community law. The danger of a decline in legal uniformity could be removed, it is suggested, if the ruling as to fairness in a particular case were delivered by the Court of Justice itself. At any rate, the actual

9 — Judgment of 28 June 1977 in Case 118/76 *Balkan Import-Export* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1177.

10 — Judgment of 14 November 1985 in Case 299/84 *Neumann* v *BALM* [1985] ECR 3663.

wording of the judgment in that case does not exclude such a possibility. The Court there ruled that:

'A national court which 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.'

25. Thus, although a principle of fairness in Community law has not until now been recognized in individual cases, it does not appear to me entirely implausible that such a principle could be developed and applied by the Court of Justice, particularly if one considers the principle of objective unfairness to be a facet of the principle of proportionality which is recognized in Community law. [11]

26. A conclusive decision as to whether or not the Court of Justice recognizes a principle of objective unfairness and, if so, whether it ought to apply it to the present case is, however, unnecessary if what the national court considers to be the 'fair outcome' can be derived from legal principles in the form in which they are now recognized by Community law. It is therefore necessary to examine the facts of the case.

27. *2.* It appears to me appropriate at the outset to clarify the material scope of the questions. The second question in the reference for a preliminary ruling concerns the suspension, in the individual case, of the provision governing forfeiture of the security 'in the circumstances' outlined in the first question. This incorporates a reference to the conditions laid down in Regulation No 2661/85 for release from the obligations assumed under Regulation No 1932/81. The question could therefore also be framed as follows:

'Can a trader who has been awarded a contract under invitations to tender Nos 76 to 81 be released at any time from his obligations under Regulation No 1932/81, if he satisfies the substantive conditions for release under Regulation No 2661/85?'

28. It is clear from the comments of the national court itself that it is concerned not so much with the validity of Article 12(1) of Regulation No 1932/81 as with the legal consequences deriving from Regulation No 2661/85 in respect of obligations arising under Regulation No 1932/81. That is clear not only from the way in which the first question is worded, with reference being made to the criteria for the application of Regulation No 2661/85, but also from the grounds of the order, in which it is stated that:

'In this case, however, there is a special situation which the Commission created by adopting Regulation (EEC) No 2661/85 with effect from 21 September 1985. That is so because, in respect of some of the traders, the introduction of the regulation in effect eliminated the risk incurred by every participant in a tendering procedure.'

29. It is therefore necessary to examine whether the forfeiture of the security provided for in Article 12(1) of Regulation No 1932/81 is, in view of the effects of

11 — See in this connection Case 299/84, cited above, paragraph 27 of the judgment.

Regulation No 2661/85, disproportionate and contrary to the prohibition on discrimination.

(a) As I observed in discussing the legality of Article 12(1) of Regulation No 1932/81, a measure is disproportionate if it is not appropriate to achieve the objective pursued or if it goes beyond what is necessary to achieve it. The abstract purpose of Article 12(1), that is to say, to ensure that tenders are serious and that the processing obligation is satisfied, is of course the same in the case of an individual decision based on this legal foundation. However, the objective behind the provision may exceptionally have been eliminated by the entry into force of Regulation No 2661/85. The utilization of the means would in that case no longer have been necessary.

30. The national court takes the view that this state of affairs has arisen and provides the following explanation in the grounds of the request for a preliminary ruling:

'By the time that the tendering security had been declared forfeit in the present case, however, there was no such aim. On the contrary, it may be seen from Regulation (EEC) No 2661/85 that the Commission had attached no importance to the processing of market butter since 21 May 1985 but was striving to redirect demand towards intervention butter. In view of that objective it is quite incomprehensible and no longer justifiable that, in effect, conduct to which the Commission manifestly attaches no more importance should be penalized.'

31. That view should not, I think, be followed. It is true that demand was intended to be redirected. Furthermore, traders awarded contracts under invitations to tender Nos 76 to 81 pursuant to Regulation No 1932/81 were given the option of being released, on request, from their obligations under Regulation No 1932/81 on condition that they acquire a quantity of intervention butter under Regulation No 262/79 equivalent to 25% more than the quantity which they had already undertaken to obtain and process. Provisions which make conversion possible under specific conditions, however, do not have the effect of eliminating the objective behind the provisions governing forfeiture of the security. Having regard to the conditions in the derogating regulation the objective may be redefined.

32. The prohibition on discrimination, however, may be breached if not all the operators awarded contracts under invitations to tender Nos 76 to 81 are in a position to make equal use of the opportunity to convert under Regulation No 1932/81.

33. (b) A provision of Community law breaches the prohibition on discrimination and is on that ground illegal if comparable situations are treated differently and different situations are treated in the same way, unless such treatment can be objectively justified. This legal principle recognized by Community law is based on the general prohibition on discrimination on grounds of nationality contained in the first paragraph of Article 7 of the EEC Treaty and on specific prohibitions on discrimination such as the prohibition on discrimination in the agricultural sector laid down in the second subparagraph of Article 40(3)

of the EEC Treaty.[12] The latter provision prohibits any discrimination under the common agricultural policy between producers and consumers within the Community.

34. The national court takes the view that in this case there is breach of the general legal principle of equal treatment:

'The effect of applying Article 12(1) is that the plaintiff's competitors who happened not to have commenced processing by 21 September 1985 and for whom the period allowed for processing had not yet expired qualified for the option of converting their contracts and thus did not incur the loss of their security, whereas the applicant did so. The circumstance which distinguishes the plaintiff from its competitors is purely fortuitous and does not justify unequal treatment.'

35. I should first point out that we do not need to address the question whether the principle of equal treatment has been breached with regard to those participants who had fulfilled their obligations under Regulation No 1932/81. It is not necessary to resolve this problem in order to reply to the questions referred by the national court and enable it to decide the case before it, since those processors who had fulfilled their obligations under Regulation No 1932/81 did not face the threat of losing their security.

12 — See judgments of 13 December 1984 in Case 106/83 *Sermide* v *Cassa conguaglio zucchero* [1984] ECR 4209, paragraph 28, of 23 February 1983 in Case 8/82 *Wagner* v *BALM* [1983] ECR 371, of 17 June 1987 in Joined Cases 424 and 425/85 *Frico* v *Voedselvoorzienings In- en Verkoopbureau* [1987] ECR 2755 and of 11 March 1987 in Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau* v *Commission* [1987] ECR 1069.

36. A distinction must be drawn between that and the fact that owing to the decisions on pricing taken by the Commission and the subsequent partial opportunities for release from obligations those processors carried out their processing under conditions which were economically less favourable than those affecting their competitors. We do not have to decide whether the requirement of equal treatment makes it necessary to eliminate those economic disadvantages, since in this case we are concerned merely with the forfeiture of security.

37. The view expressed by the national court that the principle of equal treatment has been breached must be upheld inasmuch as all traders who were awarded contracts under invitations to tender Nos 76 to 81 were in the same position during the entire tendering procedure and were subject to the same obligations by virtue of their participation in that procedure. It does constitute unequal treatment to treat unequally participants within this group. That is true at least of all successful tenderers who had not yet complied with their obligations under Regulation No 1932/81. There is no objective justification for allowing only some of them to be released from obligations which they had undertaken and instead to make use of the opportunity to convert under Regulation No 2661/85. That regulation was intended to release successful tenderers under invitations to tender Nos 76 to 81 from their obligations in order to encourage increased processing of intervention butter.

38. It appears to me arbitrary to treat participants in this group in different ways depending on prescribed periods and time-limits. All successful tenderers were in an

identical legal and factual position. That is therefore why the recitals in the preamble to Regulation No 2661/85 make the point in quite general terms:

'. . . whereas it would appear to be advisable to (widen the scope of the measures concerned by) introducing a temporary measure whereby, subject to certain conditions, *operators* who are awarded a contract under Regulation (EEC) No 1932/81 *are not required to fulfil the obligations arising therefrom* provided . . . '. [13]

39 The general release which I have outlined is subject to the condition that the operators concerned undertake to acquire large quantities of intervention butter. For those traders who have expressed their willingness to fulfil these conditions, there is no specific or obvious objective reason to refuse them such release.

40. Those traders entitled to take advantage of the opportunity of release (or better, the opportunity to convert, since release is linked to the obligation to take an increased amount) are clearly and unmistakably identified, and are exclusively those who were awarded contracts under invitations to tender Nos 76 to 81. [14] The requirement of an application under Article 1 of Regulation No 2661/85 can be equally applicable for all concerned only since the entry into force of Regulation No 2661/85.

41. It is hard to understand why the exercise of the right to take advantage of the opportunities under Regulation No 2661/85 should be made dependent on the time at which the regulation entered into force or on the various processing periods, which must in any case be calculated in different ways, [15] and no explanation has been given either in the regulation or in this case. The distinctions are therefore arbitrary. If the difference in treatment cannot be objectively justified, it breaches the prohibition on discrimination and is consequently invalid.

42. An interpretation of Regulation No 2661/85 consistent with overriding principles of law must therefore be that all traders awarded contracts under invitations to tender Nos 76 to 81 pursuant to Regulation No 1932/81 who, under the conditions imposed by Regulation No 2661/85, undertook to process an increased quantity of intervention butter subject to the conditions laid down in Regulation No 262/79, must be entitled to take advantage of the possibility of conversion under Regulation No 2661/85, irrespective of the date on which the regulation entered into force or the dates on which the periods prescribed for processing expired.

Costs

43. Since the reference for a preliminary ruling is, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings before the national court, the decision on costs is a matter for that court. The costs incurred by the Commission are not recoverable.

13 — Second recital in the preamble to the regulation, emphasis added by the present writer; the wording of the regulation in the Romance languages of the Community and in Dutch corresponds to that in the German text and therefore does not give rise to any divergent interpretation. Likewise, the slightly different wording in the English text does not result in any different meaning.

14 — See Article 1 of Regulation (EEC) No 2661/85.

15 — See Article 2(2) of Regulation (EEC) No 1932/81.

C — Conclusion

44. In view of the foregoing considerations, I would suggest that the Court reply as follows to the questions referred by the national court:

'All operators to whom contracts were awarded under invitations to tender Nos 76 to 81 must, irrespective of the date on which Regulation (EEC) No 2661/85 entered into force or the dates on which the periods prescribed for processing expired, be given an equal opportunity to make use of the opportunity of conversion under Regulation (EEC) No 2661/85 and thereby to be released from their obligations under Regulation (EEC) No 1932/81.'