OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 23 April 1986 *

Mr President,
Members of the Court,

A — Regulation (EEC) No 2750/75 of the Council fixing criteria for the mobilization of cereals intended as food aid (Official Journal 1975, L 281, p. 89) provides that, where cereals held by the intervention agencies are used, tenders are to be invited (Article 4 (2)). In that connection the terms are to be so framed that equal access and treatment are ensured for all persons concerned irrespective of their place of establishment in the Community (Article 4 (4)).

The implementing rules are laid down in Commission Regulation No 1974/80 (Official Journal 1980, L 192, p. 11). They apply, by virtue of Article 1(2), 'to operations to be carried out either at the fob stage or at the cif stage'. Article 2 provides that the intervention agency of the designated Member State is to be responsible for putting into operation the procedures for the mobilization and supply of the products. Those wishing to take part in the procedure must, by virtue of Article 4, attach to their tender:

'(b) an undertaking ... to comply with the tendering conditions;

(d) where the invitation to tender relates to the supply of goods at the cif stage, an undertaking ... to transport the goods by sea in vessels listed in the larger [1] classes in recognized classification registers, not more than 15 years old, and attested by a competent body as meeting hygiene requirements'.

In addition, Article 5 of the regulation provides that tenders are to be considered only if security is furnished to serve as a guarantee that the tenderer will fulfil his obligations. Article 11 provides that the successful tenderer must fulfil his obligations in accordance with the conditions laid down in the regulation opening the tendering procedure and comply with the undertakings referred to in Article 4 (4) (b), (c), (d) and (e). Finally, Article 20 lays down rules for the release of the security. The second indent is of particular interest. It provides that the security is to be released to 'the successful tenderer in respect of the quantities delivered ... *in accordance with the provisions governing this delivery* ...'.

Pursuant to Article 2 (1) of Regulation No 1974/80 the Commission adopted Regulation (EEC) No 588/81 on the supply of common wheat to Ethiopia as food aid. Its effect was to designate the German intervention agency as responsible for implementing the mobilization and supply procedures. Annex A to the regulation indicated the total quantity of common wheat to be taken from the stocks of the German intervention agency (a consignment of 5 000 tonnes), stipulated that the wheat be delivered on cif terms from a Community port to Assab, the port of landing, and also specified the shipment period (1 to 30 April 1981).

* Translated from the German.

1 — Translator's note: The German version of the Regulation reads '... die der höchsten Kategorie ... angehören'.

The successful tenderer was the plaintiff in the main proceedings. However, it experienced certain difficulties, with the result that the wheat was loaded on to two ships which, although listed in the top class in the shipping registers, were more than 15 years old; moreover, loading was not completed until 5 or 6 May 1981.

The Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], which was responsible for the conduct of the operation, therefore took the view that the 'provisions governing this delivery' within the meaning of Article 20 of Regulation No 1974/80 had not been complied with and declared the security forfeit in its entirety.

As a result, proceedings were instituted before the Verwaltungsgericht [Administrative Court] Frankfurt. That court considers that there is some doubt as to the validity of the rules under which the security was declared forfeit. The forfeiture of the whole security in a case where the full quantity was delivered, albeit not on ships meeting the prescribed requirements and not within the shipment period, was, in the opinion of the court, not in conformity with the principle of proportionality and was absurd in view of the fact that if half the quantity is delivered only half the security is forfeited. If it is assumed — because penalties ought to be commensurate with the gravity of the infringement and the extent of the failure to fulfil an obligation — that in the plaintiff's case only part of the security lodged can be declared forfeit, then it must be concluded in the present case that the extent to which the security is affected is very small, in so far as compliance with the shipment period provides no guarantee as to the arrival of the wheat at a particular time and likewise the fact that a ship is old does not entail any greater risk if its general condition is so good that it is entered in the top class of the recognized classification registers. The Verwaltungsgericht considers that the fixing of a maximum age for the ship to be used might well be regarded as arbitrary, because the Commission itself abandoned that criterion in Regulation (EEC) No 75/84 on delivery of common wheat as food aid to the Kingdom of Lesotho. (Official Journal 1984, L 10, p. 37). Accordingly, by order of 15 November 1984 the court suspended the proceedings before it and submitted the following questions for a preliminary ruling under Article 177 of the EEC Treaty.

'Is the second indent of Article 20 (1) of Commission Regulation (EEC) No 1974/80 of 22 July 1980, laying down general implementing rules in respect of certain food-aid operations involving cereals and rice, compatible with the principle of proportionality, in so far as its effect is that the security furnished pursuant to Article 5 of the regulation is to be wholly forfeit where:

(1) The successful tenderer breaks his undertaking under Article 4 (4) (d) by transporting the goods in question in vessels which, although listed in the top classes in recognized classification registers, are more than 15 years old; or

(2) The successful tenderer breaks his undertaking to ship the goods within a specified period (laid down in this case in point 16 of Annex A to Commission Regulation (EEC) No 588/81 of 4

March 1981, Official Journal 1981, L 60, p. 19) by shipping the goods five or six days after the expiry of that period?'

Only the Italian Government and the Commission have submitted written observations on the questions. The Italian Government is of the opinion (I shall not go into detail at this point) that — if the ships used display the same degree of reliability — failure to fulfil the obligation to use vessels which are no more than 15 years old cannot be punishable by forfeiture of the whole security any more than failure to comply with the prescribed shipment period (where the delay in question is not significant). The Commission, on the other hand, considers Article 20 of Regulation No 1974/80 to be in conformity with the principle of proportionality and accordingly takes the view that it is proper for the security to be declared forfeit if the criterion regarding the age of the ship is not complied with or if the shipment period is exceeded, albeit by only a few days. In the oral procedure (in which the Italian Government and the Commission amplified their observations) the plaintiff in the main proceedings also expressed its views. It submitted first of all that it was prevented from complying with the provisions governing delivery by a case of *force majeure*. For the rest, it takes the view that it was not proper to insist on the use of ships which had been in use for no more than 15 years and to declare the security forfeit in respect of an insignificant overstepping of the shipment period which — in the difficult circumstances of the present case — could not be regarded as an infringement of a principal obligation incumbent upon the successful tenderer.

B — In my opinion, the correct view of these problems is as follows.

1. The Court will recall how the *principle of proportionality* to which the Verwaltungsgericht Frankfurt refers in the present case is to be understood in the light of the case-law of the Court. Thus it is important to establish 'whether the means [a provision] employs to achieve its aim correspond to the importance of the aim and . . . whether they are necessary for its achievement' (judgment in Case 66/82 [1983] ECR 395 at p. 404, paragraph 8 [2]) or else simply — as in the judgment in Case 15/83 [3] ([1984] ECR 2171 at p. 2185) — 'what is appropriate and necessary to attain the objective pursued' (paragraph 25).

Let me remind the Court of a few cases in which the principle was applied.

In Case 122/78 [4] ([1979] ECR 677 at p. 682 *et seq.*), concerning the security which had to be furnished upon issue of an import licence, the plaintiff complained that the same proportion of the security was forfeited whether the offence consisted in a failure to import during the validity of the licence or in a failure to submit *proof* of the importation within the time-limit. With respect to the latter offence, it was held that — in so far as the offence was of very little importance — the penalty was excessively severe having regard to the objectives of administrative efficiency underlying the provision in question; the penalty should be more closely allied to the practical effects of the breach of the rules.

A similar position was adopted by the Court in Case 240/78 [5] ([1979] ECR 2137 p. 2147 *et seq.*). That case was concerned with aid for the private storage of pig meat (for

2 — Judgment of 23 February 1983 in Case 66/82 *Fromançais SA v Fonds d'orientation et de régularisation des marchés agricoles (Forma* [1983] ECR 395.

3 — Judgment of 17 May 1984 in Case 15/83 *Denkavit Nederland BV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1984] ECR 2171.

4 — Judgment of 20 February 1979 in Case 122/78 *Buitoni SA* v *Fonds d'orientation et de régularisation des marchés agricoles (Forma)* [1979] ECR 677.

5 — Judgment of 21 June 1979 in Case 240/78 *Atalanta Amsterdam BV* v *Produktschap voor Vee en Vlees* [1979] ECR 2137.

which security also had to be furnished) and with the fact that the documents relating to the storage operations had not been produced within the prescribed period. The Court held that the right to aid arose notwithstanding the fact that the documents had been forwarded out of time, and it was emphasized in relation to the foreiture of the security envisaged by that provision that the principle of proportionality requires that a 'penalty [must be] made commensurate with the degree of failure to implement the contractual obligations or with the seriousness of the breach of those obligations' (paragraph 15).

In that judgment great importance was clearly attached to the difference between principal obligations and secondary obligations (of a purely administrative nature), and in two other cases the Court, on the basis of that distinction, held that it was not justified to declare a provision imposing a penalty to be void. That was the finding in Case 272/81 [6] (which was concerned with the grant of special aid for skimmed-milk powder intended for animal feed and forfeiture of the security for failure to comply with the prescribed conditions for denaturing). In the judgment of the First Chamber of 2 December 1982 it was emphasized that it was proper to lay down strict conditions for denaturing on account of the risk that the aid might be used for unauthorized purposes. Accordingly, the loss of the aid and of the security was held to be justified where that obligation was not complied with, and it was also emphasized in particular that it was not necessary to vary the severity of the measure in question 'according to the gravity of the . . . failure to comply with that obligation' (paragraph 14 — and it is noteworthy that only one trifling departure from the denaturing formula provided for in the regulation in question was involved). It is also appropriate at this point to refer once more to the judgment in Case 66/82 (which concerned the disposal of butter at a reduced price to certain processing undertakings which were required to process the butter within a specified time-limit — the purpose of the security being to ensure compliance with that requirement). The Advocate General [7] took the view that there was no justification for applying the same penalty (forfeiture of the whole security) for infringements which differed considerably in gravity, namely outright failure to complete the processing and somewhat belated completion thereof. However, the First Chamber did not accept that view. In its opinion forfeiture of the whole security merely for failure to complete processing within the prescribed period was not open to criticism, and in that connection particular importance was attached to the finding that strict compliance with the time-limit for processing was fundamental to the proper functioning of the system provided for in the regulations in question.

2. Before I endeavour to expound a proposal for a solution to the problem under consideration it must be made clear — since this was of considerable importance for the national court and for the Italian Government in its written submissions — that it is incorrect to take the view that Commission Regulation No 1974/80 contains a rule which operates rateably with the result that where only some of the product to be shipped is delivered only the corresponding portion of the security is forfeited. As the Commission has convincingly demonstrated, that is apparent first of all from Article 15 of that regulation. Article 15 (2) thereof specifically provides that the quantities delivered are to be determined when the goods are placed under customs control (that is to say before the departure of the vessel), and merely adds that, where the goods are to be

6 — Judgment of 2 December 1982 in Case 272/81 *Société RU-MI* v *Fonds d'orientation et de régularisation des marchés agricoles* [1982] ECR 4167.

7 — Opinion of Mr Advocate General Reischl of 11 November 1982 in Case 66/82 *Fromançais S.A* v *Fonds d'orientation et de régularisation des marches agricoles (Forma)* [1983] ECR 407.

delivered in bulk, a tolerance of minus 2% of the weight to be delivered is to be allowed. In addition Article 15(4) clearly provides as follows:

'Where the inspection provided for in the preceding paragraphs reveals that goods do not satisfy the requirements stipulated, they must be refused and replaced. Where some quantities are missing the successful tenderer must make up the cargo.'

Secondly, reference may be made to the rules concerning release of the security (Article 20). According to that provision, the security is to be released 'in respect of the quantities delivered, having regard to the 2% tolerance specified in the second subparagraph of Article 15(2)'. According to the following indent, the security is to be released 'in respect of quantities not delivered through the fault of the recipient'; in other words, where there is found to be a shortage at the port of delivery, the security is released only if the shortage is attributable to the recipient.

It may therefore be stated that, on closer examination, one of the main premises upon which the views of the national court and of the Italian Government are based is false.

3. In so far as the question submitted to the Court is concerned with the *maximum age-limit of the vessel to be employed* and the question whether Regulation No 1974/80 lays down an excessively strict requirement, the Italian Government maintains that, when the condition of a vessel is such that it is placed in the top class in recognized classification registers, no greater risk is involved where the vessel is more than 15 years old. Consequently, it maintains, it is sufficient to have regard to the objective suitability of a vessel, which, if the need should arise, can be proved by a special certificate. In that connection the Italian Government also refers to the fact that in Mediterranean ports there is little choice as regards carriers who can comply with the strict conditions imposed; it also mentions the principle of equal access and equal treatment which applies here (Article 4 (4) of Regulation No 2750/75) and argues that the principle is endangered by the imposition of excessively strict conditions, to the detriment of interested parties in the Mediterranean area. The Commission puts forward the opposing view that the criteria laid down in Regulation No 1974/80 are essential to ensure safe and prompt deliveries. According to the previous decisions of the Court, the obligations involved are principal (and not secondary, incidental) obligations and it is therefore appropriate to ensure that they are fulfilled by imposing strict penalties. The Commission also refers in that connection to the expression 'proper functioning of the system' used in the case-law. It observes that the requirement of equal treatment in Article 4 of Regulation No 2750/75 is indeed important here; however, in the interests of complying with that requirement, specific objective criteria cannot be dispensed with, and that is so not because — as the Italian Government considers — the intention is to make certain that all the participants in a call for tenders enjoy the same insurance conditions but rather because those participants who use older — and therefore cheaper — vessels would otherwise be placed in an advantageous position.

In my opinion the Commission's view should be upheld in so far as it places particular stress on the need to concentrate on proper fulfilment of the commitments entered into *vis-à-vis* the recipient countries and to ensure the safe and reliable transportation of the foodstuff which — if the purpose of the action is to be achieved — must reach its destination quickly and in perfectly fresh condition. I also find convincing the answer given to the

question whether vessels which have been in service for more than 15 years may be regarded as being subject to greater risk. Experience clearly shows that they are more frequently involved in accidents and cases of fraud. It may also be said that, in view of their low purchase prices, they are often to be found in the possession of owners whose capital is not particularly substantial and who are inclined to resort to the cheapest options when repairs have to be carried out. As a result, the age criterion — as has been shown by the Commission, which referred to the legal position in several Member States (United Kingdom, Kingdom of the Netherlands and the Federal Republic of Germany) — also plays a role with respect to the determination of insurance conditions and premiums; in other words a greater risk is assumed when old ships are used (except in the case of vessels engaged in liner trading, which of course would not normally be used for bulk transport operations of the kind involved here). In addition, it is — as the Commission has stated, without being contradicted — also a fact that certain countries in the Middle East (such as Saudi Arabia and Jordan) subject ships which have been in service for more than 15 years to rigorous inspections, and that this may discourage their use in that area and prevent the prompt completion of transport operations.

Although on the other hand the Italian Government is right in its view that there certainly are vessels more than 15 years old which have been maintained in such good condition that their use entails no increased risk, that fact can hardly be taken into account within the framework of a general rule. This could scarcely be achieved by carrying out a reliability test in each individual case (since this would entail additional and avoidable — and therefore unjustifiable — administrative expenditure), or by requiring that participants in a tendering procedure should provide on each occasion a certificate as to the condition of the vessels to be employed (it is difficult to see how such certificates could be obtained without great difficulty, and moreover problems might arise regarding appraisal of them). In drafting a general rule it is surely more appropriate to adopt general criteria based on the results of long experience, not least because — and it seems to me that the Commission is also correct here — that is the easiest way to ensure that the principle of equal treatment is observed in the tendering procedure.

Abandonment of the criterion of a maximum age would be tantamount to preferential treatment for the successful tenderer and discrimination against all the other interested parties, who might possibly, if the criterion of age had been waived earlier, have been able to offer more favourable terms than the successful tenderer. In view of that consideration, there can be no question of making concessions to the successful tenderer after the event.

Consequently, the age criterion laid down for ships by the Commission is in no way arbitrary, but indeed is appropriate and reasonable for the purposes of the principle of proportionality, and that view cannot be undermined by two further considerations to which attention was drawn during the proceedings, in particular the reference made by the Italian Government to the special circumstances obtaining in the Mediterranean ports (where vessels meeting the prescribed age criterion are not readily available) and the reference to Commission Regulation No 75/84 (Official Journal 1984, L 10, p. 37), according to which the only condition imposed for the delivery of common wheat as food aid to the Kingdom of Lesotho was the requirement 'to ship in vessels listed in the larger classes in

recognized classification registers' (whereas no age criterion was laid down).

If, as the Commission stated without being contradicted, it is true that the proportion of vessels over 15 years old *in the world as a whole* is only 28% of the total and if it is to be concluded therefore that the same (or even better) circumstances prevail in the Mediterranean area, it is not apparent how the exclusion of vessels of that age by the regulation under consideration could significantly reduce the opportunity to participate available to interested parties in the Mediterranean region, contrary to the principle of equal treatment. On the other hand, as far as the rules laid down for deliveries to the Kingdom of Lesotho are concerned, the Commission has given the plausible explanation that in that case a departure from the age criterion applicable to ships (which was nevertheless contained in the original regulation, Regulation No 3406/83, Official Journal 1983, L 337, p. 28) was inevitable since otherwise it would have been impossible to find anyone to undertake the difficult transport operation by sea and overland in the African interior. It should also be noted that in that case the delivery was not on cif terms of the kind to which Article 4 (4) (d) of Regulation No 1974/80 applies. Provision had to be made for transport as far as the ultimate destination. In that case, it was quite conceivable that the requirements regarding the choice of the vessel should be less strict than in the case of deliveries on cif terms (where all that is important is that the sea transport operation should be proprerly completed), since it can be assumed that, as the successful tenderer is responsible for ensuring that the goods reach their final destination, it is in his own interest to ensure that an unreliable vessel is not selected.

It must therefore be stated in reply to the first part of the question submitted that the conditions laid down in Article 4 (4) (d) of Regulation No 1974/80 concerning the vessels to be used appear to be appropriate in so far as they constitute an obligation which is essential for ensuring the success of the action concerned, and accordingly a substantial penalty for failure to fulfil that obligation is properly provided for in the form of forfeiture of the entire security.

4. It appears from the order for reference that the aforesaid condition was not complied with in this case (as a result of which the security was quite properly declared forfeit), and therefore a decision on the other matter referred to in the question submitted — *failure to ship the goods within the specified period* — is in fact not necessary for the purposes of the judgment to be given in the main proceedings. However I will consider it briefly.

As has been seen, in the Commission's view observance of the shipment period constitutes a principal obligation as defined in previous decisions of the Court and it is therefore appropriate for the whole security to be forfeited where that requirement is not fulfilled. The Italian Government, on the other hand, takes the view that observance of the shipment period is not a matter of essential importance, in the first place because it provides no guarantee that the goods will arrive at their destination at a given time, and secondly because, notwithstanding non-observance of the shipment period, the freight charges are paid (and the contract is not rescinded). In its opinion, no consequences should ensue where the shipment period is only slightly exceeded; moreover, since non-observance of that period does not lead to rescission of the contract, it would appear, in the light of the principle of proportionality, to be more appropriate to impose a pecuniary penalty for each day by which the shipment period

is exceeded (up to a specified maximum limit).

As far as this issue is concerned, to begin with it is difficult to give credence to the view put forward by the Italian Government that compliance with the shipment period cannot be of any great significance because non-observance of it does not lead to cancellation of the legal relationship entered into with the successful tenderer. In my opinion, the criteria applicable to the delivery cannot be properly appraised on that basis. When it is ascertained, from an inspection carried out at the port of shipment, that the shipment period has not been observed, it is of course better, in the case of food aid, to tolerate the resultant delay than to repeat the whole procedure *ab initio*, which would entail a considerable waste of time.

It cannot however be denied that the opinion of the Italian Government that the penalty could have been made commensurate with the extent of the delay is very attractive (in common with the view expressed by the Advocate General in Case 66/82, to the effect that where the processing period applicable to butter sold at reduced prices was exceeded only slightly it was appropriate to apply a less severe penalty than where the processing was not carried out at all). I think however that, as in that case, the Commission cannot be said in this instance to have infringed the principle of proportionality by opting for a different solution. Two principles laid down by the Court in the decisions to which I referred earlier are of particular importance here: firstly, where a *principal obligation* is infringed in a tendering procedure there is no need to vary the severity of the penalty according to the gravity of the infringement (Case 272/81 [1982] ECR 4167 at p. 4180, paragraph 14); and secondly, it is necessary to establish what is of fundamental importance to the *proper functioning of the system* (Case 66/82 [1983] ECR 395 at p. 405, paragraph 13).

It cannot be denied that observance of the shipment period is an essential obligation, the purpose of which is to ensure that the commitment entered into *vis-à-vis* the recipient country to make the food aid available as soon as possible is effectively discharged. Even though it cannot be denied that the length of the sea voyage cannot be precisely calculated, it can as a rule be assumed that a vessel which is loaded later and sails later will also arrive later at its port of destination. In any event, there is no justification for the view put forward by the Italian Government that the date on which the goods *arrive* in the recipient country is unimportant, according to the system of Regulation No 1974/80, because provision is made for inspections only until loading is completed.

It is also correct that compliance with the shipment period is of fundamental importance to the proper functioning of the system. That follows from the basic principle of equal treatment and from the fact that on that basis selection of the most favourable tender (within the meaning of Article 7 of Regulation No 1974/80) would not be assured if it were possible to depart from the prescribed shipment period without formality. And if only limited penalties were applied they might possibly be offset by the advantages obtained by exceeding the shipment period. It is still less thinkable to

dispense with the penalty where the shipment period is exceeded only to an insignificant extent (quite apart from the fact that the problem would immediately arise of where to draw the line between 'significant' and 'insignificant'). For the rest, what I said earlier (p. 3547, third paragraph) applies, namely that a subsequent waiver of the requirement to comply with the prescribed shipment period would represent unilateral preferential treatment for the successful tenderer and would place at a disadvantage all the other persons concerned who, had they known of the possibility of exceeding the time-limit, might have been able to offer terms more favourable than those offered by the successful tenderer.

Finally, for the sake of completeness, it must be stated that the Italian Government's argument regarding the special circumstances obtaining in the Mediterranean ports clearly cannot be upheld. In reply the Commission correctly stated that there is simply no question of accepting the view that there are greater difficulties in that area regarding compliance with the provisions concerning loading. If however certain difficulties were to be encountered — and no evidence to that effect has been adduced — the generous shipment period allowed provides ample time for them to be overcome and there is absolutely no need, for the purpose of ensuring equal treatment for the persons concerned in the Mediterranean area, for an extended time-limit.

C — Accordingly, the question submitted by the Verwaltungsgericht Frankfurt should be answered as follows:

The second indent of Article 20 (1) of Commission Regulation No 1974/80 laying down general implementing rules in respect of certain food-aid operations involving cereals and rice is compatible with the principle of proportionality, in so far as its effect is that the security furnished pursuant to Article 5 of the regulation is to be wholly forfeit where the successful tenderer breaks his undertaking under Article 4 (4) (d) by transporting the goods in question in vessels which, although listed in the top classes in recognized classification registers, are more than 15 years old; or where the successful tenderer breaks his undertaking to ship the goods within a specified period, by shipping the goods five or six days after the expiry of that period.