

OPINION OF ADVOCATE GENERAL
LÉGER

delivered on 19 March 1998 *

1. Economic operators who use natural starch to produce certain goods are entitled to production refunds. These are granted on condition that the starch is processed into 'approved products'¹ and the manufacturer must lodge a security for the effective completion of the processing operation.

2. If the starch is to be processed into esterified or etherified starch² the manufacturer is also required to use the processed products for a specific purpose (hereinafter a '*prescribed use*'), either for export to third countries or for use within Community customs territory in the manufacture of products other than the basic products or certain derived products from which they are obtained.

3. These special rules are justified by the particular nature of esterified or etherified

starch, which can be processed back into a basic product, thus enabling the manufacturer wrongfully to cumulate production refunds. The Community legislature has therefore specified that the esterified or etherified starch must leave Community territory or may only be processed within it for specified purposes, failing which the security will not be released.

4. The Court is requested to specify the nature of this obligation of *prescribed use* of the processed starch and in particular whether it constitutes a *primary requirement* calling for proof of compliance within a given period, without which the security is forfeit.

I — The relevant Community legislation

Commission Regulation (EEC) No 2220/85

5. Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down common detailed rules for the application of the

* Original language: French.

1 — 'Approved products' are products specified in various lists most of which are annexed to the regulations on production refunds in the cereals and rice sector. More specifically the term denotes various kinds of paper (newsprint, kraft paper, carbon paper etc.) or cloth. It also covers esterified or etherified starch, which is the subject of this case.

2 — Product specified under CN code 3505 10 50.

system of securities for agricultural products³ defines in order of importance the various types of requirement which the Community agricultural regulations may lay down.

5. This Title shall not apply where the relevant specific regulation has not defined the primary requirements.'

6. Article 20 thus provides:

7. The 1985 regulation also sets out the consequences for the security of breach of a primary requirement and the time-limits for proving that the prescribed requirements have been complied with, when the relevant regulation is silent in that respect.

'1. An obligation may include primary, secondary or subordinate requirements.

2. A primary requirement is a requirement, basic to the purposes of the regulation imposing it, to perform, or to refrain from performing, an act.

8. Article 22(1) and (2) provides that:

3. A secondary requirement is a requirement to respect the time-limit for fulfilling a primary requirement.

'1. A security shall be forfeited in full for the quantity for which a primary requirement has been breached.

4. A subordinate requirement is any other requirement imposed by a regulation.

2. A primary requirement shall be considered to have been breached if the relevant evidence is not produced within the time-limit set for the production of that evidence except in cases of *force majeure*...'

³ — 'The 1985 regulation', OJ 1985 L 205, p. 5.

9. Article 28 reads as follows:

Commission Regulation (EEC) No 2169/86

'1 Where no period is laid down for producing the evidence needed to release a sum secured, such period shall be:

(a) 12 months from the time-limit specified for respecting all primary requirements, or

(b) where no such time-limit is specified, 12 months from the date by which all primary requirements have been met.

2. The period laid down in paragraph 1 shall not exceed three years from the time the security was assigned to a particular obligation, except in cases of *force majeure*.'

10. Article 4(1) of Commission Regulation No 2169/86 of 10 July 1986 laying down detailed rules for the control and payment of the production refunds in the cereals and rice sectors⁴ provides that '[a] manufacturer wishing to obtain a production refund shall apply in writing to the competent authority in the Member State where the starch is to be processed for a refund certificate.'

11. The prior lodging of a security is required under the conditions set out in Article 7(1) of Regulation No 2169/86, as supplemented by Regulation (EEC) No 3642/87,⁵ which provides as follows:

'The issue of a certificate shall be subject to the lodging of a security by the manufacturer with the competent authority, equal to 25 ECU per tonne of basic starch, where appropriate multiplied by the coefficient relating to the type of starch to be used as shown in the Annex.

4 — 'The 1986 regulation', OJ 1986 L 189, p. 12.

5 — Commission Regulation of 2 December 1987 amending Regulation (EEC) No 2169/86 (OJ 1987 L 342, p. 10).

However, where the product indicated on the certificate falls within Common Customs Tariff subheading No 39.06 B I (CN 3505 10 50), the security shall equal to 105% of the production refund to be granted for the manufacture of the product in question.’

12. Article 7(2) provides that:

‘The primary requirement within the meaning of Article 20 of Regulation (EEC) No 2220/85 shall be the processing of the quantity of starch stated on the application into the prescribed products so stated within the period of validity of the certificate. However, where a manufacturer has processed a minimum of 95% of the quantity of starch stated on the application he shall be considered to have fulfilled the aforesaid primary requirement.’

13. Article 7(4) makes the release of the security subject to specific conditions when the product concerned falls within the scope of CN code 3505 10 50. In the version resulting from Regulation No 165/89,⁶ the provision reads as follows:

‘Without prejudice to paragraph 2, the security referred to in paragraph 1, second sub-

paragraph, shall only be released if the competent authority has received proof that the product under CN code 3505 10 50 is:

(a) used to manufacture products other than those listed in Annex I; or

(b) exported to third countries.’

Commission Regulation (EEC) No 1722/93

14. As indicated in the thirteenth recital of the preamble, Commission Regulation No 1722/93 of 30 June 1993⁷ ‘incorporates, whilst adapting them to the current market situation the provisions of Commission Regulation (EEC) No 2169/86 ...’, and consequently repeals the latter regulation.

15. Two separate securities are now to be lodged.

⁶ — Commission Regulation (EEC) No 165/89 of 24 January 1989 amending Regulation (EEC) No 2169/86 (OJ 1989 L 20, p. 14).

⁷ — Commission Regulation (EEC) No 1722/93 of 30 June 1993 laying down detailed rules for the application of Council Regulations (EEC) No 1766/92 and (EEC) No 1418/76 concerning production refunds in the cereals and rice sectors respectively (OJ 1993 L 159, p. 112), hereinafter ‘the 1993 regulation’.

16. The first of these securities is provided for in Article 8, which states that:

'1. The issue of a certificate shall be subject to the lodging of a security by the manufacturer with the competent authority, equal to ECU 15 per tonne of basic starch, where appropriate multiplied by the coefficient corresponding to the type of starch to be used as shown in Annex II.

2. The security shall be released in accordance with Regulation (EEC) No 2220/85. The primary requirement within the meaning of Article 20 of that regulation shall be the processing of the quantity of starch stated on the application into approved products (as defined) within the period of validity of the certificate. However, if a manufacturer has processed at least 90% of the quantity of starch stated on the application, he shall be deemed to have fulfilled the aforesaid primary requirement.'

17. The lodging of the second security is required by Article 9(2) when the products concerned fall within the scope of CN code 3505 10 50.

18. According to that provision: 'Where the product mentioned on the certificate falls within CN code 3505 10 50, the notification referred to in paragraph 1 shall be accompanied by the lodging of a security equal to the production refund payable on the manufacture of the product in question.'

19. The conditions for releasing the security referred to in Article 9 are set out in Article 10(1), which states:

'1. The security provided for in Article 9(2) shall be released only once the competent authority has received proof that the product falling within CN code 3505 10 50 has been:

(a) used within the customs territory of the Community to manufacture products other than those listed at Annex II;

or

(b) exported to third countries. In the case of direct export to third countries, the security shall be released only once the competent authority has received proof that the product in question has left the customs territory of the Community.'

20. Transitional provisions are set out in Article 14(2), which reads:

‘For the purpose of releasing the security pursuant to Article 7 of Regulation (EEC) No 2169/86, Article 10 shall also apply in the case of files which are still open at the time of the entry into force of this regulation.’

II — The facts and the national procedure

21. The plaintiff in the main proceedings, Kyritzer Stärke GmbH (hereinafter ‘Kyritzer’ or ‘the plaintiff in the main proceedings’) processes natural starch, and in particular esterified starch, into approved products and receives production refunds in that respect.

22. In December 1991 and January 1992 consignments of 1 000 and 700 tonnes respectively of potato starch were placed under official supervision. Production refunds for the manufacture of products falling within CN code 3505 10 50 were fixed by refund certificates dated 9 December 1991 (amended by the refund certificate of 16 March 1992) and 22 January 1992 (amended by certificate of 24 March 1992).

23. Under Article 7(1) of Regulation No 2169/86, the Hauptzollamt Potsdam (Potsdam Principal Customs Office) requested that Kyritzer lodge securities of DEM 288 555.62 and DEM 216 877.42 respectively.

24. Kyritzer declared the manufacture of 950.94 tonnes and 631.58 tonnes respectively of etherified or esterified starch (hereinafter ‘the processed products’) by discharge notices dated 10 January and 21 February 1992.

25. Evidence that this modified starch was used for a prescribed purpose was supplied on 24 February 1995, but only for quantities of 706 870 tonnes and 587 061 tonnes respectively. The Principal Customs Office therefore declared the securities forfeit by a decision of 9 May 1995. The amounts were DEM 74 060.58 due from 17 March 1995 and DEM 33 869.95 due from 25 March 1995, the dates on which the period specified in Article 28(2) of the 1985 regulation expired.

26. The objections challenging that decision were rejected, as was the action on the merits before the Finance Court.

27. In its appeal to the Federal Finance Court the plaintiff in the main action con-

tended in particular that evidence that processed products were for a prescribed use was not a primary requirement within the meaning of Article 20(2) of the 1985 regulation, so that the contested judgment was not supported by either Article 22(1) or the combined provisions of Article 22(2) and Article 28(2) of that regulation. Nor could it be regarded as a secondary requirement; it was a subordinate requirement, which would not entail the forfeiture of part of the security under the terms of Article 24 of the 1985 regulation, the object of which was to sanction failure to fulfil an obligation rather than a delay in doing so.

be produced within the period prescribed by Article 28(2) of Regulation No 2220/85, so that, in any other case, security lodged pursuant to Article 22(1) and (2) of that regulation becomes forfeit?

- (2) If the answer to Question (1) is in the negative:

III — The questions referred for a preliminary ruling

28. The Federal Finance Court considers that some factors support the view that the prescribed use of processed products is a primary requirement, while others support the contrary view; it has therefore referred the following questions to the Court:

Is some other prescribed period to be inferred from the applicable Community legislation, within which evidence of use is to be produced in accordance with Article 10(1) of Regulation No 1722/93, so that the security becomes wholly or partially (to what extent?) forfeit if the evidence is not produced within the prescribed period?

IV — The first question

(1) Does the use prescribed in Article 10(1) in conjunction with Article 14(2) of Regulation No 1722/93 for processed goods falling within CN Code 3505 10 50 constitute a primary requirement within the meaning of Article 20(1) and (2) of Regulation No 2220/85, evidence of the fulfilment of which is to

29. In this question the national court seeks to know what is the exact nature of the prescribed use of processed products, which is the determining factor for the release or forfeiture of the securities.

30. In order to answer it we must construe the 1986 and 1993 regulations, in which the prescribed use requirement originated, and the 1985 regulation, which lays down the relevant legal rules.

no doubt that the common detailed rules for securities are those set out in the 1985 regulation.

A — *Determining the applicable rules*

31. I must say, first, that the 1985 regulation is applicable to this case. Article 1 thereof states that it 'lays down the rules governing securities to be given, either under the following regulations or under any implementing regulations, unless other rules are laid down by those regulations...'

33. Furthermore, although the main action arose from an application for production refunds made in 1991 and ought therefore to be outside the scope of the 1993 regulation, which came into force on 1 July 1993,¹⁰ it is subject to the provisions of Article 10 of the 1993 regulation in accordance with Article 14 thereof.

32. In this context Article 1 mentions both Regulation (EEC) No 1418/76⁸ (the very regulation for which the 1993 regulation laid down detailed rules of application) and Regulation (EEC) No 2727/75,⁹ which was followed by Regulation No 1766/92, cited above, the other regulation on which the 1993 regulation is based. There is therefore

34. It should be noted that under that provision, for the purpose of releasing the security pursuant to Article 7 of the 1986 regulation, Article 10 also applies in the case of files which were still open when the 1993 regulation came into force.

35. In addition to the conditions for the release of the security for the prescribed use of processed products, Article 10 states how such proof of use is to be constituted, produced and monitored.

⁸ — Council Regulation of 21 June 1976 relating to the common organisation of the rice market (OJ 1976 L 166, p. 1).

⁹ — Council Regulation of 29 October 1975 relating to the common organisation of the market in cereals (OJ 1975 L 281, p. 1). This regulation was repealed by Article 26(1) of Council Regulation (EEC) No 1766/92 of 30 June 1992 on the common organisation of the market in cereals (OJ 1992 L 181, p. 21), which also states that 'references to the regulation repealed by paragraph 1 shall be construed as references to this regulation'.

¹⁰ — Article 14, first paragraph, of the 1993 regulation.

36. However, the similarities between the 1986 and 1993 regulations appear to warrant interpreting them jointly in order to furnish the reply to the national court's questions.

39. First of all, it should be noted that the only primary requirement expressly mentioned in the two regulations is the processing of the starch into approved products.¹²

37. The wording of the thirteenth recital in the preamble to the 1993 regulation indicates that the regulations have the same purpose and that their contents are similar, the only distinctions being certain adjustments made necessary by the present state of the market.

40. The emphasis is therefore on the importance of processing that basic product into specified products, which is a precondition for the payment of production refunds.¹³

41. The requirement that processed products must be for a prescribed use is not subject to a similar qualification

B — *The nature of the prescribed use*

38. In order to decide whether prescribed use is a primary obligation we must refer to the wording of the applicable regulations, to the intentions of the Community legislature and to the general logic of the scheme imposed by the provisions, in accordance with the Court's settled case-law.¹¹

42. The introduction of rules solely for products falling within CN code 3505 10 50 stems from the changes made to the 1986 regulation in 1987 and 1989, which amended Article 7 by adding a second subparagraph to paragraph (1) and a new paragraph, paragraph (4).

43. The initial legal provision was thus supplemented by fixing the amount of the security for manufacturing these products

The content of the regulations

11 — See, for example, Case 91/87 *Gutshof-Ei* [1988] ECR 2541, paragraph 9 et seq., Case C-22/90 *France v Commission* [1991] ECR I-5285, paragraph 14 et seq., and Case C-315/96 *Lopex Export* [1998] ECR I-317, paragraph 18.

12 — Article 7(2) of the 1986 regulation and Article 8(2) of the 1993 regulation.

13 — Fourth recital in the preamble to the 1986 regulation.

and by including the obligation of prescribed use, evidence of which would permit the release of the security.

44. However, these changes did not bring prescribed use within the category of primary requirements.

45. The amendments following the adoption of the 1993 regulation principally comprise an obligation to lodge a second security, specifically for the prescribed use of products, but they do not make prescribed use a primary requirement either.

46. We must therefore decide whether this restricted definition is deliberate and should consequently be interpreted literally, or whether it is the result of an omission, which would justify a wider interpretation.

47. This is a question of some importance: failure to fulfil a primary requirement involves the total forfeiture of the security under the 1985 regulation, so the manufacturer who fails to fulfil the prescribed use obligation may forfeit either all or only part of his security, depending on the answer.

48. Furthermore, a text which makes two different obligations subject to the same rules — total forfeiture of a security in case of default — when the classification on which the rules are based applies to only one of the obligations — raises doubts as to how it will be understood by the manufacturers to whom it is intended to apply.

49. To clarify the meaning of the disputed provisions we must examine the aims of the two regulations.

The aims of the regulations

50. The first recital in the preamble to the 1993 regulation states that the special situation of the market in starch, and particularly the need to keep prices competitive in relation to starch produced in third countries and imported as goods in respect of which the import arrangements do not provide sufficient protection for Community producers, justifies the grant of a production refund to enable the user industries concerned to have access to starch and certain derivatives at a lower price than that which would result from applying the rules of the common organisation of markets in the products in question.

51. The regulations aim in particular to establish detailed rules for the control and payment of production refunds in the cereals and rice sectors so that the same rules are applied in all Member States.¹⁴

52. It is provided that production refunds are to be paid for the use of starch and certain derived products in the manufacture of certain goods¹⁵ and that payment of the production refunds should not be made until processing has taken place.¹⁶

53. Finally, the Community legislature states that it is necessary to define the primary requirements of the obligations incumbent upon manufacturers and guaranteed by the lodging of a security.¹⁷

54. The purpose of the Community rules, therefore, is to protect Community products manufactured from starch by a system of production refunds to compensate for the difference between Community prices for

the basic product and those obtaining in third countries.

55. It is thus clear that the legislature regards the processing into approved products as an essential operation, and it is the only one which justifies the granting of production refunds when it is completed.

56. However, the 1987 and 1989 amendments to the 1986 regulation, substantially repeated in the 1993 regulation, aim to draw the consequences of the special characteristics of esterified or etherified starch which could lead to certain speculative processing operations designed to receive the production refund more than once.¹⁸

57. The Community legislature considered that in order to avoid such speculation measures were necessary to ensure that esterified or etherified starch was not processed back into a basic product the use of which would give the right to apply for a refund.¹⁹

14 — First recital in the preamble to the 1986 regulation and second recital in the preamble to the 1993 regulation.

15 — Third recital in the preamble to the 1986 regulation and sixth recital in the preamble to the 1993 regulation.

16 — Fifth recital in the preamble to the 1986 regulation and tenth recital in the preamble to the 1993 regulation.

17 — Sixth recital in the preamble to the 1986 regulation and twelfth recital in the preamble to the 1993 regulation.

18 — First recital in the preamble to Regulation No 3642/87 amending the 1986 regulation and ninth recital in the preamble to the 1993 regulation.

19 — Ibid.

58. It should be recalled that Article 20(2) of the 1985 regulation defines a primary requirement as one which is basic to the purposes of the regulation imposing it.

59. There is no doubt that since 1987 the campaign against fraud in the processing of esterified or etherified starch has been one of the Community legislature's objectives in drafting regulations and the prescribed use of processed products is its chosen method of attaining it.

60. It seems, therefore, that the purpose of the regulations justifies qualifying prescribed use as a primary requirement.

The general logic of the regulations

61. It is necessary to consider the requirement of prescribed use in the context of the regulations.

62. We have seen that the 1986 and 1993 regulations introduced a system of Commu-

nity grants for certain products manufactured from starch to compensate for price differences between Member States' production and that of third countries.

63. Production refunds are therefore central to the provision, forming both the purpose of the regulation and the main instrument for implementing it. They give effect to the economic operations which it is intended to protect.

64. In the circumstances it would be surprising if the prescribed use of processed products were not also a precondition for the granting of refunds.

65. However, there is a reason for this difference in the rules. The processing of agricultural products is the basic transaction justifying production refunds whose purpose is to compensate for price differences, while the obligation of prescribed use of certain products is designed to prevent abuses of the refund system. The different nature of these operations therefore supports the conclusion that a system of securities has been established solely to ensure that products are used for their normal purpose, though this choice does not diminish the significance of the position of this phase under the legislation.

66. I would also observe that the security required, initially only one, was subsequently required to be double specifically to ensure this use, which is evidence that the legislature was at least as concerned about fraud as with the implementation of the common agricultural policy itself.

67. Furthermore, it is my opinion that if the prescribed use of processed products was not a primary requirement, it could only be a subordinate requirement, which Article 20(3) of the 1985 regulation defines as a requirement to respect the time-limit for fulfilling a primary requirement; this cannot be true for prescribed use under Article 7(4) of the 1986 regulation and Article 10(1) of the 1993 regulation, which specify an obligation to perform without mentioning any time-limit.

68. That being so, the penalty for infringing a subordinate requirement, specified in Article 24 of the 1985 regulation as '... forfeiture of 15% of the relevant part of the sum secured', does not appear to be compatible either with the requirement of a security for prescribed use in the 1993 regulation or with the purpose of agricultural securities in Community law.

69. In fact it is unlikely that the Community legislature would provide for an additional

security and fix the amount thereof, knowing that failure to fulfil the requirement would only involve the loss of such a small part of the total.

70. The regulation would obviously be ineffective as a deterrent if the maximum risk was equal to 15% of the security, as a manufacturer could obtain a further production refund for the whole amount of the security if he resorted to fraud.²⁰

71. Furthermore, it is evident from Article 3 of the 1985 regulation that a security is a sum which is to be paid or forfeit if a specific obligation is not fulfilled, so that the possibility of total loss of the security can never be excluded.

72. It must be accepted that the campaign against fraud relating to products falling within CN code 3505 10 50 has a fundamental place in the system established by the Community regulations. The financial risk to the system arising from the illegal receipt of several refunds for the same product justifies qualifying prescribed use as a primary

20 — See points 11 and 18 of this Opinion for the respective amounts of production refunds and securities.

requirement, though it may be regretted that the legislature has not explicitly designated it as such, thus giving rise to a risk of differences in interpretation.

solely from a reading of the text which prescribes such use.

73. However, we should bear in mind that the Court's scrutiny of a Community regulation in the light of the principle of legal certainty takes account of the fact that the individual concerned is in the trade, and better able than a layman to interpret an ambiguous text in the light of factors other than the express wording.²¹

75. I am therefore of the opinion that the prescribed use for processed products falling within CN code 3505 10 50 specified in Article 10(1) of the 1993 regulation is a primary requirement.

C — The time-limit for the production of evidence and the forfeiture of the security

74. Moreover, a discussion of how the disputed requirement is to be qualified is only of interest in determining the penalty for non-compliance. I consider that Kyritzer was bound to respect the deadline laid down in Article 28 of the 1985 regulation, regardless of the categorisation of the requirement regarding the prescribed use, as the text does not restrict the application of this deadline to evidence of primary requirements and no particular issue justifies such an interpretation.²² This being so, the obligation on the plaintiff in the main proceedings to prove prescribed use within a given time-limit was not in the least ambiguous and was not affected by the uncertainty which might arise

76. Article 21 of the 1985 regulation states that a security is released on the production of evidence that all the primary, secondary and subordinate requirements have been fulfilled.

77. Article 7(4) of the 1986 regulation and Article 10(1) of the 1993 regulation confirm that fulfilment of the prescribed use requirement is a precondition for the release of the guarantee.

78. Article 28 of the 1985 regulation covers cases such as this, where there is no time-limit for the production of the evidence required to release a security. The time-limit

21 — In this respect, see Case C-354/95 *National Farmers' Union and Others* [1997] ECR I-4559, paragraph 58.

22 — The release of the security depends on compliance with the time-limit in Article 28 but Article 21 provides for the release of the security when evidence has been provided that all requirements have been fulfilled.

is thus twelve months; the starting date will differ depending on whether or not there is a specified time-limit for meeting the primary requirement.

lation, but Article 7(2) states that processing should take place before the refund certificate expires.

79. I agree with the Commission on the need to refer to the 1986 regulation to verify the existence of such a time-limit, as the processing and prescribed use obligations were drafted in pursuance of this text. In particular, Article 10 of the 1993 regulation applies to open files only for the purpose of releasing the security. That being so, it is the conditions for prescribed use and the system for verifying compliance, as laid down in the 1993 regulation, which fall to be applied retroactively, and not the time-limit for fulfilling one of the legal requirements.

82. The extension of the time-limit for processing starch for a prescribed use proceeds from a wide interpretation of the text, which is excluded by the differences between the two manufacturing stages of the product. Processing is the stage of the industrial process which the Community legislature has chosen to support, while prescribed use is given the force of a primary requirement with the sole object of preventing fraud. In the absence of such a requirement, whether or not the prescribed use occurred would merely be the result of industrial or commercial choices, and would be neither natural nor systematic.

80. However, unlike the Commission, I do not believe that the prescribed use requirement should be subject to the same rules on time-limits as the processing requirement, although both should qualify as primary requirements.

83. Consequently, I cannot agree with the Commission and the national court that prescribed use is necessarily an extension of processing, and therefore subject to the rules in Article 7(2).

81. Prescribed use is not subject to any time-limit under Article 7(4) of the 1986 regu-

84. That provision makes it clear that manufacturers are not subject to any time-limit for

the prescribed use of processed products. Article 28(1)(b) of the 1985 regulation is thus applicable.

85. The evidence of prescribed use must therefore be produced within a maximum of twelve months from the date on which such processing took place, as the Federal Finance Court suggests.

86. However, under Article 28(2) of the 1985 regulation, this time-limit 'shall not exceed three years from the time the security was assigned to a particular obligation, except in cases of *force majeure*'.

87. Kyritzer and the Commission have given us to understand that one of the securities was lodged in December 1991 and the other in January 1992. If that is so, proof of the prescribed use should have been produced at the latest in December 1994 and January 1995. It is not disputed that the proof was submitted between April and September 1995, when the time-limit under Article 28(2) of the 1985 regulation had expired.

88. Consequently, the whole of the security should be declared forfeit in accordance with Article 22(1) and (2) of the 1985 regulation.

89. Kyritzer contends that if the Community legislation is interpreted as imposing forfeiture of the security if proof was presented out of time, the manufacturer of a product falling within CN code 3505 10 50 would be the victim of unfair discrimination compared with other manufacturers of approved products. That contention does not appear to me to be justified.

90. As the plaintiff in the main action has pointed out, the principle of distinguishing between a manufacturer of esterified or etherified starch and a manufacturer of another approved product is justified by the risk of fraud inherent in the activity of the former. Their situations are different, so it is compatible with the principle of non-discrimination for them to be treated differently and for special rules to cover the production of this type of starch.²³

91. With regard to Kyritzer's plea that the proposed interpretation violates the proportionality rule, in accordance with the Court's settled case-law it is necessary to ascertain

²³ — See, for example, *National Farmers' Union*, cited earlier, paragraph 61.

whether the methods used are appropriate to the objective and whether they go beyond what is necessary to achieve it.²⁴

92. The loss of the whole of the security where proof of prescribed use is out of time undeniably serves the legislature's aim of preventing fraud.

93. As to whether the means used were necessary, I am not convinced that retaining the security until proof of fulfilment is lodged would be sufficient to encourage the manufacturer to fulfil the prescribed use requirement, as Kyritzter maintains.

94. Making the release of the security subject to proof of prescribed use without a specific time-limit would involve serious inconvenience, as it would create a situation in which the exact status of the security was uncertain. If the prescribed use requirement were not fulfilled for various reasons, forfeiture would be impossible, as proof of fulfilment could be lodged at any time, in theory at least, and the security would be frozen

indefinitely, to the detriment of the manufacturer, who is responsible for payment in fact if not in law, and of the competent authority, which would not be authorised to use it.

95. Furthermore, such a situation would be contrary to the purpose of the security, which is defined by Article 3(a), first subparagraph, of the 1985 regulation as '... an assurance that a sum of money *will be paid or forfeited* to a competent authority if a particular obligation is not met'.²⁵ The security is not, therefore, to remain suspended pending proof of fulfilment of an obligation which it has become impossible to fulfil. It should be released or forfeit, depending on whether or not the manufacturer has fulfilled his obligation. The only way to establish whether the obligation has been fulfilled when the manufacturer himself has presented no proof of it is to set a deadline beyond which silence is taken as non-performance. That is the option chosen by the Community legislature.

96. The prescribed use of processed products must therefore be proved within the period laid down in Article 28(1)(b) of the 1985 regulation, or in Article 28(2), whichever is the shorter. Failure to meet the deadline entails forfeiture of the security.

97. As the reply to national court's first question is in the affirmative, there is no need to reply to the second.

24 — See, in particular, C-233/94 *Germany v Parliament and Council* [1997] ECR I-2405, paragraph 54, and Case C-161/96 *Südzucker Mannheim v HZA Mannheim* [1998] ECR I-281, paragraph 31.

25 — My italics.

Conclusion

98. In the light of those considerations I propose that the Court reply to the first question referred by the Federal Finance Court as follows:

Article 10(1) of Commission Regulation (EEC) No 1722/93 of 30 June 1993 laying down detailed rules for the application of Council Regulations (EEC) No 1766/92 and (EEC) No 1418/76 concerning production refunds in the cereals and rice sectors is to be interpreted as meaning that the use of a product falling within CN code 3505 10 50 or the export of such a product to a third country as laid down in that provision constitutes a primary requirement within the meaning of Article 20(2) of Commission Regulation (EEC) No 2220/85 of 22 July 1985 laying down detailed rules for the application of the system of securities for agricultural products, fulfilment of which must be proved within the time-limits laid down in Article 28 of the said regulation, failing which the whole of the security will be forfeit under Article 22(1) and (2) of the regulation.