REPORT FOR THE HEARING
in Case C-172/89 *

I — Facts

1. *The relevant provisions*

Article 1(1) of Commission Regulation (EEC) No 2200/87 of 8 July 1987 laying down general rules for the mobilization in the Community of products to be supplied as Community food aid (Official Journal 1987 L 204, p. 1, hereinafter referred to as 'the regulation') provides that: 'Where it is decided, for the purpose of implementing a Community food aid operation, to mobilize products in the Community, the procedures laid down in this regulation shall apply, without prejudice to any special provisions adopted on a case-by-case [basis] by the Commission. All deliveries shall entail purchase of the product.'

The supply of products is to be determined by a tendering procedure (Article 3), the conditions for which are laid down by regulation (Article 6).

Article 12(1) of the regulation provides that the successful tenderer is to meet his obligations in accordance with the conditions laid down in the regulation opening the invitation to tender and is to comply with the undertakings referred to in Regulation No 2200/87, including those arising from his tender.

Article 12(2), which requires the successful tenderer to lodge a delivery security, provides, in particular, that: 'In order to ensure that he meets his obligations regarding the supply operation, the successful tenderer shall, within five days following the award of the contract, furnish the Commission department indicated in the notice of invitation to tender with evidence that a delivery security has been lodged. The amount of the security to be lodged shall be indicated in the notice of invitation to tender.'

In the case of supply free-at-port-of-landing, Article 14 provides that: 'the successful tenderer shall arrange, at his own expense and on the customary terms, transport by the route most appropriate for completing the operation within the period referred to in point 8 from the port of shipment indicated in his tender to the port of destination indicated in the notice of invitation to tender. At the tenderer's request, backed up by appropriate supporting documents, the Commission may, however, authorize a change of port of shipment' (Article 14(1)). It also provides that: 'The successful tenderer shall take out a marine insurance policy or claim cover under a general policy. This policy, which shall be for at least the amount of the tender, shall cover all the risks associated with carriage and, where appropriate, transhipment and unloading, including all cases of non-delivery, loss and risks regarded as exceptional, without exclusion of particular average' (Article 14(3)(a)). It further provides that: 'The goods supplied must arrive at the port of landing before the end of the period specified in the notice of invi-

* Language of the case: Dutch.

tation to tender. Registration of the vessel by the authorities of the port of landing shall be taken as proof of date of arrival in that port. If it is not possible to obtain such proof by registration the date of arrival shall be that declared by the captain and confirmed by the undertaking referred to in Article 10' (Article 14(8)).

According to Article 10 of the regulation, certificates are issued on the basis of checks carried out by one or more undertakings designated by the Commission.

In the case of supplies delivered free-at-port-of-landing, the conformity of the goods to be delivered is provisionally determined prior to the commencement of loading operations at the port of shipment and is definitively determined at the time of delivery (Article 16(1), subparagraphs 1, 2 and 3). Finally, after the goods have been made available, the successful tenderer is to receive either a taking-over certificate, issued by the recipient or, at his request, a certificate of acknowledgement of supply issued by the undertaking responsible for carrying out the checks (Article 17(1) and (2)).

Articles 18 to 22 lay down the conditions relating to payment and the release of securities.

Payment is to be made at the request of the successful tenderer in respect of the net quantity given in the taking-over certificate or in the certificate of acknowledgement of the supply (Article 18(2) and (3)). In the case of supply free-at-port-of-landing an advance payment not exceeding 90% of the amount of the tender is to be made at the successful tenderer's request on condition that the latter has lodged a security in favour of the Commission for an amount equal to the amount of the advance, plus 10% (Article 18(5)).

Article 20 provides that: 'If, for reasons which are not the fault of the recipient but are attributable to the successful tenderer, the goods have not been supplied within 60 days following the date of expiry of the period specified for supply free-at-port-of-shipment . . . the successful tenderer shall bear all the financial consequences resulting from total or partial failure to supply the goods on the terms stipulated'.

According to Article 21, the Commission is to assess cases of *force majeure* 'which might be the cause of the successful tenderer's failure to supply the goods or to comply with any of his obligations. The additional costs arising from a case of *force majeure* shall be borne by the Commission'.

Article 22(2) and (3) fix the conditions in accordance with which the delivery security and the security for the advance payment are either to be released or forfeit.

Article 22(2) and (3) read as follows:

'2. The delivery security provided for in Article 12:

(a) shall be released in full when the successful tenderer:

(i) has carried out the supply in compliance with all his obligations,

(ii) has been released from his obligations pursuant to the third paragraph of point 5 of Article 13 and the second subparagraph of Article 19(2),

(iii) has not carried out the supply for reasons of *force majeure* recognized by the Commission,

(iv) has lodged the security on the advance provided for in Article 18(5),

(b) shall be withheld on a cumulative basis as follows:

(i) in proportion to the percentage of the quantities not delivered, without prejudice to the application of Article 17(3),

(ii) 20% of the cost of sea transport as specified in the tender where the vessel chartered by the successful tenderer for the purposes of the supply does not meet the conditions stipulated in Article 14, point 2,

(iii) 0.001% [1] of the total value of the tender for each day's delay in making the goods available or in shipment in the case of supply free-at-port-of-shipment, or in arrival at the port of landing in the case of supply free-at-port-of landing or in arrival at the destination in the case of supply free-at-destination, whichever is appropriate.

The security shall not be withheld in accordance with the first and third indents if the failure which has taken place is not attributable to the successful tenderer and does not lead to a payment under insurance cover;

(c) The security shall be forfeit if the Commission, pursuant to Article 20, establishes that the supply has not been carried out.

3. The security provided for in Article 18(5) shall be released:

(a) where definitive entitlement to the amount advanced has been established;

or

(b) where the advance has been refunded by the successful tenderer.'

2. *Background to the dispute*

In Commission Regulation (EEC) No 941/88 of 8 April 1988 (Official Journal 1988 L 92, p. 26) on the supply of 2 000 tonnes net of refined rape seed oil to Bangladesh as food aid, the Commission initiated a tendering procedure in accordance with the provisions of Regulation No 2200/87. The rape seed oil was to be purchased on the Community market and supplied free-at-port-of-landing

1 — Translator's note: the other language versions refer to one-thousandth of the total value.

— landed. The port of landing was Chittagong and the deadline for the supply was 31 July 1988. The contract was awarded to Vandemoortele NV by telex of 28 April 1988.

The amount of the delivery security was fixed at 10% of the amount of the tender in ecus. The applicant put up that security (ECU 95 700) on 29 April 1988, following which the tendering security of ECU 15 per tonne, which it had put up when submitting its tender, was released.

By letter of 22 June 1988, the applicant informed the Commission that the vessel on which the goods had been loaded at Antwerp, the *Banglar Robi*, had suffered a mechanical failure and, since it was impossible to find alternative transport, the goods would not arrive in Chittagong before the end of July 1988. The applicant also informed the shipowners and their shipping agent that it could not regard the vessel's difficulties as an act of God and that, consequently, it held the shipowner and the shipping agent liable for all the resulting consequences and expenses.

On 26 July 1988, the Commission replied that the delay which had occurred was a commercial risk which the applicant was obliged to bear and could not be regarded as a case of *force majeure*.

According to the definitive certificate of conformity issued on 27 October 1988, the ship arrived in Chittagong on 28 September 1988, the rape seed oil was discharged between 1 and 9 October 1988 and, at the time it was unloaded, the oil fulfilled the requirements laid down in the invitation to tender.

On 30 January 1989, the Commission, in a telex addressed to the bank involved, released the security lodged in connection with the advance payment, stating that 'it has been established in accordance with Article 22(3)(a) of Regulation No 2200/87 that your customer was definitively entitled to the amount advanced'.

On 2 March 1989, the applicant received ECU 32 646.42 from the Commission. The total amount it received (ECU 893 943.84) was less than the total value of the goods supplied, namely ECU 950 472.78.

In response to the applicant's request for an explanation, the Commission replied that it had withheld ECU 56 463 as compensation for delays in making delivery (59 days) and ECU 6 527.22 in respect of a quantity which was not delivered.

By telex of 30 March 1989, the applicant protested and reserved all its rights in regard to the amount withheld and interest thereon. The applicant does not contest the amount withheld in respect of the quantities which were not delivered.

II — Written procedure and form of order sought by the parties

Vandemoortele NV's application was received at the Court Registry on 17 May 1989.

The written procedure followed the normal course.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

Vandemoortele NV, the applicant, claims that the Court should:

declare void the Commission's decision, notified by telex of 15 March 1989, concerning the withholding, on account of delays in making delivery, of part of the amount owed by the Commission to the applicant under Commission Regulation No 941/88 of 8 April 1988.

The *Commission*, the defendant, contends that the Court should:

(i) dismiss the application as being without foundation;

(ii) order the applicant to pay the costs.

III — Pleas in law and arguments of the parties

1. *Infringement of Regulation No 2200/87*

The *applicant* claims that no provision of the regulation gives the Commission power to withhold any part of the amounts due on the ground that there has been delay in making delivery. Any amount retained must be deducted from the delivery security.

The applicant points out that Article 22(2)(b) provides that the delivery security may be withheld on a cumulative basis if there has been delay in making delivery on the basis of one-thousandth of the total value of the tender for each day's delay. However, on 23 September 1988, the Commission released the delivery security which had been lodged.

In the applicant's view, it may be deduced from the fact that the Commission withheld an amount corresponding to one-thousandth of the total value of the tender for each day's delay (59 days × 1/1000 of ECU 957 000 = ECU 56 634) that it was applying by analogy the provisions of Article 22(2)(b) (which are applicable only to the delivery security which has been lodged) to payments due by it to the applicant, something for which there is no basis in law.

The *Commission* observes that the applicant's point of view is in clear contradiction with the scope of that deduction and the structure of the regulation. Article 22(2) does not limit deductions for delay in delivery to the time at which the delivery security is released.

According to the Commission, if the abovementioned provision was to be interpreted in the way proposed by the applicant, no amount could ever be withheld where goods are supplied free-at-port-of-landing or free-at-destination if the successful tenderer has asked for advance payment, which is generally the case. In that case, the delivery security must be released when the successful tenderer has lodged the security provided for in Article 18(5) (Article 22(2)(a), second indent).

The Commission also contends that the deduction at issue is the only sanction which may be imposed in respect of delay in making delivery during the first 60 days. The sanctions provided for in Article 20 concern only delay beyond that period.

Moreover, the fact of making the deduction not at the time that the delivery security is released but when accounts are finally or definitively settled with the successful tenderer has certain advantages from the Commission's point of view, but especially from that of the tenderers: the banks which must guarantee the amount put up remain unaware that their customer has to pay a penalty for delay in making delivery and the customer's credit is thus unaffected. The deduction takes place later and may, in addition, be compensated for by the additional costs which the Commission may refund to the tenderer in the cases mentioned in Article 19 of the regulation.

2. *Infringement of the principle of the protection of legitimate expectations*

The *applicant* observes that, after the release of the delivery security, it was entitled to assume that delays in making delivery would no longer give rise to deductions.

The *Commission* points out that that argument is not relevant in so far as the delivery security was released, as it must be, after the security on the advance was lodged, and, therefore, before it could be established whether the goods had actually been delivered, and if not, what deductions should be made. Moreover, the Commission clearly indicated that the mechanical failure which arose was not a case of *force majeure* but a commercial risk to be borne by the successful tenderer.

The Commission points out that it has always made deductions for delay in making delivery from the amount due, that is to say, at the time of the definitive settlement. That established practice has never been contested by tenderers, including the applicant itself.

3. *Infringement of the principle of proportionality*

The *applicant* points out that the delay in making delivery cannot be attributed to it and that its agents did all in their power to avoid the delay.

The applicant argues that even if it is liable for the failure to deliver on time, the Commission may, in any event, make deductions only in reasonable proportion to the degree of fault involved. A deduction of 5.9% of the amount due cannot be regarded as a sanction which is in proportion to the wrong committed.

The *Commission* contends first that Article 22(2)(b) does not infringe the principle of proportionality since the deduction per day of delay of arrival in the port of landing is not applied when the 'failures' found to exist are not attributable to the successful tenderer and do not give rise to any insurance payment.

The Commission also contends that the applicant did not put forward any relevant arguments in support of the proposition that it was entitled to exemption from the deduction in accordance with the last subparagraph of Article 22(2)(b) of the regulation. Application of that provision requires that two conditions should be fulfilled: there must be *force majeure* and no entitlement to an insurance payment.

With regard to the first condition (the only one relied on by the applicant), the Commission observes that the party concerned must prove the existence of abnormal circumstances outside his control, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the price of excessive sacrifice. The Commission refers in that regard to its notice concerning *force majeure* in agricultural law and the Court's decisions mentioned therein (Official Journal 1988 C 259, p. 10). A mechanical failure is not an abnormal circumstance but is one of the normal, foreseeable risks which a trader must run and against which he may insure.

It follows that even if it was demonstrated that the applicant had done everything possible to avoid the delay, it could not rely on *force majeure*.

The Commission points out that the applicant itself informed the shipping company by telex that it did not regard the ship's difficulties as an act of God.

4. *The late delivery did not cause serious damage*

The *applicant* observes that the late delivery did not cause the Commission or the consignee to suffer serious damage, which the Commission implicitly admitted by releasing the delivery security.

The *Commission* points out that the existence of damage is not a pre-condition for withholding an amount in respect of delay in making delivery.

J.-C. Moitinho de Almeida
Judge-Rapporteur