Judgment of the Court of Justice, Internationale Handelsgesellschaft, Case 11/70 (17 December 1970)

Caption: In this judgment, the Court supplements the Stauder precedent by stating that respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice and that the protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.

Source: Reports of Cases before the Court. 1970. [s.l.].

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Judgment of the Court of17 december 19701

Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel2

(Reference for a preliminary ruling by the Verwaltungsgericht Frankfurt)

Case 11/70

Summary

1. Measures adopted by institutions - Validity - Assessment in terms of Community law - Independence, uniformity and efficacy of Community law - Recourse to the rules of national constitutional law excluded

2. Community law - General principles - Fundamental rights - Respect for such rights ensured by the Court in terms of the structure and objectives of the Community

3. Agriculture - Common organization of the markets - Import and export licenses guaranteed by a deposit - Necessary and appropriate nature of that system - Absence of violation of fundamental rights
(EEC Treaty, Articles 40 and 43)

4. Agriculture - Common organization of the markets - Import and export licences - Period of validity - Expiration of such period - Case of force majeure *- Concept*
(Regulation No 120/67 of the Council)

5. Agriculture - Common organization of markets - Import and export licences - Cancellation of the undertaking to import or export - Limitation to cases of force majeure *- Permissibility*

1. The validity of measures adopted by the institutions of the Community can only be judged in the light of Community law. The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of its constitutional structure.
(Judgment of 15 July 1964, Case 6/64 [1964] E.C.R., p. 594)

2. Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community.
(Judgment of 12 November 1969, Case 29/69, Rec. 1969, p. 425)

3. The requirement by the agricultural regulations of the Community of import and export licences involving for the licensees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate, for the purposes of Articles 40 (3) and 43 of the EEC Treaty, to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals. The system of deposits violates no fundamental right.

4. The concept of *force majeure* adopted by the agricultural regulations is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the importer or exporter, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice.
(Judgment of 11 July 1968, Case 4/68, Rec. 1968, p. 563)

5. By limiting the cancellation of the undertaking to export and the release of the deposit to cases of *force majeure* the Community legislature adopted a provision which, without imposing an undue burden on importers or exporters, is appropriate for ensuring the normal functioning of the organization of the market in cereals, in the general interest as defined in Article 39 of the Treaty.

In Case 11/70

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht (Administrative Court) Frankfurt-am-Main, for a preliminary ruling in the case pending before that court between

INTERNATIONALE HANDELSGESELLSCHAFT MBH, the registered office of which is at Frankfurt-

am-Main,

and

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt-am-Main,

on the validity of the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals and Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur) and H. Kutscher, Judges.

Advocate-General: A. Dutheillet de Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I - Facts and procedure

On 7 August 1967 Internationale Handelsgesellschaft mbH, an import-export undertaking based at Frankfurt-am-Main, obtained an export licence in respect of 20 000 metric tons of maize meal, the validity of which expired on 31 December 1967.

In accordance with the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ Special Edition 1967, p. 33) the issue of the licence was conditional on the lodging of a deposit, amounting to 0.5 units of account per metric ton, guaranteeing that exportation would be effected during the period of validity of the licence. As exportation was only partially effected (11 486.764 metric tons) during the period of validity of the said licence, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel declared DM 17 026.47 of the deposit to be forfeited, in accordance with Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products (OJ 1967, No 204, p.16).

On the Einfuhr- and Vorratsstelle’s failure to come to a decision on the objections of Internationale Handelsgesellschaft mbH, that undertaking on 18 November 1969 brought an action before the Verwaltungsgericht (Administrative Court) Frankfurt-am-Main.

By order of 18 March 1970, received at the Court Registry on 26 March, the Verwaltungsgericht Frankfurt-am-Main, asked the Court under Article 177 of the EEC Treaty for a preliminary ruling on the following questions:

1. Are the obligation to export, laid down in the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967, the lodging of a deposit, upon which such obligation is made conditional, and forfeiture of the deposit, where exportation is not effected during the period of validity of the export licence, legal?

2. In the event of the Court's confirming the legal validity of the said provision, is Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967, adopted in implementation of Regulation No 120/67, legal in that it excludes forfeiture of the deposit only in cases of *force majeure*?

In its order the *Verwaltungsgericht* emphasized the following considerations in particular:

As the court has refused, by reason of established case-law, to accept the legality of the provisions cited, it appears to it essential to put an end to the resultant legal uncertainty.

Although Community regulations are not German national laws, but legal rules pertaining to the Community, they must respect the elementary, fundamental rights guaranteed by the German Constitution and the essential structural principles of national law. In the event of contradiction with those principles, the primacy of supranational law conflicts with the principles of the German Basic Law.

The system of deposits instituted by Regulation No 120/67 is contrary to the principles of freedom of action and disposition, of economic liberty and of proportionality stemming in particular from Articles 2 (1) and 14 of the German Basic Law. More particularly, the adverse effects of the system of deposits on the interests of trade appear disproportionate to the objective sought by the regulation, which is to ensure for the competent authorities as precise and comprehensive a view as possible of market trends. The same result could in fact be obtained by less radical means.

Even if the Court of Justice were to confirm the validity of the system of deposits, the court of reference still has doubts as to the validity of Article 9 of Regulation No 473/67, by reason of the fact that forfeiture of the deposit is excluded only in cases of *force majeure* and not in other cases in which exportation has not been effected without nevertheless any fault being attributable to the persons concerned.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 15 June 1970 by the Government of the Kingdom of The Netherlands, the defendant in the main action and the Commission of the European Communities, on 17 June by the plaintiff in the main action and on 18 June by the Government of the Federal Republic of Germany.

After 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. The plaintiff in the main action and, the Commission submitted their oral observations at the hearing on 11 November 1970. The Advocate-General delivered his opinion at the hearing on 2 December 1970.

For the procedure before the Court Fritz Modest, Advocate, of Hamburg, appeared for the plaintiff in the main action, Albrecht Stockburger, Advocate, of Frankfurt-am-Main, for the defendant in the main action, W. Riphagen, Legal Adviser to the Ministry for Foreign Affairs, for the Government of the Kingdom of The Netherlands, Rudolf Morawitz, Ministerialrat to the Ministry for Economic Affairs, for the Government of the Federal Republic of Germany and Claus-Dieter Ehlermann, the Commission's Legal Adviser, for the Commission of the European Communities.

II -Observations submitted to the Court

The written and oral observations submitted to the Court may be summarized as follows: *Internationale HandelsgeselIschaft mbH*, the plaintiff in the main action, after pointing out the factual reasons for which it did not during the period of its validity fully utilize the export licence granted to it, disputes the validity of the system of deposits as instituted by the third subparagraph of Article 12 (1) of Regulation No 120/67 and Article 9 of Regulation No 473/67, for the following reasons:

(a) Forfeiture of the deposit, which is the consequence of failure to carry out the obligation to import or export, in reality constitutes a fine or a penalty. The provisions of the Treaty concerning the organization of

the agricultural markets contain no provision enabling the Council or the Commission to impose sanctions of a penal nature.

(b) The system of deposits, as it is instituted by the provisions criticized, is contrary to the principle of proportionality which forms part of the general principles of law, recognition of which is essential in the framework of any structure based on respect for the law. As these principles are recognized by all the Member States, the principle of proportionality forms an integral part of the EEC Treaty.

The plaintiff in the main action points out more particularly in this connexion that the agricultural regulations of the Community, in particular Regulation No 120/67, are limited in principle to the formation of market policy by means of prices. The regulation of prices has an automatic sluice-gate effect on quantitative movements in the Community market and avoids any disturbance to it. Consequently, the point of prime importance in the assessment of the market and market trends is the observance and checking first, of the prices on the internal market and, secondly, of the situation on the world market. On the other hand, a quantitative check, such as arises from the system of import and export licences, the implementation of which must be guaranteed by means of a deposit, is only of secondary importance.

It appears therefore that the system of deposits is ineffectual in attaining the objective sought by the regulation and is therefore contrary to the scheme of the regulation.

Moreover, it is also ineffectual in view of the fact that it can neither guarantee that the obligation to import or export is actually carried out, nor enable the competent authorities in good time to have a sure view of the state of the market, much less future market trends.

This is all the more true as the Commission’s departments are not technically in a position to exploit the information provided by the system criticized.

Lastly, the amount of the deposit, particularly in cases of advance fixing of levies or refunds, is excessive when compared to trade profit margins.

It follows from these findings that a substantial charge is imposed without any necessity on importers and exporters. Any measure constituting a charge, whether or not it is in itself tolerable, infringes the principle between the charge and the result which it may or must endeavour to achieve, when that objective cannot be attained by the method employed or when, in order to attain it, there are other methods which may be more conveniently applied.

(c) The plaintiff in the main action casts doubt on the validity of Article 9 of Regulation No 473/67, which allows importers and exporters to be relieved of their obligations and of forfeiture of the deposit in cases of *force majeure*, for the following reasons:

- the system of Article 9 infringes the principle of proportionality in that it refuses, otherwise than in cases of *force majeure*, to take into consideration situations in which the authorization to import or export has not been utilized for justifiable commercial reasons;

- the provision in dispute does not take into account the peculiarities of the inward processing trade, a system to which the goods concerned in the main action are subject;

- the whole of Regulation No 473/67, including Article 9 thereof, was adopted, by virtue of Article 26 of Regulation No 120/67, according to the ‘Management Committee’ procedure; the application of that procedure is incompatible with the institutional structure laid down by the EEC Treaty.

The *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, the defendant in the main action, first of all

observes that the Court of Justice of the Communities cannot assess the validity of measures taken by Community institutions with regard to the rules of national law, even constitutional law, or to the fundamental rights enshrined therein. However, the fundamental right to free expression and free choice in commercial decisions, enounced by the Basic Law of the Federal Republic, constitutes an element of that common fund of fundamental values which form part of Community law; as to the principle of proportionality, it is recognized by several provisions of the EEC Treaty, in particular Article 40, and the Court of Justice has already had recourse to it in assessing various measures adopted by Community institutions.

But both in Community law and in national law there is violation of the principle of proportionality only where no objectively defensible consideration can justify recourse to a specific method intended to attain a given objective. In this instance, therefore, it is merely a question of establishing whether or not the economic assessment on which the legislature of the EEC based the regulations in dispute is vitiated by obvious errors.

(a) With regard to the first question submitted to the Court, the defendant in the main action considers that the significance and objective of the system of licences and deposits is to enable the agencies entrusted with the organization of the market to have a permanent, sure and comprehensive view of future imports and exports and to put them in a position to check market activities. Such a permanent check is indispensable, not to establish statistics, but to enable the powers with regard to market guidance to be exercised to the correct degree, to facilitate intervention without delay in case of crisis and to enable any precautionary measures to be taken. The available information must continuously provide a *prospective*, comprehensive view of the market.

However, the informatory value of licences can only be trusted when they are actually made use of, when, in other words, there is an obligation to import or export, sanctioned by a penalty which consists precisely in the forfeiture of the deposit. This system alone is equally capable of preventing with sufficient certainty speculations which, when made in the context of import and export licences and of levies and refunds, have a decisive effect on the informatory value of the unused licences. The absence of such a system would in all probability lead to an unlimited number of import and export licences being renounced and it would no longer be possible effectively to keep watch over the market.

The system of deposits is perfectly capable of fulfilling the function accorded it: the penalty constituted by the risk of forfeiture of the deposit in the event of non-utilization of the licence is sufficient guarantee that the intended transaction is effected and the competent authorities are informed in good time of the utilization or otherwise of the licence.

It is impossible to substitute for the system of deposits other methods imposing lesser charges on the persons concerned. Neither the system whereby exporters report exports actually effected nor that consisting in the obligation to report non-exportation is capable of providing the Commission and the competent national administration with the necessary comprehensive view over the market and to prevent speculation. The result of both procedures, taking into account the long period of validity of the licences; is that it is impossible at any given moment to determine, even approximately, the actual quantities which are expected to be imported or exported. Moreover, the duration of the validity of the licences cannot be reduced, as they have been fixed by reference to periods usual in the commercial world.

The amount of the deposit does not impose an excessive burden on the exporter; it is in particular very much less than the normal profit margin for this type of transaction. In the case of export licences with the refund fixed in advance, it was obviously necessary to fix the amount of the deposit at a higher figure, as the deposit must forestall the risk of more serious speculation on the fixed rate of refund, which could lead to the nonutilization of the licence.

(b) With regard to the second question, the defendant in the main action denies that the principle of proportionality is violated by the fact that Article 9 of Regulation No 473/67 excludes the obligation to utilize the licence within the prescribed period only in circumstances which may be considered to amount to

force majeure.

The cases of *force majeure* provided for by this provision are not exhaustively listed; since the competent agencies are enabled to countenance circumstances other than those expressly referred to therein. The list of additional circumstances to be considered as cases of *force majeure*, as drawn up and intimated by the Federal Republic of Germany, is so complete that it takes into account all serious cases capable of justifying the non-application of forfeiture of the deposit. The Court of Justice itself, in its judgment of 11 July 1968 in Case 4/68, has to a remarkable extent taken into account the interests of importers and exporters, by defining the meaning of the expression '*force majeure*' by reference to general criteria and leaving the application of that concept to the administration and the courts.

(c) In conclusion, the defendant in the main action is of the opinion that if the scope of the system of deposits is considered in its true light it cannot seriously be maintained that the provisions referred to the Court violate the principle of proportionality or that of freedom of trade.

The *Government of the Federal Republic of Germany* is of the opinion that in order to reply to the questions put it is unnecessary to examine whether there may be deduced from the EEC Treaty an unwritten reservation in favour of the constitutions of the Member States and, more particularly, of fundamental rights recognized by those constitutions or whether the Community Treaties provide individual rights analogous or equivalent to the fundamental rights generally recognized in the Member States or stipulated by the European Convention on Human Rights.

The Court of Justice has in fact accepted on various occasions that the principle of proportionality is equally valid in the context of the Community. This principle is not put in issue by the provisions in dispute. The functioning of all the mechanisms instituted by Regulation No 120/67 is only ensured by a prospective comprehensive view of the market. The issue of licences by itself cannot guarantee it. Certain information on imports and exports can only be obtained if the transactions to which the licences relate are actually effected. Such is the object of the lodging and possible forfeiture of the deposit; they also avoid speculation.

The *Government of the Kingdom of The Netherlands* considers that the obligation to effect within a certain period the import or export transactions to which the licences relate, the lodging of a deposit to this end and the forfeiture of that deposit when the obligation is not fulfilled are in accordance with the objective sought by Regulation No 120/67 and cannot be considered to be illegal.

The objective of these measures is to enable a common policy for the market in cereals to be established; this presupposes a correct view of the state of the market in that sector and a valid prospective study of market trends. These conditions are not satisfied if certain data relating to expected imports and exports remain uncertain.

The obligation to export and the lodging of a deposit have other than purely statistical functions; they form an integral part of the system established by the common organizations of the agricultural markets. Export refunds vary in accordance with the estimated size of stocks, assessed on the basis of predicted exports; the spreading of those stocks over the whole marketing year is one of the objectives of the policy of the markets; the determination of the number of exports and the quantities intended for other uses, for denaturing for example, are particularly important in a surplus situation. A notice of non-exportation or nonimportation cannot be substituted for the system in force. Such notification is incompatible with the necessity to fix in advance the amount of the imports and exports which will be effected during given periods. Moreover, the policy of the markets would find itself paralysed by it, as it would be several months behind events. Finally, such a solution would promote speculation.

The *Commission of the European Communities* makes the preliminary observation that the Community institutions are bound by Community law alone and that in their regard the protection conferred by the fundamental rights of national constitutions flows only from Community law, written or unwritten. Further, even according to German constitutional law, the system of deposits is only capable of infringing the provisions concerning free development of the person, freedom of action and economic freedom if, at the

same time, it runs counter to the principle of proportionality.

This principle is in no way put in issue by the system in dispute, as that system is indispensable to the proper functioning of the common organization of the market in cereals.

(a) The common organization of the market in cereals involves essentially the regulation of prices, the object of which is to stabilize the price of cereals in the Community at a level higher than that on the world markets. Such regulation protects the internal market from falls in prices provoked either by over-production by the Community or by imports from third countries. It can only function if the regulatory mechanisms are used in a rational manner; it is therefore essential that data be available indicating not only the imports and exports already effected but also enabling a valid assessment of *future* market trends to be made. This *prospective* comprehensive view of the market is essential not only for the possible application of protective measures in the face of a threat of serious disturbances to the market but also for the fixing of export refunds and denaturing premiums.

The system of deposits is a necessary instrument for such a prospective comprehensive view of the market.

Such a view requires sure data on future imports and exports; the licence only provides such information if it can be expected with sufficient certainty that the issue of the licence will actually lead to importation or exportation. This is only the case if non-utilization of the licence involves some disadvantage for the licensee; such is the object of the deposit which is forfeited in cases where the licence is not used. The obligation to import or export involves no disadvantage for the licensee other than forfeiture of the deposit; thus it in no way has a particularly adverse effect on the rights of the individual.

In the absence of a deposit, the licence is not capable of providing sure data as to future imports or exports. In fact, there are several reasons for a trader to apply for more licences than he needs.

It is not possible to obtain a valid comprehensive view of the market by obliging the licensee to report non-utilization of his licence and by penalizing any failure to fulfil that obligation by the imposition of a fine; in fact, in order to acquire a prospective comprehensive view of the market it is necessary that at the time when the licence is issued there should be sufficient certainty that the quantity mentioned in the licence will be imported or exported during the period of its validity. Notice of nonutilization would merely lead to piecemeal correction of the initially false image of the future state of the market.

A reduction in the duration of the validity of licences is not an adequate solution: it runs counter to the objectives of the common organization of the market in cereals and is incompatible with the principle that trade must be taxed as lightly as possible. The cases in which the licences remain unused are the exception and do not prevent the system of deposits from attaining its objective.

The complaint that the system of deposits transforms the economy of the market into a planned or directed economy is not justified. The common organization of the market in cereals cannot dispense with all intervention on the market; it is characterized, however, by the concern to make such intervention conform as much as possible to the rules of the market and to allow the widest scope for competition.

To sum up, the Commission considers that with regard to the first question posed by the Verwaltungsgericht Frankfurt it should be held that the functioning of the common organization of the market in cereals requires a prospective comprehensive view of the market and therefore demands sufficiently certain knowledge of future imports and exports; only a licence subject to the risk of forfeiture of the deposit is capable of giving such knowledge. The system complained of not only conforms to the objective sought but is necessary to its attainment; thus it does not run counter to the principle of proportionality of the method to the objective sought.

(b) With regard to the second question, the Commission repeats that the system of deposits must ensure that utilization of the licence remains the general rule and its nonutilization the exception; this is only possible if, where the licence is not used, the deposit is forfeited as a general rule and the release of the deposit is

limited to exceptional cases.

Limitation by Article 9 of Regulation No 473/67 of the release of the deposit to cases of *force majeure* runs counter neither to the principle of proportionality nor to the theory of the rule of law.

In fact, it follows from the case-law of the Court that the existence of a case of *force majeure* must be recognized when the application of strictly objective criteria indicates that the failure to effect importation or exportation is not due to negligence and that, in such examination, the principle of proportionality must be respected; furthermore, the fact that a trader has to bear an excessive loss may constitute a case of *force majeure* capable of releasing him from the obligation to effect the intended transaction.

In conclusion on the second question, the Commission maintains that, in order to attain its objective, the system of deposits must include a strict definition of the conditions which, if satisfied, justify the release of the deposit. Such is the concept of *force majeure*. Limitation to cases of *force majeure*, in the interpretation given to this concept by the Court, runs counter neither to the principle of proportionality nor to any other legal principle.

Grounds of judgment

1 By order of 18 March 1970 received at the Court on 26 March 1970, the Verwaltungsgericht Frankfurt-am-Main, pursuant to Article 177 of the EEC Treaty, has referred to the Court of Justice two questions on the validity of the system of export licences and of the deposit attaching to them - hereinafter referred to as ‘the system of deposits’ - provided for by Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ Special Edition 1967, p. 33) and Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences (OJ 1967, No 204, p. 16).

2 It appears from the grounds of the order referring the matter that the Verwaltungsgericht has until now refused to accept the validity of the provisions in question and that for this reason it considers it to be essential to put an end to the existing legal uncertainty. According to the evaluation of the Verwaltungsgericht, the system of deposits is contrary to certain structural principles of national constitutional law which must be protected within the framework of Community law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law. More particularly, the system of deposits runs counter to the principles of freedom of action and of disposition, of economic liberty and of proportionality arising in particular from Articles 2 (1) and 14 of the Basic Law. The obligation to import or export resulting from the issue of the licences, together with the deposit attaching thereto, constitutes an excessive intervention in the freedom of disposition in trade, as the objective of the regulations could have been attained by methods of intervention having less serious consequences.

The protection of fundamental rights in the Community legal system

3 Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the Community would have an adverse effect on the uniformity and efficacy of Community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

4 However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts

expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the Community legal system.

The first question (legality of the system of deposits)

5 By the first question the Verwaltungsgericht asks whether the undertaking to export based on the third subparagraph of Article 12 (1) of Regulation No 120/67, the lodging of a deposit which accompanies that undertaking and forfeiture of the deposit should exportation not occur during the period of validity of the export licence comply with the law.

6 According to the terms of the thirteenth recital of the preamble to Regulation No 120/67, 'the competent authorities must be in a position constantly to follow trade movements in order to assess market trends and to apply the measures ... as necessary' and 'to that end, provision should be made for the issue of import and export licences accompanied by the lodging of a deposit guaranteeing that the - transactions for which such licenses are requested are effected'. It follows from these considerations and from the general scheme of the regulation that the system of deposits is intended to guarantee that the imports and exports for which the licences are requested are actually effected in order to ensure both for the Community and for the Member States precise knowledge of the intended transactions.

7 This knowledge, together with other available information on the state of the market, is essential to enable the competent authorities to make judicious use of the instruments of intervention, both ordinary and exceptional, which are at their disposal for guaranteeing the functioning of the system of prices instituted by the regulation, such as purchasing, storing and distributing, fixing denaturing premiums and export refunds, applying protective measures and choosing measures intended to avoid deflections of trade. This is all the more imperative in that the implementation of the common agricultural policy involves heavy financial responsibilities for the Community and the Member States.

8 It is necessary, therefore, for the competent authorities to have available not only statistical information on the state of the market but also precise forecasts on future imports and exports. Since the Member States are obliged by Article 12 of Regulation No 120/67 to issue import and export licences to any applicant, a forecast would lose all significance if the licences did not involve the recipients in an undertaking to act on them. And the undertaking would be ineffectual if observance of it were not ensured by appropriate means.

9 The choice for that purpose by the Community legislature of the deposit cannot be criticized in view of the fact that that machinery is adapted to the voluntary nature of requests for licences and that it has the dual advantage over other possible systems of simplicity and efficacy.

10 A system of mere declaration of exports effected and of unused licences, as proposed by the plaintiff in the main action, would, by reason of its retrospective nature and lack of any guarantee of application, be incapable of providing the competent authorities with sure data on trends in the movement of goods.

11 Likewise, a system of fines imposed *a posteriori* would involve considerable administrative and legal complications at the stage of decision and of execution, aggravated by the fact that the traders concerned may be beyond the reach of the intervention agencies by reason of their residence in another Member State, since Article 12 of the regulation imposes on Member States the obligation to issue the licences to any applicant 'irrespective of the place of his establishment in the Community.'

12 It therefore appears that the requirement of import and export licences involving for the licensees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals.

13 The principle of the system of deposits cannot therefore be disputed.

14 However, examination should be made as to whether or not certain detailed rules of the system of

deposits might be contested in the light of the principles enounced by the Verwaltungsgericht, especially in view of the allegation of the plaintiff in the main action that the burden of the deposit is excessive for trade, to the extent of violating fundamental rights.

15 In order to assess the real burden of the deposit on trade, account should be taken not so much of the amount of the deposit which is repayable - namely 0.5 unit of account per 1000 kg - as of the costs and charges involved in lodging it. In assessing this burden, account cannot be taken of forfeiture of the deposit itself, since traders are adequately protected by the provisions of the regulation relating to circumstances recognized as constituting *force majeure*.

16 The costs involved in the deposit do not constitute an amount disproportionate to the total value of the goods in question and of the other trading costs. It appears therefore that the burdens resulting from the system of deposits are not excessive and are the normal consequence of a system of organization of the markets conceived to meet the requirements of the general interest, defined in Article 39 of the Treaty, which aims at ensuring a fair standard of living for the agricultural community while ensuring that supplies reach consumers at reasonable prices.

17 The plaintiff in the main action also points out that forfeiture of the deposit in the event of the undertaking to import or export not being fulfilled really constitutes a fine or a penalty which the Treaty has not authorized the Council and the Commission to institute.

18 This argument is based on a false analysis of the system of deposits which cannot be equated with a penal sanction, since it is merely the guarantee that an undertaking voluntarily assumed will be carried out.

19 Finally, the arguments relied upon by the plaintiff in the main action based first on the fact that the departments of the Commission are not technically in a position to exploit the information supplied by the system criticized, so that it is devoid of all practical usefulness, and secondly on the fact that the goods with which the dispute is concerned are subject to the system of inward processing are irrelevant. These arguments cannot put in issue the actual principle of the system of deposits.

20 It follows from all these considerations that the fact that the system of licences involving an undertaking, by those who apply for them, to import or export, guaranteed by a deposit, does not violate any right of a fundamental nature. The machinery of deposits constitutes an appropriate method, for the purposes of Article 40 (3) of the Treaty, for carrying out the common organization of the agricultural markets and also conforms to the requirements of Article 43.

The second question (concept of '*force majeure*')

21 By the second question the Verwaltungsgericht asks whether, in the event of the Court's confirming the validity of the disputed provision of Regulation No 120/67, Article 9 of Regulation No 473/67 of the Commission, adopted in implementation of the first regulation, is in conformity with the law, in that it only excludes forfeiture of the deposit in cases of *force majeure*.

22 It appears from the grounds of the order referring the matter that the court considers excessive and contrary to the abovementioned principles the provision in Article 1 [sic] of Regulation No 473/67, the effect of which is to limit the cancellation of the obligation to import or export and release of the deposit only to 'circumstances which may be considered to be a case of *force majeure*'. In the light of its experience, the Verwaltungsgericht considers that provision to be too narrow, leaving exporters open to forfeiture of the deposit in circumstances in which exportation would not have taken place for reasons which were justifiable but not assimilable to a case of *force majeure* in the strict meaning of the term. For its part, the plaintiff in the main action considers this provision to be too severe because it limits the release of the deposit to cases of *force majeure* without taking into account the arrangements of importers or exporters which are justified by considerations of a commercial nature.

23 The concept of *force majeure* adopted by the agricultural regulations takes into account the particular

nature of the relationships in public law between traders and the national administration, as well as the objectives of those regulations. It follows from those objectives as well as from the positive provisions of the regulations in question that the concept of *force majeure* is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the importer or exporter, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice. This concept implies a sufficient flexibility regarding not only the nature of the occurrence relied upon but also the care which the exporter should have exercised in order to meet it and the extent of the sacrifices which he should have accepted to that end.

24 The cases of forfeiture cited by the court as imposing an unjustified and excessive burden on the exporter appear to concern situations in which exportation has not taken place either through the fault of the exporter himself or as a result of an error on his part or for purely commercial considerations. The criticisms made against Article 9 of Regulation No 473/67 lead therefore in reality to the substitution of considerations based solely on the interest and behaviour of certain traders for a system laid down in the public interest of the Community. The system established, under the principles of Regulation No 120/67, by implementing Regulation No 473/67 is intended to release traders from their undertaking only in cases in which the import or export transaction was not able to be carried out during the period of validity of the licence as a result of the occurrences referred to by the said provisions. Beyond such occurrences, for which they cannot be held responsible, importers and exporters are obliged to comply with the provisions of the agricultural regulations and may not substitute for them considerations based upon their own interests.

25 It therefore appears that by limiting the cancellation of the undertaking to export and the release of the deposit to cases of *force majeure* the Community legislature adopted a provision which, without imposing an undue burden on importers or exporters, is appropriate for ensuring the normal functioning of the organization of the market in cereals, in the general interest as defined in Article 39 of the Treaty. It follows that no argument against the validity of the system of deposits can be based on the provisions limiting release of the deposit to cases of *force majeure*.

Costs

26 The costs incurred by the Government of the Kingdom of The Netherlands, the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

27 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Verwaltungsgericht Frankfurt-am-Main, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 2, 39, 40, 43 and 177;
Having regard to Regulation No 120/67/EEC of the Council of 13 June 1967 and Regulation No 473/67/EEC of the Commission of 21 August 1967;
Having regard to the Protocol on the Statute of the Court of Justice of the European Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt-am-Main, by order of that court of 18 March 1970, hereby rules:

Examination of the questions put reveals no factor capable of affecting the validity of:

(1) the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 making the issue of import and export licences conditional on the lodging of a deposit guaranteeing performance of the undertaking to import or export during the period of validity of the licence;

(2) Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967, the effect of which is to limit the cancellation of the undertaking to import or export and the release of the deposit only to circumstances which may be considered to be a case of '*force majeure*'.

Lecourt
Donner
Trabucchi
Monaco
Mertens de Wilmars
Pescatore
Kutscher

Delivered in open court in Luxembourg on 17 December 1970.

A. Van Houtte
Registrar

R. Lecourt
President

1 - Language of the Case: German.
2 - CMLR.