JUDGMENT OF THE COURT
OF 20 FEBRUARY 1975 [1]

Firma Adolf Reich
v Hauptzollamt Landau
(preliminary ruling requested by the Finanzgericht Rheinland-Pfalz)

Case 64/74

Summary

Agriculture — Common organization of the markets — Cereals — Maize — Importation from a Member State — Levy fixed in advance — Period laid down for importation — Not observed — Force majeure

(Regulation No 31 of the Council — Article 2 (1) and (2))
(Regulation No 87/62 of the Commission, Article 8 (3))

While the concept of *force majeure* in a case such as the present implies that the failure to observe a time limit provided for in the licence does not involve the loss of the entitlement to a levy fixed in advance, this is nevertheless on condition that the delay in importation is due to exceptional circumstances, and is in particular not due to negligence of which a prudent importer would not be guilty, either when entering into a contract to buy or to carry, or in asserting his rights against the carrier.

In Case 64/74,

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht, Rheinland-Pfalz, for a preliminary ruling in the action pending before that court between

FIRMA ADOLF REICH, Stuttgart,

and

HAUPTZOLLAMT LANDAU,

Party joined: Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Frankfurt-on-Main,

1 — Language of the Case: German.

on the interpretation of certain provisions of Regulation No 54/62 of the Council of 30 June 1962 (OJ 1962, No 54, p. 1581) and of Regulation No 87/62 of the Commission of 25 July 1962 (OJ 1962, No 66, p. 1895) on the application of the levy fixed in advance on the importation of maize from a Member State,

THE COURT

composed of: R. Lecourt, President, J. Mertens de Wilmars and A. J. Mackenzie Stuart, Presidents of Chambers, A. M. Donner, R. Monaco (Rapporteur), P. Pescatore, H. Kutscher, M. Sørensen and A. Ó Caoimh (O'Keeffe), Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The order making the reference and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

1. On 3 October 1963, Firma Adolf Reich imported into the Federal Republic of Germany two consignments of fodder maize from France and cleared them through the customs for free circulation. It submitted on this occasion two import licences dated 5 and 13 September 1963, on which the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (EVSE) had fixed in advance the rate of levy applicable to imports of maize during September. The licences further stated that in respect of imports during October to December 1963, the daily rate of levy for the date of importation would apply. On 3 October 1963, upon clearing the goods for import, the customs office fixed the rate of levy on a provisional basis. Once it had been notified of the final rate, the office demanded, by way of corrective assessment dated 6 December 1963, the final amount applicable. Firma Adolf Reich objected against this assessment to the head office at Landau. When this objection was rejected, it appealed to the Finanzgericht Rheinland-Pfalz.

Basing itself essentially on Regulation No 54/62 of the Council and on Regulation No 87/62 of the Commission, Firma Reich argues, *inter*

alia, that the goods which are the subject-matter of the imports in question had been sent on 25 September 1963 to Mulhouse in Alsace for the purpose of being forwarded by rail to Wörth in the Federal Republic of Germany but, consequent upon delays said to be the fault of the railways, they only arrived at their destination on 3 October 1963. Since therefore this delay could not be blamed on the importer the rate of levy applied ought to have been that fixed in advance in the two import licences.

The Finanzgericht Rheinland-Pfalz considered that on this point the suit gives rise to a question of interpretation of Community law and by order of 29 August 1974 decided to suspend the proceedings and to refer the following question to the Court of Justice for a preliminary ruling, in accordance with Article 177 of the EEC Treaty:

'Are Article 7 (a) of Regulation No 54 of the Council of 30 June 1962 (OJ 1962, p. 1581) and Article 9 of Regulation No 87 of the Commission of 25 July 1962 OJ 1962, p. 1895) to be interpreted as meaning that the rate of levy fixed in advance upon the import of maize from a Member State, fixed pursuant to Article 2 (1) and (2) of Regulation No 31 of the Council of 2 April 1963 (OJ 1963, p. 1225) is also to be applied where the import was not effected in the month indicated in the application for a reason which under Article 8 (3) of Regulation No 87 justifies an exception being made?

2. An office copy of the order referring the matter reached the Court of Justice on 6 September 1974.

Firma Adolf Reich, represented by Jürgen Gündisch, and the Commission of the European Communities, represented by its legal adviser, Peter Gilsdorf, acting as agent, submitted written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court.

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

II — Written observations submitted to the Court in Accordance with Article 20 of the Protocol on the Statute of the Court

A — Observations submitted by Firma Adolf Reich

The plaintiff in the national proceedings submits that in the present case the national court considered that in the absence of a decision to this effect on the part of the Court of Justice, it is unable to apply the provisions of Regulations Nos 87/62 and 54/62 which are involved in these proceedings, on the grounds that these provisions apply to trade with third countries. This hesitation is not however justified. Consequent upon the coming into force of Regulation No 31/63 of the Council of 2 April 1963 (OJ 1963, No 59) the regulations as to the advance fixing of levies applied in trade with third countries, were extended to intra-Community trade.

In this connexion, the Community legislator did not merely refer to certain general principles of these regulations but, as emerges from the preamble to the Regulation and in particular its fourth recital, intended to repeat by implication all the detailed provisions arising therefrom.

Amongst these provisions are those relating to case of *force majeure.* On the contrary hypothesis — which, it may be added, is not supported by the relevant legislation — imports from Member States would be at a disadvantage when compared with those originating in third countries, and the fundamental principle of Community preference laid down in the Treaty would thus be violated.

In fact, at the root of Article 8 (1) of Regulation No 87/63 lies the

fundamental and formally recognized legal principle that failure to observe a time-limit for reasons not attributable to the citizen cannot be used against him.

After having referred to the case-law of the Court in Cases 4/68 and 11/70, the plaintiff in the national proceedings concludes by suggesting that the following answer ought to be given to the question referred:

'The levy fixed in advance in accordance with Article 2 (1) and (2) of Regulation No 31 of the Council of 2 April 1963 (OJ 1963, p. 1225) applies equally to imports which could not be effected during the month provided for this purpose by reason of circumstances outside the importer's control and which for that reason are of a kind that would justify an exception being made.'

B — Observations submitted by the Commission of the European Communities

1. The Commission recalls that at the time of the imports in question common prices within the Community did not exist, so that Regulation No 19 of the Council of 30 April 1962 (OJ 1962, No 30) in Article 1 introduced a levy to apply also in the relationships between Member States. This levy, equal to the difference between the threshold price and the free-at-frontier price of the importing State, was under Article 17 (1) that in force on the date of importation.

At the same time the Community legislator had for practical reasons provided the possibility of fixing in advance the levy for trade *with third countries*. According to Article 17 (2) of the aforementioned Regulation:

'. . . the levy applicable on the date of submission of the application for a licence, adjusted according to the threshold price in force at the date of importation, shall be applied . . . to an importation to take place during the period of validity of that licence. In that case a premium fixed at the same time as the levy shall be added thereto.'

As is shown by the first paragraph, this provision assumes that the import licence states the 'expected month' of import. This requirement was subsequently expressly formulated by Regulation No 87/62 of the Commission of 25 July 1962 (OJ 1962, No 66), Article 5 (3) of which provides:

'Where the amount of the levy is fixed in advance, the import licence shall contain details as to:

(a) The expected month of import;

. . . . . .

Since the importer does not always observe the time-limit laid down, the Community legislator had to deal with the case where importation takes place at a date later than that expected. Instead of adjusting the levy in relation to the 'expected month', it was by Article 7 of Regulation No 54/62 of the Council of 30 June 1962 (OJ 1962, No 54) provided that:

'If the importation is not effected during the month shown in the application . . .:

(a) the levy applicable on the date of submission of the application for a licence shall be adjusted according to the threshold price in force at the date of importation and

(b) the applicable premium shall be the highest premium applicable for the product in question among those in force on the date of submission of the application for a licence.'

2. Besides, in order to be informed on the real movement of trade within the Community, as well as with third countries, the Commission provided by Article 7 of Regulation No 87/62 that the issue of import or export licences shall be subject to the giving of security which shall be forfeit in whole or in part where the obligation to import or to export has not been carried out. Article 8 of this Regulation provides in its first paragraph that:

'In determining whether security shall be forfeit in whole or in part, account shall

be taken of circumstances which justify the case being treated as exceptional.'

and sets out in paragraph 2 a non-exhaustive series of circumstances which would justify such an exception being made, these being later regrouped under the heading of '*force majeure*'.

Finally, referring to the case where the levy is fixed in advance, Regulation No 87/72 added, by Article 9:

'The provisions of Article 7 of Regulation No 54 of the Council shall not apply where the goods have not been imported during the month stated in the application for the licence for reasons which justify the case being treated as exceptional . . .'

3. The possibility provided by the aforementioned Regulations of fixing the levy in advance was subsequently, by Regulation No 130/62 of the Council of 23 October 1962 (OJ 1962, No 106), which as from 1 July 1963 was in this field replaced by Regulation No 31/63 of the Council of 2 April 1963 (OJ 1963, No 59), extended to *intra-Community trade;* Article 2 (1) and (2) of the latter Regulation provides that:

'1. Notwithstanding Article 17 (1) of Regulation No 19 of the Council, the levy applicable upon importation from Member States . . . shall be fixed in advance upon application made by the party involved when applying for the licence, in the case of an importation to be effected during the period of validity of that licence.

2. In that event the amount of the levy shall be that applicable on the date of submission of the application for the licence, adjusted where necessary according to

(a) the threshold price . . . in force in the importing Member State during the month of importation . . .'

Having thus recapitulated the Community legislation which might be of interest in these proceedings, the Commission considers it opportune to examine its Regulation No 111/63 of 10 October 1963 which, though admittedly it came into force after the date of the importations in question, does in its opinion provide useful elements of assessment in the present case. This Regulation, modifying Regulation No 87/62 on the subject of security, provides by Article 3 that where importation or exportation cannot by reason of *force majeure* take place during the period of validity of the licence, there are two possible solutions: either the obligation to import or export is cancelled and the security is not forfeited, or the period of validity of the licence is extended. In this second event the application of the levy to imports from a Member State would follow the general rule under which the levy fixed in advance is adjusted according to the threshold price in force 'during the month of importation'.
Moreover, Article 4 of that Regulation by implication accepts that in the event just envisaged, the provisions of Article 7 (a) of Regulation No 54 remain applicable or, to be more exact, that *force majeure* does not prevent a levy fixed in advance from being calculated on the basis of the threshold price in force during the actual month of importation.

4. Bearing all this in mind, the Commission's attitude on the question raised is that the problem raised by the present case cannot be decided on the basis of provisions dealing with trade with third countries. Those provisions relate to situations other than that which is involved here. Article 9 of Regulation No 87/62, when considered in conjunction with Article 7 of Regulation No 54/62, involves a case where for reasons of *force majeure* the importer was unable to adhere to the period laid down *during the currency* of the licence, a crucial factor in that case. In the present case, the importations in question in fact took place at a time when the right to import subject to a

levy fixed in advance had expired. Admittedly, the import licence was valid until December 1963. But one must not confuse two distinct aspects which one finds in any import licence: on the one hand, the right and the obligation to import during a prescribed period, and on the other hand the right during a specified period to a levy fixed in advance. The two rights and, it follows, the two aspects of the licence, normally have the same duration, except in certain cases — such as the present one — where the period of entitlement to a levy fixed in advance was limited to 30 September 1963.

Since the rules as to the fixing in advance of the levy in trade within the Community do not provide for the obligation on the part of the importer to indicate the 'expected month of import' the system established by these rules is quite different, so that it is not possible to apply Article 9 of Regulation No 87/62 by analogy.

It seems therefore that the question put by the national court was not precisely formulated. The problem to be resolved is rather whether the Community provisions as to the fixing in advance of the levy in trade between Member States, especially those in Regulation No 31/63, allow the application of the levy fixed in advance, adjusted if necessary in relation to the threshold price in force at the date of importation, in a case where the importer has been unable to observe the time-limit for reasons of *force majeure*.

In the light of the applicable provisions, the reply can only be in the negative. As long as Community law does not provide that the duration of the licence might be extended for reasons of *force majeure*, the importer has only one possibility open to him: to renounce importation, at the same time benefiting from the release of his security. The party concerned may of course, on the basis of a new licence effect importations subject to new conditions then laid down.

The Commission recognizes however that this solution would be somewhat unsatisfactory in equity, by reason of the disadvantages which it would involve for the importer.

It is precisely in order to remedy these disadvantages that Regulation No 111/63 provided for the possibility of an extension of the import licences. Although it came into force on 1 November 1963, that is to say after the date of the importations in question, one must ask oneself whether exceptionally it could not retrospectively be applied to these imports, so as to ensure equality of treatment between importers.

The Commission invites the Court to examine this suggestion, based not only on grounds of equity but also on legal principles such as that of 'proportionality' and that of equality of burdens'.

The Commission concludes by suggesting that the question might be answered as follows:

'The provisions of Article 9 of Regulation No 87 of the Commission and of Article 7 (a) of Regulation No 54 of the Council cannot apply in a case where the levy on importation of maize from another Member State was fixed in advance in accordance with Article 2 of Regulation No 31/63 of the Council and where for one of the reasons set out in Article 8 (3) of Regulation No 87 the importation only took place after the expiration of the period of validity of the advance fixing. Where this is the case, it is nevertheless in accordance with principles of equity to grant, at the request of the interested party, an extension of the aforementioned period and consequently to apply the rate of levy fixed in advance, adjusted according to the threshold price in force during the month when the goods were in fact imported.'

III — Oral procedure

The oral observations of Firma Adolf Reich and of the Commission of the

European Communities were made at the hearing on 15 January 1975.

The arguments developed at this hearing did not give rise to any new elements as compared with those submitted in the course of the written procedure.

The Advocate-General delivered his opinion on 4 February 1975.

Law

1 By order dated 29 August 1974, filed at the Court of Justice on 6 September 1974, the Finanzgericht Rheinland-Pfalz referred under Article 177 of the EEC Treaty a question on the interpretation of certain provisions of Regulation No 54/62 of the Council of 30 June 1962 (OJ 1962, No 54) and of Regulation No 87/62 of the Commission of 25 July 1962 (OJ 1962, No 66).

The Court is asked to decide whether the rate of levy fixed in advance pursuant to Article 2 (1) and (2) of Regulation No 31/63 of the Council of 2 April 1963 (OJ 1963, No 59) on the import of maize from a Member State is also to be applied where the import was not effected in the month indicated in the application for an import licence on a ground which, under Article 8 (3) of Regulation No 87/62, justifies an exception being made.

This question was referred in the course of proceedings concerning a refusal of the German customs authorities to apply the levy fixed in advance upon an import of maize from France on 3 October 1963, the time-limit laid down in the licence having expired on 30 September 1963.

The party in question claims that this refusal is unjustified, on the grounds that the delay which occurred in importation was the fault of the railway authority and not of the importer.

2 Under the general rule in Article 17 (1) of Regulation No 19/62 of the Council of 4 April 1962 (OJ 1962, p. 933) the amount of the levy, within the Community as well as *vis-à-vis* third countries, is that 'applicable on the date of importation'.

However, as regards the importation of cereals from third countries, paragraph (2) of that Article provides the possibility for the importer to request the fixing in advance of the levy, by virtue of which 'the levy applicable on the date of submission of the application for a licence, adjusted according to the threshold price in force at the date of importation, shall be

applied . . . to an importation to take place during the period of validity of that licence'.

This possibility was under similar conditions extended to imports of cereals from Member States, by Regulation No 130/62 of the Council of 23 October 1962 (OJ 1962, p. 2555) and as from 1 July 1963 by Regulation No 31/63 of the Council.

Since the benefit provided by these provisions is only granted where the import takes place within the time-limit laid down in the licence, the non-observance of the time-limit normally involves the application of the levy calculated according to the general rule of Article 17 (1) aforementioned.

As regards the importation of cereals from third countries, Regulation No 54 of the Council of 30 June 1962 has expressly in its Article 7 (a) laid down that in the event of the time-limit not being observed 'the levy applicable on the date of submission of the application for a licence shall be adjusted according to the threshold price at the date of importation'.

Having in its sixth recital found that 'it is nevertheless proper to provide special rules to meet exceptional circumstances', Regulation No 87/62 of the Commission excludes by Article 9 thereof the application of Article 7 aforementioned, 'for reasons which justify the case being treated as exceptional under Article 8 (2) and (3) of the present Regulation'.

Nevertheless, since Article 7 of Regulation No 54/62 refers solely to imports of cereals from third countries, the derogation which is made therefrom by Article 9 of Regulation No 87/62 only applied to these imports and could not therefore regulate the case of imports from Member States which were delayed.

Accordingly, it is in the present case necessary to examine whether and to what extent the exception of *force majeure,* allowed for by Regulation No 87/62 in the field of trade with third countries, may equally apply to trade with Member States.

3 It follows from the sixth and seventh recitals of Regulation No 87/62 that to make, in respect of imports of cereals from third countries, special regulations that provide for the case of *force majeure,* is justified by reasons of equity.

It does not appear that this justification is lacking in the case of imports of cereals from Member States.

On the contrary, Regulation No 111/63 of the Council of 1 October 1963 (OJ 1963, p. 2490), but which came into force on 1 November 1963, shows that there is no reason why the problems which, during the period in question, arose from delays due to exceptional circumstances, should not be resolved in an analogous manner in relation to trade between Member States.

4 While the concept of *force majeure* in a case such as the present implies that the failure to observe a time-limit provided for in a licence does not involve the loss of the entitlement to a levy fixed in advance, this is nevertheless on condition that the delay in importation is due to exceptional circumstances, and is in particular not due to negligence of which a prudent importer would not be guilty, either when entering into a contract to buy or to carry, or in asserting his rights against the carrier.

5 It must therefore be concluded that the levy fixed in advance under Article 2 (1) and (2) of Regulation No 31/63 of the Council in respect of the importation, even if it is not effected during the month indicated in the importation of maize from a Member State continues to apply to such application for the licence, provided the delay which thus occurred is not due to the conduct of the importer or to circumstances that can normally be foreseen, but to *force majeure,* as referred to in Article 8 (3) of Regulation No 87/62.

Costs

6 The costs incurred by the Commission of the European Communities which has submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Finanzgericht Rheinland-Pfalz by order dated 29 August 1974, hereby rules:

The levy fixed in advance under Article 2 (1) and (2) of Regulation No 31 of the Council of 2 April 1963 in respect of the importation of maize from a Member State continues to apply to such importation, even if it is not effected during the month indicated in the application for the licence, provided the delay which thus occurred is not due to the conduct of the importer or to circumstances that can normally be foreseen, but to *force majeure,* as referred to in Article 8 (3) of Regulation No 87 of the Commission of 25 July 1962.

Lecourt Mertens de Wilmars Mackenzie Stuart Donner Monaco
Pescatore Kutscher Sørensen O'Keeffe

Delivered in open court in Luxembourg on 20 February 1975.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 4 FEBRUARY 1975

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Finanzgericht of the Rhineland-Palatinate. It concerns two importations of maize from France into the Federal Republic of Germany effected by the Plaintiff on 3 October 1963. Your Lordships will remember that, at that time, the common organization of the market in cereals had not yet been established; the transitional system created by Regulation No 19 of the Council, of 4 April 1962, was in force. Your Lordships will also remember that, under that system, Member States were permitted to charge levies on imports from other Member States. The question in this case is as to the amount of the levy that the Federal Republic was entitled to require the Plaintiff to pay on those two importations.

The question arises because the Plaintiff had obtained from the competent