JUDGMENT OF THE COURT
OF 11 JULY 1978 [1]

Union Française de Céréales v Hauptzollamt Hamburg-Jonas (preliminary ruling requested by the Finanzgericht Hamburg)

"Accession compensatory amounts"

Case 6/78

1. *Agriculture — Trade between new Member States and the original Community — "Accession" compensatory amounts — Purpose — Community preference*
   (Act of Accession, Art. 55)

2. *Agriculture — Goods exported from one of the original Member States to a new Member State — Destruction in transit — Force majeure — "Accession" compensatory amounts — Grant — Exporter's entitlement — Analogy with the rule on export refunds*
   (Regulation No 269/73 of the Commission, Art. 5 (2); Regulation No 192/75 of the Commission, Art. 6 (1))

1. The temporary system of "accession" compensatory amounts was intended *inter alia* to ensure that the principle of Community preference was observed in trade between the Community as originally constituted and the new Member States before the full and complete integration of the latter into the common organization of agricultural products.
2. By analogy with Article 6 (1) of Regulation No 192/75, Article 5 (2) of Regulation No 269/73 of the Commission is to be interpreted as meaning that where goods exported from one of the original Member States of the Community to a new Member State have perished in transit as a result of *force majeure*, the exporter is entitled to the same compensatory amounts as would have been due to him if the goods had reached their destination and if import formalities had been completed there.

In Case 6/78

REFERENCE to the Court under Article 177 of the EEC Treaty by the Finanzgericht (Finance Court) Hamburg, for a preliminary ruling in the action pending before that court between

UNION FRANÇAISE DE CÉRÉALES, Paris,

1 — Language of the case: German.

and

HAUPTZOLLAMT (PRINCIPAL CUSTOMS OFFICE) HAMBURG-JONAS, Hamburg,

on the interpretation of Article 5 (2) of Regulation (EEC) No 269/73 of the Commission of 31 January 1973 laying down detailed rules for the application of the system of "accession" compensatory amounts (Official Journal L 30 of 1 February 1973, p. 73),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Article 55 (1) of the Act concerning the conditions of accession and the adjustments to the Treaties (Official Journal, English Special Edition of 27 March 1972) provides that during the transitional period, "in trade between the new Member States themselves and with the Community as originally constituted, compensatory amounts shall be levied by the importing State or granted by the exporting State", in order to compensate the differences in price levels between the Community as originally constituted and the new Member States.

Regulations No 229/73 of the Council of 31 January 1973 laying down general rules for the system of compensatory amounts for cereals and fixing these for certain products (Official Journal L 27 of 1 February 1973, p. 25) and No 269/73 of the Commission of 31 January 1973 laying down detailed rules

for the application of the system of "accession" compensatory amounts (Official Journal L 30 of 1 February 1973, p. 73) laid down general rules and application provisions for "accession" compensatory amounts applicable to cereals. The first paragraph of Article 9 of Regulation No 229/73 provides that:

"Detailed rules for granting, levying and recovering compensatory amounts shall be such as to avoid possible deflections of trade and distortions of competition . . ."

Article 5 (1) of Regulation No 269/73 provides that:

"The compensatory amount shall be paid only upon proof that the product in respect of which customs export formalities have been completed has left the geographical territory of the Member State in which the formalities were completed".

Article 5 (2) of that regulation provides that where the compensatory amount has to be adjusted for the amount of customs duties, or where it is higher than the export refund applicable on the day of exportation, compensatory amounts shall be paid

"only upon proof that, further, import formalities have been completed and duties and taxes of equivalent effect payable in the Member State of destination have been collected".

2. In the field of export refunds, Article 6 (1) of Regulation (EEC) No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal L 25 of 31 January 1975, p. 1), provides that:

"In the following circumstances payment of the refund shall be conditional not only on the product having left the geographical territory of the Community but also — save where it has perished in transit as a result of *force majeure* — on its having been imported into a third country and where appropriate into a specific third country: . . .".

Under Article 11 (1) of Regulation No 192/75:

"Where the rate of refund varies according to destination, payment of the refund shall, subject to the provisions of paragraph 2, be made only if the product has been imported into the third country or countries in respect of which the refund is prescribed".

3. In 1975 the Union Française de Céréales (hereinafter referred to as "U.F.C."), the plaintiff in the main action, exported wheat from the Federal Republic of Germany to the United Kingdom. The ship carrying the wheat sank in the North Sea. U.F.C. then applied to the defendant in the main action for the payment of "accession" compensatory amounts on the basis of the rate fixed in advance. The defendant refused to make the said payment because U.F.C. had not provided the proof of importation into the United Kingdom required by Article 5 (2) of Regulation No 269/73. U.F.C. brought an action against this refusal before the Finanzgericht (Finance Court) Hamburg.

4. By an order of 14 December 1977, the Finanzgericht stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. Is Article 5 (2) of Regulation (EEC) No 269/73 of the Commission of 31 January 1973, by analogy with Article 6 (1) of Regulation (EEC) No 192/75 of the Commission of 17 January 1975, to be interpreted as meaning that a compensatory amount is to be paid even if the product in respect of which customs export formalities have been completed, having left the geographical territory of the Member

State in which the formalities were completed, has perished in transit as a result of *force majeure?*

2. In the event of Question 1 being answered in the affirmative, what is the compensatory amount that has to be paid:

   (a) the compensatory amount laid down for the country of destination, or

   (b) the lowest compensatory amount, or

   (c) the lowest refund?"

It appears from the order making the reference that the Finanzgericht favours an interpretation by analogy.

Regarding the calculation of the "accession" compensatory amounts, the Finanzgericht considers that an identical solution must be applied, whatever the interpretation of the provisions on export refunds. In the Finanzgericht's judgment, for the purposes of equality of treatment it would also be conceivable to arrange for a person entitled to the compensatory amount when the lowest rate of refund is higher than the lowest compensatory amount to receive at least that amount and also for such person not to receive more than a person entitled to the refund when the lowest rate of refund is lower than the lowest compensatory amount.

5. The order making the reference was registered at the Court on 11 January 1978.

Written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC were submitted by U.F.C. and by the Commission of the European Communities.

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.

II — Submissions and arguments of the parties

1. (a) *U.F.C.* submits that the first question referred for a preliminary ruling should be answered in the affirmative.

A provision must be applied by analogy to another case which is not governed by the same rules if it is obvious that the legislature has forgotten to deal with the second case in the same way as it dealt with the first one or if the difference in treatment results in an infringement of the principle of equality.

If the introduction of export refunds and that of "accession" compensatory amounts are compared, it is found that the purport and aim is the same in both cases: export refunds are paid in order to compensate the differences between lower prices on the world market and higher prices within the Common Market (Article 16 of Regulation (EEC) No 2727/75 of the Council, Official Journal L 281, p. 1; first recital in the preamble to Regulation (EEC) No 2746/75 of the Council, Official Journal L 281, p. 78); "accession" compensatory amounts are paid in order to compensate among other things the differences between lower prices in the new Member States and higher prices within the Community as originally constituted (Article 55 of the Act of Accession; the recitals in the preamble to Regulation No 2757/75 of the Council, Official Journal L 281, p. 104 — for cereals).

U.F.C. then observes that Article 5 of Regulation No 269/73 provided for the first time for proof that the goods had reached the country of destination; Regulation No 192/75, which was adopted two years later, repeated those rules with regard to exports to third countries and added the exception of *force majeure* to them. The objective of the rules if identical in both cases,

namely to prevent abuses (fourth recital in the preamble to Regulation No 269/73 and sixth recital in the preamble to Regulation No 192/75). Since the two provisions had similar objectives but were adopted at different times, it may be inferred that the Commission omitted to insert in the earlier regulation a provision on the exception of *force majeure* corresponding to Article 6 of Regulation No 192/75.

In answering the first question it should also be borne in mind that the concept of *force majeure* is one of the general principles of Community law. In that connexion, U.F.C. points out that the exception of *force majeure* appears in several Community provisions where individuals are to be protected from the consequences of having been unable through no fault of their own to fulfil an obligation imposed on them. Even though the Court has not expressly held that the concept of *force majeure* is one of the general principles of law, it can be inferred that the Court considered the exception of *force majeure* from the fact that in its judgment of 30 November 1972 in Case 32/72, *Wasaknäcke Knäckebrotfabrik GmbH* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1972] ECR 1181, it examined the question of fault in connexion with the failure to comply with the limitation period. Since Article 3 of Regulation No 602/68 of the Commission (Journal Officiel L 114, p. 13), which was referred to in that case, did not make express provision for the exception of *force majeure*, it must be accepted that the Court includes that concept among the general principles of law.

1. (b) On the second question, U.F.C. points out first of all that the goods in question were sold, taking the compensatory amount into account, at a price corresponding to the level of prices on the British market (£74.25 less ½ % per 1 016 kg, c.i.f. Leith). The insurance company with which U.F.C. had concluded a contract in favour of the British purchaser paid the purchaser as compensation the c.i.f. price plus 2 % estimated profit.

At the time the lowest "accession" compensatory amount was one sixth of the "accession" compensatory amount applicable to the United Kingdom (Regulation No 3096/75 of the Commission, Official Journal L 309, p. 9). The lowest rate of the export refund was nil (Regulation No 3301/75 of the Commission, Official Journal L 327, p. 27), in the aim of preventing exports to certain third countries.

In that situation, the only justified course is to grant the compensatory amount laid down for the country of destination of the goods at issue, namely the United Kingdom.

There is no justification for the view that only the lowest refund can be granted for exports to third countries where the goods perish as a result of *force majeure* (Rohr-Cordts, "EWG Abschöpfungen und Erstattungen", Anmerkungen II 2.5 Vorbemerkungen/ Erstattungs-Verordnungen — "EEC Levies and Refunds", Notes/Regulations on Refunds — p. 34). This view is mistakenly based on Article 11 of Regulation No 192/75. As Article 11 (1) refers to Article 11 (2), which in its turn emphasizes that the rules on the lowest refund concerning third countries apply "without prejudice to the provisions of Article 6", and since Article 6 makes provision for *force majeure*, those rules should not apply where the goods have perished in transit as a result of *force majeure*. Basically, the view held by Rohr-Cordts ignores the fact that the only reason why proof of importation into a third country is stipulated as a condition for payment of the higher refund is the prevention of abuses.

Thus in a case such as this one, in order to prevent wrongful claiming of the

higher refund it is sufficient to produce by means of documents relating to the sale, shipping documents or by other means certain proof of the transportation of the goods to the country of destination in which the refund is higher.

Since it is a matter of the payment of an "accession" compensatory amount in respect of goods which have perished, no other inference can be drawn from the grounds stated above. It is unjustified and unfair to grant in respect of the goods at issue only the lowest "accession" compensatory amount, that is to say the one fixed for exports to Ireland, or even to grant no compensatory amount, on the pretext that at the time it so happened that there was no refund for exports of wheat to most third countries. That the refund for exports to third countries was theoretically nil is irrelevant because those rules were to prevent exports to third countries whereas the grant of the compensatory amount was to encourrage trade.

The same consideration, namely that trade between the six old Member States and the United Kingdom had to be allowed and encouraged, weighs against any application of the lower refund in force in respect of Ireland.

To adopt any other solution than the one proposed above by U.F.C. or to refuse the "accession" compensatory amount in the case of accidental loss would force those concerned to insure goods in transit at the higher price of the exporting Member State and to pay a correspondingly higher premium, which would have the effect of a charge having an effect equivalent to a customs duty.

Finally, payment of an amount less than the "accession" compensatory amount provided for the country of destination could appear as an infringement of Article 39 (1) (a) to (c) of the Treaty. If a lower "accession" compensatory amount or refund were paid, every vendor would have to calculate a higher price from the outset and then the goods would no longer be competitive.

2. The *Commission* emphasizes that Article 5 of Regulation No 269/73 governs only the way in which the plaintiff in the main action must prove a right when the law treats him as having such a right. As to whether a right could be granted in this case, that issue can be resolved only through an analysis of the wording, the logic and the aim of all the provisions relating to "accession" compensatory amounts. If it could be granted, then there is need to consider whether and in what way an exception can be made to the requirements as to proof laid down in Article 5 (2) of Regulation No 269/73.

The Commission further points out that the purpose of "accession" compensatory amounts was to "promote the satisfactory circulation of products between Member States with different price levels" (ninth recital in the preamble to Regulation No 229/73). Therefore there is no reason to grant those amounts or levy them in respect of wheat which never reached the market of a Member State other than that from which it originated. The wording and the logic of the legislation on "accession" compensatory amounts reflect that objective. That legislation treats exportation and importation as a necessarily single and indivisible process. In support of its opinion, the Commission refers *inter alia* to Articles 5 (2) and (3) of the Act of Accession, 3 and 8 (1) to (4) of Regulation No 269/73, 4 of Regulation No 181/73 of the Council (Official Journal L 25, p. 9) and to 2 and 5 of Regulation No 3280/73 of the Commission (Official Journal L 337, p. 11).

Having regard to the situation set out above, it is not because of a legal lacuna but rather because of the nature and purpose of compensatory amounts that

a right to them cannot be held to exist in the present case. In these circumstances, even a restrictive interpretation of the rules on proof in Article 5 (2) of Regulation No 269/73 is of no advantage to U.F.C.

The Commission then considers whether U.F.C. is not entitled to the "accession" compensatory amounts which it is claiming for reasons outside that legislation.

In that connexion, it points out that its Regulation No 269/73 was not in contravention either of Article 55 (6) of the Act of Accession or the first paragraph of Article 9 of Regulation No 229/73, whereby detailed rules for granting compensatory amounts were to be such as to avoid any distortion of competition. In fact competition in the market of the Member State of destination is not distorted to the detriment of U.F.C. by the fact that U.F.C. is not granted a right to compensatory amounts in respect of wheat which is not subject to that competition. The Commission is not liable for the financial losses suffered by the undertaking as a result of the loss of the goods. Since the Commission would not have paid "accession" compensatory amounts to the competitors of U.F.C. in similar circumstance, U.F.C. is not therefore the victim of discrimination.

On the issue of *force majeure* the Commission points out that the objective of "accession" compensatory amounts is not to insure the plaintiff in the main action against the risk of purely accidental loss of its goods in transit where the Commission did not bring about and could not have prevented the said loss. Such losses are a normal commercial risk which the undertaking must bear itself. This follows from the judgment of the Court of 14 February 1978 in Case 68/77, *IFG* v *Commission*.

The Commission cannot admit the existence of a right to "accession" compensatory amounts by way of analogy with the right to export refunds: they are independent instruments having different legal foundations, objectives and ambit. If analogies have to be accepted in such cases, the freedom of the legislature in the field of economic policy would be unacceptably reduced. That freedom has been confirmed by the Court most recently in its two judgments of 19 October 1977, Joined Cases 117/76 and 16/77, *Ruckdeschel and Others* v *Hauptzollamt Hamburg-St. Annen* and *Diamalt* v *Hauptzollamt Itzehoe* [1977] ECR 1753 and Joined Cases 124/76 and 20/77, *S.A. Moulins et Huileries de Pont-à-Mousson* v *Office National Interprofessionnel des Céréales* and *Société Co-operative "Providence Agricole de la Champagne"* v *Office National Interprofessionnel des Céréales* [1977] ECR 1795. It emerges from these judgments that even if an export refund had to be paid in the present circumstances, that does not mean that the Community is obliged to grant "accession" compensatory amounts to the plaintiff in the main action.

Furthermore, sustained analysis of the right to refunds shows that in this instance it is also impossible to base a right to "accession" compensatory amounts on application by analogy of Article 6 of Regulation No 192/75.

Since "accession" compensatory amounts were to provide a means of overcoming the obstacles imposed by the common price policy on the entry of products from the exporting Member State into the market of the Member State of destination, those amounts can only by compared with export refunds varied according to the country of destination, that is to say amounts which are designed in particular to bring the price of Community products in the country of destination to the level of the prices prevailing in that country, and not with amounts which are designed to encourage producers to

relieve the Community market of surpluses for which there is no buyer in that market. As with payment of the varied refund, the grant of an "accession" compensatory amount is justified only where the goods concerned are actually brought into the country of destination and put on the market there.

In so far as it is possible to extend the refund rules by analogy to the field of "accession" compensatory amounts, in this case reliance can be placed not on the provision of Article 6 but only on that of Article 11 (1) of Regulation No 192/75. However that provision does not establish any right to compensation in respect of goods which perish before reaching the country of destination. Its effect is only what is already stated in the provisions of Regulations No 229/73 and No 269/73: a right to the grant of compensatory amounts arises only when the products concerned have reached the Member State of destination and are put on the market there. The amount claimed can be paid only after proof of such importation.

III — Oral procedure

1. At the hearing on 30 May 1978, U.F.C., represented by B. Festge and F. Modest, and the Commission, represented by its Legal Adviser, P. Kalbe, acting as Agent, submitted their oral observations.

2. U.F.C. stated in answer to a question asked by the Court that it was possible to insure against the loss of monetary compensatory amounts. However, exporters did not take out such insurance: if they passed the cost of it on in their selling prices, the products would no longer be competitive with those from third countries; and profit margins were too small for the cost to be borne by the exporters themselves.

U.F.C. also made the point that the purpose of "accession" compensatory amounts was the same as that of export refunds, namely to enable Community goods to withstand the competition of goods from third countries.

3. The Advocate General delivered his opinion at the hearing on 21 June 1978.

Decision

1 By an order of 14 December 1977 which was received at the Court on 11 January 1978, the Finanzgericht Hamburg submitted two questions under Article 177 of the EEC Treaty concerning the interpretation of Article 5 (2) of Regulation No 269/73 of the Commission of 31 January 1973 laying down detailed rules for the application of the system of "accession" compensatory amounts (Official Journal L 30, p. 73).

2 Those questions are submitted in connexion with a dispute between, on the one hand, an undertaking which exported from the Federal Republic of Germany a cargo of wheat which failed to reach its destination in the United Kingdom because the ship sank in the North Sea and, on the other hand, the German customs authorities.

The latter refused to grant the exporting undertaking the "accession" compensatory amounts which it claimed, on the ground that it had failed to provide proof, as required by Article 5 (2) of Regulation No 269/73, of the completion of import formalities in the Member State of destination.

Since that regulation makes no provision for *force majeure* within the framework of the system of "accession" compensatory amounts, the questions submitted by the Finanzgericht concern the possibility of, and if appropriate the detailed rules for, applying by analogy the provisions of Article 6 (1) of Regulation No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal L 25, p. 1) according to which, when such a refund is applied for, the person concerned is exempted from providing proof of importation into a third country where the product has perished in transit as a result of *force majeure.*

3 Title II, Chapter 1, of Part Four of the Act concerning the conditions of accession of the three new Member States (Official Journal, English Special Edition of 27 March 1972; Journal Officiel of 27 March 1972, L 73, p. 26) laid down detailed rules for the alignment of prices of agricultural products in the new Member States with prices fixed within the framework of the common agricultural policy.

In order to compensate for such differences in price levels as may have continued to exist during a transitional period expiring not later than the end of 1977, Article 55 of the Act of Accession provided for the levying or granting of compensatory amounts equal to the difference between the prices fixed for the new Member State concerned and the common prices.

That temporary arrangement was designed to facilitate the transition of the new Member States from their previous status as third countries in relation to the Community system of export refunds to their new status as Member States.

It was intended *inter alia* to ensure that the principle of Community preference was observed in trade between the Community as originally constituted and the new Member States before the full and complete integration of the latter into the common organization of agricultural products.

4 It is common ground that if the exporter were refused the grant of "accession" compensatory amounts in circumstances such as those in the present case, after goods have perished in transit as a result of *force majeure,*

he would suffer a real loss, as the insurance taken out in favour of the purchaser pursuant to the c.i.f. clause would cover only the value of the goods in terms of the prices prevailing in the importing country, and not in terms of the higher common prices prevailing in the exporting country.

If it were accepted that the exporter had to bear that loss, or that he had to insure himself against that risk, he would be in an unfavourable competitive situation in relation to a seller in a third country.

Such a result would be incompatible with the principle of Community preference, which the Act of Accession was intended to promote.

Therefore there is an omission in Regulation No 269/73 in that it does not provide for the granting of "accession" compensatory amounts in cases of *force majeure*, and this omission should be made good by applying Article 6 (1) of Regulation No 192/75 by analogy.

Such an application by analogy is also justified by the numerous parallels which exist between the detailed rules for the application of export refunds, on the one hand, and of "accession" compensatory amounts, on the other.

5 As regards the level of the "accession" compensatory amounts to be granted in the case under consideration, it follows from the objectives of the system of those amounts, in particular the achievement of Community preference, that the exporter must be able to claim the same amounts as would have been due to him if the goods had reached their destination and if import formalities had been completed there.

6 Thus the answer to the questions submitted should be that Article 5 (2) of Regulation No 269/73 is to be interpreted as meaning that where goods exported from an old Member State to a new Member State have perished in transit as a result of *force majeure*, the exporter is entitled to the same compensatory amounts as would have been due to him if the goods had reached their destination and if import formalities had been completed there.

Costs

7 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable.

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 national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Finanzgericht Hamburg by an order of 14 December 1977, hereby rules:

Article 5 (2) of Regulation No 269/73 of the Commission of 31 January 1973 is to be interpreted as meaning that where goods exported from an old Member State to a new Member State have perished in transit as a result of *force majeure*, the exporter is entitled to the same compensatory amounts as would have been due to him if the goods had reached their destination and if import formalities had been completed there.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 11 July 1978.

A. Van Houtte
Registrar

H. Kutscher
President