OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 2 DECEMBER 1970[1]

Mr President,
Members of the Court,

The reference for a preliminary ruling on which I am giving my opinion today concerns the interpretation of Regulation No 102/64 of the Commission of 28 July 1964 concerning import and export licences for cereals, processed products derived from cereals, rice, brokens and processed products derived from rice (OJ of 5.8.1964, p. 2125), and more precisely the interpretation of Article 8 as respects certain problems concerning the concept of *force majeure*. On this subject I will make the following brief observations.

Under Article 16(1) of Regulation No 19 of the Council on the progressive establishment of a common organization of the market in cereals (OJ 1962, p. 933), the import into a Member State of cereals from third countries is subject to the presentation of an import licence issued by the national administration (in the Federal Republic of Germany by the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Import and Storage Agency for Cereals and Fodder) in Frankfurt). Its issue was subject to the lodging of a deposit. It required the licensee to effect the import during the validity of the licence. In the case of failure to carry out this obligation, Article 16(2) of Regulation No 19 provides that the deposit shall be forfeited. Nevertheless exceptions are applicable in the case of *force majeure*. It is thus that Article 8, already quoted, of Regulation No 102/64 of the Commission provides detailed rules which must be quoted *verbatim* because of the importance it has in the present case. It reads as follows:

'Where the import or export cannot be effected during the term of validity of the licence, owing to circumstances to be regarded as of *force majeure*, and there is a request that these circumstances be taken into consideration:

(a) in the cases listed in paragraph (2)(a) to (d) below, the obligation to import or to export shall be cancelled and the deposit shall not be forfeited; at the request of the party concerned, however, the term of validity of the licence may be extended for such period as the Member State deems necessary in view of the circumstances invoked;

(b) in the cases listed in paragraph (2)(e) to (h) below, the term of validity of the licence shall be extended, for such period as the Member State deems necessary in view of the circumstances invoked; at the request of the party concerned, however, the Member State may decide that the obligation to import or to export shall be cancelled and the security be not forfeited.

Where the term of validity of the licence is extended, and the amount of the levy or of the refund has been fixed in advance, this amount shall be adjusted in relation to the threshold price in force in the month of actual import or export.

The following circumstances shall be regarded as being of *force majeure* within the meaning of paragraph (1) above:

(a) war and civil disturbances;

(b) Government ban on imports or exports;

(c) restrictions on navigation by acts of sovereignty;

(d) shipwreck;

(e) damage to ship or cargo;

(f) strikes;

(g) hold-up of navigation in periods of icing or low water;

(h) mechanical breakdown.

...

If Member States recognize circumstances other than those set out in paragraph (2)

1 — Translated from the German.

above as of *force majeure* within the meaning of paragraph (1), they shall at once advise the Commission thereof, indicating whether the provisions applied are those of (1)(a) or of (1)(b).

...

The importer or exporter shall furnish evidence, in the form of official documents, of the circumstances regarded as being of *force majeure*.'

That provision is important for the main action, for the plaintiff which held a certificate issued on 14 September 1965 and valid until 31 December 1965 for the import of maize from third countries could not discharge the cargo consigned to it until January 1966, following a blockage of the port of discharge (Rotterdam), that is to say that it could not use the licence within the required period. From the month of October 1963 the German authorities have regarded blockage of the port of discharge as a case of *force majeure* in accordance with Article 8(3) of Regulation No 102/64. In fact, as appears from a communication from the Federal Minister for Economic Affairs, there has never been an official announcement on this subject. Nevertheless on 21 July 1965 the Importation and Storage Agency informed the manager of the Central Association of German Traders in Cereals, Fodder and Fertilizers of it, who in his turn in an import circular of 27 July 1965, that is to say before the issue of the import licence in question, informed the members of the Central Association (to which the plaintiff belongs) of the official practice. Nevertheless the Commission was not advised in accordance with Article 8(3) of Regulation No 102/64 until November 1966. Further, the notification which was made to it did not specify the legal consequences following from it, that is to say that there was no indication 'whether the provisions applied are those of (1)(a) or (1)(b)' of Article 8 of the Regulation. That is what explains the difficulties inherent in the present case.

When the plaintiff in the main proceedings heard of the blockage of the port which affected it, it so informed the Import and Storage Agency on 27 December 1965. Further on 6 January 1966, in accordance with Article 8 of Regulation No 102/64, it requested the cancellation owing to *force majeure* of its obligation to import, and the freeing of the deposit. Nevertheless the Import and Storage Agency did not comply with its request. No doubt, in accordance with the practice outlined above it was prepared to regard the blockage of the port of discharge as a case of *force majeure*. However it considered and it still considers that it has to decide, under its discretionary power, the legal consequences which follow from this and that the cancellation of the obligation to import can only be taken into account if the importer proves that an extension of the licence would not be justified (for example in a case where, by reason of urgent need to supply a domestic customer, the importer had to call upon another source of supply). As the plaintiff was not interested in the extension of the licence, the Import and Storage Agency declared the deposit to be forfeited, by a decision of 12 January 1966.

The plaintiff contested that measure through every stage in the German administrative courts. It claims in fact that in case of *force majeure* the legal consequences which flow from it cannot be left to the discretion of the competent administrative authorities; on the contrary it is for the importer concerned to elect and if he does not request the extension of the certificate but the cancellation of his obligation to import the administrative authority must accede to his request. Furthermore, as it was decided in the course of the proceedings that the advice to the Commission of the case of *force majeure* in question was incomplete in that it did not indicate the legal consequences flowing from it (which precluded the recognition of that circumstance as *force majeure*), the Bundesverwaltungsgericht at present seised of the case finds itself having to consider a number of questions concerning Community law which may be referred to the Court in accordance with Article 177 of the EEC Treaty. It is this course which the Bundesverwaltungsgericht has adopted and by an order made on 12 June 1970, it has decided to stay the proceedings and to make a reference to the Court on the following questions:

'(1) Under Article 8(3) of Regulation No

102/64/EEC, may a Member State accept also as a case of *force majeure* a circumstance other than those envisaged in Article 8(2), of which it has advised the Commission without indicating however whether the provision applicable is Article 8(1)(a) or (b)?

(2) Does Article 8(1)(b) of Regulation No 102/64/EEC require that Member State to decide that the obligation to import or to export is cancelled and that the deposit is not forfeited as soon as the "person concerned" requests it to do so or may it make the benefit of this exception conditional upon the persons concerned providing it with special reasons justifying such an exception?'

I am now going to consider the reply which in my opinion should be given to these questions, taking account of the written and oral observations made by the plaintiff in the main action and by the Commission of the European Communities.

I — *The first question*

The first question concerns the consequences flowing from a notification to the Commission such as that which is provided for in Article 8(3) of Regulation No 102/64, when a Member State accepts as *force majeure* a circumstance which is not expressly mentioned in that provision. In accordance with the question raised, we must ask ourselves whether the notification has only a declaratory effect or if it has on the contrary a constitutive effect, that is to say if it also affects the external relationship with citizens of the Common Market, with the result that an incomplete notification from the point of view of the legal circumstances laid down by Article 8(1)(a) and (b) must be regarded as void and the circumstance notified as *force majeure* cannot be recognized.

Concerning that question, the two parties to the proceedings have maintained a common agreement that it was only possible to regard these notifications as having a purely declaratory effect, that is to say as affecting only the internal Commission-Member State relationship. That this opinion is in fact justified, can, I think, be shown in a few sentences.

On this point, the drafting of Article 8(3) which gives the Member States the *right* to recognize as cases of *force majeure* circumstances other than the typical and essential circumstances enumerated in paragraph (2) is in itself instructive. We can deduce from it that it is an unfettered right and that this justifies the interpretation that notification to the Commission serves the purpose only of giving information. It might possibly be said on the other hand that the notification had a wider scope and in particular that it had a constitutive effect if the Commission had been given power to act, for example, by means of an authorization or of a direct modification of a national administrative practice. There cannot certainly be any question of such a power if one considers the cases of *force majeure* expressly provided for in Article 8(2) and their application by the national administration. Given the necessity to start from a uniform concept of *force majeure*, it is not possible either to accept a different rule, such as a power to act on the part of the Commission, for other cases of *force majeure* recognized by the Member States in accordance with Article 8(3). Such a power vested in the Commission would moreover give rise to considerable difficulty in practice. In fact, it might have a retarding effect, which would be difficult to reconcile with the necessity of finding a quick administrative solution in such cases. However it does not seem in any way essential to consider notification to the Commission to be an act going beyond the realm of information. It provides the Commission with sufficient information on all cases and thus allows, if need be, a certain coordination and also the adoption in good time of measures to prevent the development of a situation harmful to the common organization of the market in cases where considerable divergencies appear. Further, I would draw your attention to the possibilities offered by national legal protection as well as the procedures laid down by Article 177 of the EEC Treaty, which follow from it and

which also tend towards uniformity. Lastly concerning the legal consequences which must be notified, it is again necessary to take into account that very often they can be decided only in relation to the circumstances of a particular case, that is to say after the event. Thus the necessity for a detailed notification in advance is likewise weakened and so also is the argument that the notification has a constitutive effect.
In accordance with what the parties to the proceedings maintain it is therefore necessary to reply to the first question that a notification in accordance with Article 8(3) of Regulation No 102/64 made after the event and without indicating in detail the legal consequences does not affect the administration-Common Market citizens relationship, and does not prevent the competent national authorities from recognizing as *force majeure*, the circumstances indicated in the notification.

2 — *The second question*

The second question submitted by the Bundesverwaltungsgericht concerns the interpretation of Article 8(1)(b) of Regulation No 102/64. The Court is asked to say whether in a case of *force majeure* where the holder of the licence has so requested, the competent national administrative authority is required to decide that the obligation to import is cancelled and to free the deposit lodged or whether it can exercise its discretion in coming to a decision and whether in so doing in the cases provided for in Article 8(1)(b), it must start from the principle of the extension of the licence and cannot consequently free the deposit unless there are special reasons. On this point the plaintiff in the main action and the Commission are not agreed, which does not facilitate the solution of the problem raised. As you know the plaintiff starts from the principle that the deposit should be freed on the request of the importer, that is to say that it considers the choice of the importer as decisive whilst the Commission argues for a discretionary power in the national authority.

In considering this question it must first of all be made clear that when the Member States wish to accept new circumstances as *force majeure* in accordance with Article 8(3) of Regulation No 102/64, they are of course bound by the rule in Article 8(1) as regards the legal consequences. That is so for the sole reason that the concept of *force majeure* is indivisible as I have shown previously. It does not therefore appear conceivable to accept the obligation to keep to the detailed provisions of paragraph (1) for the cases expressly provided for in paragraph (2) of Article 8 and on the other hand to set aside this obligation for other cases. The court which has asked for the reference properly starts from this concept: taking account of the facts on which it is required to give judgment it asks only for an interpretation of Article 8(1)(b), that is to say that it includes cases of blockage of ports in the group of cases provided for from (e) to (h). It is certainly undeniable that by its character and its consequences it is to the cases quoted from (e) to (h) that blockage of ports certainly has the greatest similarity. With the Commission and contrary to the opinion put forward by the plaintiff I consider it to be beyond dispute that national authorities have a certain discretionary power under Article 8(1): as regards the extension of licences, in fact they must at least fix the period (which in fact may also justify the argument that it lies within their discretion to decide whether there should be any extension at all).
But it is above all the system to be inferred from Article 8(1) as a whole which, in my opinion, clearly militates against the argument put forward by the plaintiff that in case of *force majeure* the importer has complete freedom as regards the legal consequences provided for in paragraph (1). It is in this sense that it is necessary to understand the distinction made between the legal consequences and the order in which they have been enumerated under (a) on the one hand and under (b) on the other. In the cases mentioned under (a), taking account of what is presumably the state of the interests involved in such circumstances (probably impossibility to import),

the rule as you know is cancellation of the obligation to import, and it is only on the request of the importer that the licence may be extended. In the cases mentioned under (b) in which mostly only *a delay in importing* is involved it is on the contrary the extension of the licence which is primarily envisaged (and this appears thus to be the rule), cancellation of the obligation to import not being taken into account unless the importer makes a request for it. Such provisions containing rules together with exceptions to them, assume in a general way a discretionary power in the authorities required to apply them. So far as Article 8 is concerned it can be said moreover that the distinction which it makes is pointless and must be regarded as superfluous if the opinion maintained by the plaintiff is correct, that is to say if the determination of the legal consequences were exclusively subject to the request of the importer suffering from the effects of the *force majeure.*

But the opinion of the Commission is above all confirmed by the *wording* of Article 8. in order to indicate the normal consequence, it uses the simple form of the corresponding expressions: 'shall be cancelled' — 'shall be extended' and then for the other possible consequences it uses each time the expression 'at the request, ... may'. As you know, as regards subparagraph (b), that latter expression applies to the decision cancelling the obligation to import or to export. If we base ourselves on the administrative terminology in general use there can be no doubt, as the Commission emphasizes (and as after all the plaintiff itself asserts) that the word 'may' normally implies a discretionary power on the part of the administrative authority. In my opinion that point is important also in the present context. On the other hand the opinion of the plaintiff that the word 'may' implies merely a margin of *freedom* for the Member States *vis-à-vis* the Community, a granting of power to national authorities, does not seem convincing to me for the simple reason that having regard to the overall concept of Article 8, and to the possibility in principle of authorizing exceptions on request in case of *force majeure,* this could just as well have been made clear with the assistance of the simple expression 'on request, the Member State shall order', if the authors of the regulation had intended to exclude all discretionary power.

If all the preceding considerations point to a discretionary power on the part of national authorities a comparison with the corresponding provisions of other rules concerning a common organization of the market gives no clear guidance. As you know the plaintiff refers in this connexion to Article 5(2) of Regulation No 97/63 (products derived from pig meat) (OJ 1963, p. 2259), to Article 6(2) of Regulation No 136/64 (milk and milk products) (OJ 1964, p. 2601) and to Article 9(1) of Regulation No 174/66 (olive oil) (OJ 1966, p. 3485). It appears from these provisions that the principle is the cancellation of the obligation to import and the freeing of the deposit, an extension of the licence being granted only on request. Nevertheless it does not appear to me possible to make a deduction by analogy for the simple reason that Article 8 of Regulation No 102/64 *is clearly constructed on a different basis.* According to the usual methods of interpretation we must thus admit that Article 8 which concerns us here must necessarily have a different meaning and actually that may be justified because of the peculiarities of the common organization of the market in cereals. As the Commission has shown, cases of *force majeure* are relatively frequent in this sphere because of the predominance of sea transport; the problems which follow from this have therefore greater importance. In the interest of a uniform solution it was not possible here to give importers freedom to elect or regularly to accept their requests concerning legal consequences; it was on the contrary necessary to lay down more precise rules. In doing this it was necessary to take account not only of the interests of the importers concerned but also of the public Community interest concerning the common organization of the markets. As the Commission itself states, certainly in the present case it would not be right to take account of the purpose of the licences which is to give a general view of the market because, in case the import does not take

place consequent upon a case of *force majeure*, the forecasts for which they serve as a basis must be corrected in any case, that is to say whether the licence is extended or cancelled. There are moreover the following considerations put forward by the Commission, which must be taken into account. A licence including a rate fixed in advance signifies *fixing with compulsory effect* a written guarantee of a *rate of levy* on which the importer has based his calculations. If, when there appears a case of *force majeure* the licence were cancelled every time that the importer requested it, that is to say if there were no extension of the licence on the firm basis of the rate fixed in advance, the importer could by effecting the import later by means of a *fresh licence* and on the basis of a considerably more favourable rate of levy, realize a profit which he had not expected. It is certainly not within the spirit of the regulation on cases of *force majeure* to allow such a profit to be realized; on the contrary the purpose of this regulation is only to prevent certain hardships. On the other hand such actions, if they were frequent, with the importers passing on the effects of their unexpected profits to the market, could constitute a serious threat to the price structure in the Community. There could therefore be considerable public interest in seeing that, in cases of *force majeure* which probably only resulted in a postponement of imports, the terms of the original licences with the rates of levy which are provided for therein are adhered to and that only an extension of the period of their validity is considered. The argument that the competent national authorities must have a measure of discretion, assumes special importance when account is taken of such situations which require the reconciliation of different interests.

All these considerations which are based on the wording, the spirit and the system of Article 8 of Regulation No 102/64 render untenable the argument of the plaintiff that in the case of *force majeure* the importer has the right of election and the administration is obliged to cancel the obligation to import and to free the deposit each time the importer so requests. It is more correct to accept that the competent authority has a discretionary power, the exercise of which is based upon the rule-exception relationship of Article 8(1). In the exercise of this power it appears obvious that account should be taken also of the business interests of the applicant (as far as concerns for example his contractual obligations). Further, it is clear that the mere fact that the cancellation of the licence leads to economic advantages does not justify the rejection of a demand for freeing the deposit.

3 — *Summary*

After what I have said, I suggest the following replies to the questions raised:

(1) Under Article 8 (3) of Regulation No 102/64 a Member State may accept as *force majeure* a circumstance other than those envisaged in paragraph (2) of that Article, when it has advised the Commission of it without nevertheless indicating whether the provision applicable is that of subparagraph (a) or that of subparagraph (b).

(2) Under Article 8 (1) (b) of Regulation No 102/64 the Member State is not required to decide that the obligation to import or to export is cancelled and the deposit freed when the person concerned requests it; the Member State has, on the contrary, a discretionary power and it may require the person concerned to show special reasons justifying an exception to the rule.