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

German authority (the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, which is joined as a party to the proceedings before the Finanzgericht) import licences on which the rate of levy had been fixed in advance. On one of those licences, which was dated 5 September 1963, the rate of levy was fixed at DM 0·38 per 1 000 kg; on the other, which was dated 13 September 1963, it was fixed at nil. The licences were valid until 31 December 1963 but were annotated to the effect that the rates of levy fixed in advance would be applicable only to importations effected during September: for importations during October to December the daily rates of levy for the time being in force would apply. The reason for this lay in paragraph (4) of Article 2 of Council Regulation No 31/63/EEC of 2 April 1963. That Article introduced the advance fixing of levies in the case of imports of a number of products, including maize, from one Member State into another. Paragraph (4) thereof provided that there should be no such advance fixing for importations of maize from one Member State into another effected in October, November or December, or for importations of other cereals or cereal products from one Member State into another effected in July, August or September. The preamble to the Regulation explained the reason for those exceptions: in general there is a break in the evolution of market prices for cereals when a new year's crop comes on to the market. It seems that, in the case of maize, the new crop normally starts reaching the market at the beginning of October, whereas in the case of other cereals it does so in July.

The Plaintiff alleges that the two consignments of maize here in question should have arrived at the German frontier in September, having been despatched by rail from Mulhouse on the 25 of that month, and that it was owing to delay on the part of the railways that they did not in fact arrive until 3 October. The Plaintiff claims that its case is thus one of *force majeure* and that it should be treated as if the two consignments had been imported in September. But the German customs authorities (which are represented) in the proceedings before the Finanzgericht by the Defendant) maintain that the Plaintiff is liable to levy at the rate in force on 3 October, which was DM 77·10 per 1 000 kg.

It is common ground that none of the provisions about *force majeure* to be found in Community regulations is expressly applicable to the case. But, in order to understand the arguments of the parties and the question referred to the Court by the Finanzgericht, it is necessary to examine a number of those regulations.

Before I turn to them I should mention one point. The Finanzgericht expressly refrains from asking the Court whether delay on the railways constitutes or can constitute a case of *force majeure*. The Finanzgericht reserves that question for its own decision. I therefore say nothing about it.

Article 16 of Regulation No 19 created, in the case of cereals and products derived from them, the familiar system of import and export licences, of which the purpose is to provide the Community authorities with accurate statistics and forecasts of trade. That Article provided among other things that every importation into a Member State, whether from another Member State or from a third country, of a product to which the Regulation applied should be subject to the submission of an import licence issued by the Member State concerned; that an import licence for cereals (as distinct from derived products) should be valid from the date of its issue until the end of the third month following that of its issue; that the issue of such a licence should be conditional on the lodging of a deposit guaranteeing the performance of the obligation to import during the period of validity of the licence; and that such

deposit should be forfeited if the importation were not effected within that period.

Article 17 (1) of the Regulation laid down the general rule that the levy to be charged on an importation, whether from another Member State or from a third country, should be that applicable on the day of importation. To that rule Article 17 (2) made an exception applicable only to imports of cereals from third countries. In the case of such imports the amount of the levy was to be fixed in advance if the importer so requested when applying for the relevant licence. If he did so, the rate of levy would be that in force on the day on which he applied for the licence adjusted for the threshold price at the expected time of importation, and there would be added to the levy a premium fixed according to a scale laid down by the Commission. It is not difficult to see that the purpose of this exception was to afford to importers in the Member States a means of insurance against fluctuations in the rates of levy due to fluctuations in prices on the world market. There was no call for insurance against changes in threshold prices (the other element entering into the computation of levies) since these were determined annually in advance. Your Lordships observe that, under Article 17 (2), no application could be made for advance fixing of the levies on imports from third countries of products other than cereals or on imports from Member States of any of the products to which Regulation No 19 applied.

On 30th June 1962 the Council adopted Regulation No 54. This, as is common ground and as indeed is clear from its terms, was concerned only with the detailed implementation of Article 17 (2) of Regulation No 19. In the main it was concerned with prescribing the criteria by reference to which the Commission was to fix the premiums referred to in that provision: broadly speaking the Commission was to fix them by reference to the differences between world market prices (c.i.f. North Sea ports) for immediate and for future delivery.

Regulation No 54 also contained, however, a provision, Article 7, about the consequences that were to follow where an importation in respect of which the levy had been fixed in advance under Article 17 (2) was not effected during the month specified in the relevant application. Article 7 provided that, in such a case, subject to exceptions to be defined by later regulations, (a) the levy should be adjusted for the threshold price in force on the day of actual importation and (b) the premium chargeable should be the highest on the scale in force on the day of that application. The Commission submits, and it attaches importance to the submission, that this Article applied only where the importation was effected in a month other than that specified in the application but nonetheless during the validity of the licence itself.

Regulation No 54 was followed by Regulation No 87 of the Commission of 25 July 1962. Two Articles of this are relevant to the argument: Articles 8 and 9.

Article 8, without using the expression '*force majeure*', which appeared in Community legislation later, introduced the concept of it in connexion with the forfeiture of deposits lodged for import and export licences. It provided that, in determining whether such a deposit should be forfeited, account should be taken of circumstances that might justify an exception being made, and it gave examples of events constituting such circumstances, i.e. of events (such as strikes, wars, etc.) beyond the control of the trader concerned which might prevent an importation or exportation being effected during the period of validity of the relevant licence. As I have indicated, this Article applied as respects both import and export licences, and it applied in relation to trade both with third countries and between Member States.

Article 9 on the other hand applied only to importations of cereals from third countries where the levy had been fixed in advance under Article 17 (2) of Regulation No 19. It provided that Article 7 of Regulation No 54 should not apply where an importation had failed to be effected during the month specified in the relevant application for reasons that would justify an exception under Article 8. The effect was of course that, in such a case, there would be no adjustment of the levy for the threshold price in force on the day of actual importation and no adjustment of the premium: the importer would pay the levy fixed in advance as if he had effected the importation during the month specified in his application. Again the Commission submits that this provision could apply only where the importation was effected in a month other than that specified in the application but nonetheless during the validity of the licence itself.

Council Regulation No 130 of 23 October 1962 extended the advance fixing of levies firstly to imports from third countries of certain products derived from cereals (e.g. wheat flour) and secondly to imports from Member States of soft wheat, meslin, barley and the same derived products. It did not however do so by applying to such imports the provisions of Article 17 (2). By separate derogations from Article 17 (1), it instituted, in the case of those imports, a system similar to that created by Article 17 (2) but differing from it in a number of respects. In particular there was no need to specify in the application for advance fixing the expected month of importation. The amount of the levy was in any case to be that applicable on the date of the application, adjusted for the threshold price in force on the date of actual importation if that differed from the threshold price on the date of the application. Moreover, in no case was any premium added to the levy. The Commission explains that these departures were made because the system provided for by Article 17 (2) had been found in practice unsatisfactory. The Commission says indeed that that system has since been wholly abandoned.

On 2 April 1963 the Council adopted Regulation No 31/63/EEC, which I mentioned at the outset as being the regulation that introduced the advance fixing of levies in the case of, among other things, imports of maize from one Member State into another. That Regulation in fact replaced Regulation No 130. In so doing it did not materially alter the system created by Regulation No 130. What it did, so far as relevant to the present case, was, by Article 2, to extend that system, as regards imports from one Member State into another, to products (including maize) to which it had not previously applied and also to render it, as I mentioned, inapplicable to importations from one Member State into another effected in the first three months of any crop-year. Like Regulation No 130, Regulation No 31/63 left the system created by Article 17 (2) and the regulations adopted in implementation of it (in particular Regulation No 54 and Article 9 of Regulation No 87) untouched as regards imports of cereals (including maize) from third countries. In the case of such imports there was no provision relating to the first three months of a crop-year — presumably because such imports could come from anywhere in the world, including the Southern Hemisphere.

Such was the state of the relevant Community legislation when the facts of the present case occurred.

Before the Finanzgericht the Plaintiff argued, as is recorded in that Court's Order for Reference, that, from the coming into force of Regulation No 130, the provisions of Article 7 (a) of Regulation No 54 and Article 9 of Regulation No 87 should be extended to imports from Member States, for otherwise such imports would be treated less favourably than imports from third countries.

This argument is reflected in the terms of the question referred to this Court by the Finanzgericht, which is, shortly, whether Article 7 (a) of Regulation No 54 and Article 9 of Regulation No 87 are to be interpreted as meaning that the rate of levy fixed in advance upon the import of maize from a Member State, pursuant to Article 2 of Regulation No 31/63, was also to be applied where the importation was not effected in the month indicated in the application for a reason which under Article 8 of Regulation No 87 justified an exception being made.

My Lords, I have no doubt that the answer to this question is that Articles 7 of Regulation No 54 and 9 of Regulation No 87 were inapplicable in the case of imports from Member States where the rate of levy was fixed in advance under Article 2 of Regulation No 31/63. As I have mentioned, Article 7 provided that, where an importation for which the rate of levy had been fixed in advance under Article 17 (2) of Regulation No 19 was actually effected in a month other than that specified in the application (a) the levy should be adjusted for the threshold price in force on the day of actual importation and (b) there should be an adjustment also of the premium. Article 9 provided in effect that Article 7 should not apply where the importation had been delayed by *force majeure*. These provisions could in my opinion have no relevance in a case governed by Regulation No 31/63 since in such a case (i) there was no requirement that a particular month should be specified in the application — the only requirement being that the importation should be effected during the period of validity of the licence, (ii) adjustment for the threshold price was an inherent part of the system and (iii) no premium was chargeable.

That is not, however, the end of the matter, for the question remains whether any relief could be accorded to a trader who, expecting to effect an importation from a Member State before the beginning of a new crop-year, applied under Article 2 of Regulation No 31/63 for the levy on that importation to be fixed in advance, and then found that, through circumstances amounting to *force majeure*, the importation was delayed until after the beginning of the new crop-year.

The Plaintiff and the Commission are at one in saying that equity demands that such a trader should be entitled to relief, and also in suggesting that the principle of proportionality, which has been recognized, in a number of decisions of the Court, as forming part of Community law, affords a sound legal basis for granting that relief. No submission to the contrary was made by the Defendant or by the Einfuhr- und Vorratsstelle. Indeed neither of them lodged any written observations or was represented at the hearing.

My Lords, I think that the Plaintiff and the Commission are right on this point. The principle of proportionality requires that Community legislation should not have the effect of imposing on traders burdens that are unnecessary to effect the object that the legislation has in view — see for instance Cases 11/70, 25/70, 26/70 and 30/70 *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, etc. (Rec. 1970 p. 1125 *et seq.*) and Cases 5/73 and 9/73 *Balkan — Import — Export GmbH v Hauptzollamt Berlin-Packhof* and *Carl Schlüter v Hauptzollamt Lörrach* [1973] ECR 1091 *et seq.* Moreover it seems to me clear from the Court's Judgments in the first of those two groups of cases that a particular application of the principle consists in the requirement that, in appropriate cases, traders should be relieved of the consequences of events amounting to *force majeure*.

It is true that the principle of proportionality has generally been thought of as one whose effect is to invalidate legislative provisions or other acts infringing it. But I do not, for my part, think that its operation should be

regarded as necessarily limited in this way. We are familiar, in all our systems of law, with general principles whose effect need not be to invalidate legislative provisions but may be to supplement them.

It would clearly be going too far to say that Article 2 (4) of Regulation No 31/63 must be declared void because it did not expressly provide for a case of *force majeure* of the kind here in question (leaving aside of course the procedural point that the Finanzgericht has not raised any question of validity). But to my mind it is open to Your Lordships to say that the principle of proportionality requires Article 2 to be interpreted as having implicitly contained such a provision. Otherwise it must be interpreted as having imposed a hardship on traders in circumstances where the imposition of that hardship could not conduce to the achievement of its object.

Thus, in my opinion, it should be regarded as implicit in Article 2 that a trader who, having obtained the advance fixing of a levy under that Article, was prevented by *force majeure* from effecting the relevant importation before the beginning of October, in the case of maize, or of July, in the case of other cereals, should be treated for the purposes of levy as if he had effected the importation in due time.

I would reject the suggestion of the Commission that, in a case such as the present, the provisions of Articles 3 and 4 of Regulation No 111/63/EEC of 1 October 1963, which came into force on 1 November 1963, should be applied 'by anticipation'. I would reject it, first, because this would be to give to those provisions retroactive effect and secondly because those provisions, even had they been in force at the relevant time, would not have been in point: Article 3 replaces Article 8 of Regulation No 87 whilst Article 4 merely amends Article 9 of that Regulation.

In the result I am of the opinion that the question referred to the Court by the Finanzgericht of the Rhineland-Palatinate should be answered as follows:

'Article 7 (a) of Regulation No 54 of the Council and Article 9 of Regulation No 87 of the Commission were inapplicable in the case of imports from Member States where the rate of levy was fixed in advance under Article 2 of Regulation No 31/63/EEC of the Commission, but it is to be implied in the latter Article that a trader who, having obtained thereunder the advance fixing of a levy on an importation of maize, was prevented by *force majeure* from effecting that importation before the beginning of October should be treated, for the purposes of levy, as if he had effected the importation in due time.'