THE COURT

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt am Main by order of 25 February 1970, hereby rules:

(1) Examination of the first question referred to the Court has revealed no factor capable of affecting the validity of the last subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 which makes the issue of import licences conditional on the lodging of a deposit guaranteeing the obligation to import during the period of validity of the licence;

(2) The expression 'levy fixed in advance' in Article 8 (3) (b) of Regulation No 183/67/EEC of the Commission of 27 June 1967 refers to the rate of levy fixed for the month of importation indicated by the holder of the import licence in his application.

Lecourt Donner Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 10 March 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 10 FEBRUARY 1971[1]

Mr President,
Members of the Court,

In Case 38/70 the Verwaltungsgericht Frankfurt am Main has referred to you two questions, one relating to the validity of the system of deposits introduced by Regulation No 120/67 of the Council for imports of cereal products coming from third countries, the other subsidiary and concerning the detailed rules for the calculation of that deposit in cases where, as a result of a failure to effect the importation for which a licence was issued, the deposit is forfeited by the importer.

In Case 58/70 this second question relating to the calculation of the amount of the deposit has been referred to the Court practically in the same terms by a Netherlands court, the College van Beroep voor het Bedrijfsleven, but as a single question.

1 — Translated from the French.

In these circumstances, Mr President, Members of the Court, I beg permission to deliver my opinion on both these cases together.

I

Concerning the first question put by the Verwaltungsgericht Frankfurt I shall confine myself to a few brief remarks.

In essence, it is the same question as that put to you by the same court in Case 11/70 and by the Hessischer Verwaltungsgerichtshof in Cases 25, 26 and 30/70, namely, that of the validity of the system of deposits introduced by Community regulations in relation to the principles of freedom of economic activity and 'proportionately' enshrined both in the fundamental law of the Federal Republic of Germany and in unwritten Community law.

That is a problem which the Court has already examined very fully and settled with regard to the aforementioned cases.

In the present case no really new argument has been put forward.

Perhaps I should mention that counsel for the importer emphasized the fact that the system of deposit is of no use in the case of imports of products which do not compete with Community products, as for example durum wheat.

But that is an argument to which the Court has already in some sort replied in advance in its judgments of 17 December 1970, in so far as you accepted that the rules relating to the deposit and its forfeiture under certain circumstances were justified not only by the desire to protect Community finances but also by the necessity for the Community authorities to have a comprehensive prospective view of the market in cereals and cereal products. Allow me to add that certain Member States (for example Italy) produce durum wheat and that, in view of the possibilities of substitution or processing, it is not possible to isolate the market in durum wheat from the whole of the cereal market.

II

The reply to the subsidiary question referred by the Verwaltungsgericht Frankfurt and the main question put by the Netherlands court requires longer analysis.

In order fully to understand it we should, I think, replace it in its context.

As the Court is aware, importers, under Community regulations, are entitled, when applying for an import licence, to have the levy which will be imposed on them fixed in advance or 'pre-fixed', to use the current terminology.

This terminology is in truth somewhat ambiguous.

The expression advance-fixing should not be understood in its narrow sense.

In fact the system is as follows:

1. In principle, the levy is equal to the threshold price less the cif price.

2. According to the so-called advance-fixing system, the cif price is, in principle, fixed in advance, but since the threshold price is fixed at a different level for each month of the marketing year, the levy actually payable depends in practice on the month on the basis of which it is calculated.

Finally, a system of premiums (a truly misleading term, since it is really an addition to the levy required of the importer) is aimed in part at encouraging the importer to effect importation during the month indicated, but also in part at diminishing the advantage for the importer which would be involved in the advance-fixing of the cif price on the basis of which the levy is calculated.

In fact, 'advance-fixing' and 'deposit' underwent a change between 1962 and 1970.

Originally, the *advance-fixing* of the levy was intended to allow importers to make provision, in particular with regard to long-term transactions, against the risks which may be involved in

delays in shipping goods. In fact, they often used it to attempt to obtain the lowest levy, and in consequence they increased requests for advance-fixing.

In reply and in order to counteract this type of manoeuvre, in certain cases the Community authorities 'adjusted' the levy fixed in advance according to the actual day of importation and introduced a penalty in the form of the 'premium'.

The *deposit* was originally intended to guarantee that importers would fulfil their obligation to import within the period of validity of the licence.

Certain national intervention agencies used the deposit not only to ensure that importers would comply with their undertaking to import within the period of validity of the licence but also to counteract as far as possible all opportunities open to them to speculate not on market fluctuations but on variations in the levy.

In any case, I think we may accept that the development of the advance-fixing system combined with that of the premiums has resulted in some modification of the significance of that system.

In its present form, rather than allowing the classic mechanisms of a liberal economy to have free play within certain limits, it has instituted as it were a game of cat and mouse between the Community authorities and importers.

But let us return to the specific cases before us.

The problem put to you by the Verwaltungsgericht of Frankfurt and the Netherlands court relates to the detailed rules for the calculation of the levy on which depends the amount of the deposit forfeited in the event of the importation for which a licence was requested not being effected or being partially effected.

Because of certain individual features regarding the dates of the operations, this question is referred to you in one case in connexion with the interpretation of Regulation No 183/67 of the Commission (Tradax), and in the other case in connexion with the interpretation of Regulation No 473/67 (Continentale, France), but this is without significance since on this point the wording of the two regulations is identical.

The two regulations in fact provide that, in the event of the importation for which a licence with advance-fixing has been requested not being effected, the amount of the deposit or the proportion thereof forfeited by the importer is calculated with particular reference to the (in the words of the regulation) 'levy fixed in advance'.

The Court is requested to say whether, in calculating the deposit, this levy fixed in advance is in such a case the levy applicable:

— during the month indicated in the import licence as being the expected month of importation (first solution),

— during the final month of the period of validity of the import licence (second solution).

The German intervention agency (Einfuhr- und Vorratsstelle) and the importers in the Netherlands case are in favour of the first solution in relation to the present cases.

The Netherlands Government, the Commission, the Netherlands intervention agency (Produktschap) and the importer in the German case are, on the other hand, in favour of the second solution (final month of the period of validity of the licence).

Finally, the Commission indicates that four of the Member States have adopted the first solution and two others, the Netherlands and France, the second, and that, for its part, although it is now in favour of the second solution, it originally supported the first.

I am inclined to think that the first solution (calculation of the deposit on the basis of the levy in force during the intended month of importation) follows if not clearly then at least necessarily from the relevant provisions, and I shall attempt to demonstrate this.

III

In order to do so I must ask you to follow me some distance into the thicket of Community rules on this matter.

The two Regulations which you are requested to interpret, Nos 183/67 and 473/67, are both, as regards cereals, regulations adopted by the Commission in implementation of Regulation No 120/67 of the Council, which is the basic regulation for the period in question.

If the provisions of Regulation No 120/67 alone are taken into account, the reply to the question is dictated by its very wording.

Article 15 of the Regulation expressly provides that the levy fixed in advance shall be calculated with reference to the threshold price in force during the expected month of importation.

But the difficulties begin if account is taken not only of Regulation No 120/67 but also another regulation of the Council adopted a week later: Regulation No 140/67 which takes the form of a regulation in implementation of Regulation No 120/67.

Although, according to its title, that regulation relates to rules for the advance-fixing of the levies, it is in fact principally devoted to detailed rules for the calculation of what are known as 'premiums', that is to say, possible additions to the levy.

However, at Article 9, and almost in passing, it contains the following provision: 'If importation is not effected during the month indicated at the time of application . . . the levy applicable on the day on which the application for the licence was submitted shall be adjusted in accordance with the threshold price in force on *the day of importation*'.

It is certain that these words apply only to importations effected and not to those which are not effected.

However, the Netherlands Government, its intervention agency, the Commission and the German importer are of the opinion that in addition to the case postulated expressly by these words they were aimed at and have the effect of abrogating the whole system whereby the levy was calculated on the basis of the threshold price in force *during the expected month* of importation.

They consider that there is therefore no provision expressly governing the question in cases of failure to import, but that even in such a case Regulation No 140/67 should be applied since that was in any case the only provision applicable as regards calculation of the premiums.

I do not share this view, for the following four reasons:

(1) The reasoning based on the similarity which should be introduced between the system for calculation of the levy and that for calculation of the premiums is contrary to the argument in support of which it was advanced, since Regulation No 140/67 makes that precise distinction between the method of calculation of the premiums and that of the levy.

For importations which are not effected during the month indicated in the application for a licence, the levy is calculated having regard to the threshold price in force on the day of importation, as I have said; but the premium, on the other hand, is calculated on a different basis. In principle, this is the scale applicable on the day of submission of the application for the *month of importation* indicated in the licence application.

However, a complicated system, which I do not think needs to be set out in detail, ensures that it is nearly always the highest of the premiums applicable during the period which is required.

It is significant that the Council, which included the principles of such a premium system in Regulation No 140/67, did not judge it necessary to do the same for the calculation of the deposit.

(2) An old rule of textual interpretation seems applicable in this case: that individual provisions cannot have the effect of abrogating the general provisions from which they depart.

The wording of the basic Regulation No 120/67 was general in scope; it was capable of application in all cases, both where importation was effected during the month indicated when the licence was issued and where importation was effected during the period of validity of the licence but during a month other than that originally indicated and, finally, where importation was not effected.

The provisions of Regulation No 140/67 apply solely to the second of these cases, where the importer imports during the period of validity of the licence but in a month other than that which he originally indicated as the expected month of importation.

In my opinion therefore this provision does not have any effect on the system based on the earlier provisions in cases where importation is not effected, in which case it is in any event inapplicable since it refers expressly to the actual date of importation.

(3) The provisions relating to the calculation of the levy in all cases other than that covered by Article 9 of Regulation No 140/67, that is to say, the provisions of Article 15 (2) of Regulation No 120/67, have been amended only by Regulation No 2434/70 of the Council of 30 November 1970 and the preamble to that regulation shows that the Council considered that those provisions had remained in force up to that date except, of course, in the particular case governed by Article 9 of Regulation No 140/67.

(4) The requirement that the importer should state, at the time of lodging his request for an import licence, the month during which he intends to effect importation was not abolished until Regulation No 2637/70 of the Commission of 23 December 1970, that is to say, after the entry into force of Regulation No 2434/70 just referred to.

In my opinion, this implicitly but necessarily recognized that that information was necessary in certain cases for the calculation of the levy so long as the Council had not, as it did in Regulation No 2434/70, expressly and radically amended the provisions of Article 15 (2) of Regulation No 120/67.

For all these reasons, I believe that until the adoption of Regulation No 2434/70 of the Council, in cases of failure to effect an importation for which a licence had been requested, the levy fixed in advance had to be determined, for the purpose of calculating the deposit pursuant to Article 15 (2) of Regulation No 120/67, on the basis of the intended month of importation as indicated when the import licence was issued.

IV

If, contrary to the opinion I have just expressed, the Court should find that no Community provision requires the solution which I have just proposed, I think that it will still be that solution which you should adopt.

The argument adduced by the Commission whereby, the law being silent, you should choose the system of calculating the deposit on the basis of the levy applicable during the final month of the period of validity of the licence rests on a reasoning which may briefly be summarized as follows:

It is suggested that all these rules have the basic aim of dissuading the importer from failing to import the goods for which he requested an import licence.

But, you are told, since the threshold price is in general graduated upwards during the months of the marketing year the objective sought could only be attained if, in calculating the deposits, reference is made to the levy during the final month of the period of validity of the licence, which is probably the highest of the whole period under consideration.

I am not convinced either by certain premises or by the internal logic of this reasoning, or by certain of the general considerations, clearly discernible though not always expressed, on which it is based.

The premises and internal logic of the reasoning first:

1. It is by no means an established fact that the use in calculating the deposit of the levy applicable during the final month of the period of validity of the licence has in all cases the 'deterrent' or 'dissuasive effect' attributed to it by the Commission.

Comparison of the two cases on which the Court has to give a ruling today is informative in this respect.

It is to the German importer's advantage to have his deposit calculated on the basis of the levy applicable during the final month of the period of validity of his licence.

On the other hand, it is to the Netherlands importer's advantage to have his deposit calculated on the basis of the levy applicable during the month indicated by him as the month during which importation would be effected.

2. In view of the premises upon which its argument is based, the Commission should go much further in its reasoning.

If, in fact, the 'deterrent' aspect of the deposit were to prevail over all other considerations, the true solution would be to say that the deposit must be calculated on the basis of the highest of the levies applicable, either during the expected month of importation or during the final month of the period of validity of the licence; that would indeed be the 'ultimate weapon' if I may put it so, and it is in any event the system adopted in relation to premiums.

However, if the Commission's reasoning is taken to its furthest limits, as I have just done, the general considerations from which it seems to proceed become open to question.

A few months ago I defended before you the legality of the system of deposits instituted by Community regulations.

I sought to demonstrate that it met a serious need and that, neither in its principle nor in the scope given to it, did it impose on importers disproportionate burdens in relation to the aims of general interest which it pursued.

Your judgments accepted that.

But we should take care that technical methods of application do not infringe this principle of 'proportionality' which you held was not infringed by the Community regulations themselves.

Each one of us, in his heart of hearts, may rejoice or be sad at it, but it is certain that Community legislature wished to leave importers on the world grain market a certain freedom of action, particularly for long-term transactions, while imposing upon them the constraints necessary for the functioning of the Community system.

If, where the law is silent or obscure, we were systematically to interpret the provisions governing those constraints in the sense most unfavourable to importers we should risk attributing to those constraints a scope wider than is required by the public interests which they are intended to protect.

However, if we depart, as I think we should, from the hypothesis that when the importer indicates the month in which he expects to effect importation he is generally acting in good faith and is giving information based upon his economic forecasts and not a statement which is intended to deceive the Community authorities, it seems to me that the fairest solution, that which combines both the Community interest and the desire to leave the importer the margin of freedom which Community authorities wished him to keep, is to calculate the deposit in the event of importation not being effected on the basis of the levy applicable for the month which he had indicated as being that in which importation was to be effected.

I therefore think that, even though the law remains silent on this point, this solution should prevail.

However, as I have said, it is really my view that the relevant provisions require it and that is why I am of the opinion that you should rule that:

(1) examination of the questions referred has revealed no factor capable of affecting the validity of the last paragraph of Article 12 (1) of Regulation No 120/67 of the Council;

(2) the expression 'levy fixed in advance' used in Article 8 (3) (b) of Regulation No 183/67 of the Commission and in Article 8 (3) (b) of Regulation No 473/67 in its version prior to Regulation No 638/70 of the Commission refers to the levy applicable during the month indicated by the importer at the time of issue of the licence as being that in which importation was to be effected.