JUDGMENT OF THE COURT
14 FEBRUARY 1978 [1]

IFG-Intercontinentale Fleischhandelsgesellschaft mbH & Co. KG v Commission of the European Communities

'Force majeure'

Case 68/77

1. *Agriculture — Common organization of the market — Beef and veal — Imports from third countries — Protective measures — Discretionary power of the Commission — Limits*
   (Regulation No 805/68 of the Council; Regulation No 2033/75 of the Commission)

2. *Community law — Principle of force majeure — Application — Condition*

1. In adopting Regulation No 2033/75 the Commission did not exceed the limits of its discretionary power under Regulation No 805/68.
2. The application of the principle of *force majeure* in the relationship between an individual and the public administration presupposes the non-performance of an obligation upon the individual with respect to the administration. No general legal principle of *force majeure* is to be discerned in the national legal systems where there is no such obligation.

In Case 68/77

IFG-INTERCONTINENTALE FLEISCHHANDELSGESELLSCHAFT MBH & CO. KG, Groß-Gerau (Germany), represented by Counsel in partnership Dr Dietrich Ehle, Ulrich C. Feldmann and Dr Ulrich Wiemann, Cologne, with an address for service in Luxembourg c/o Madame Jeanne Housse, 21, rue Aldringen,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Dr Peter Kalbe, acting as Agent, with an address for service in

1 — Language of the Case: German.

Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendant,

Application for damages under the second paragraph of Article 215 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, Presidents of Chambers, A. M. Donner, P. Pescatore, A. O'Keeffe and A. Touffait, Judges,

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

gives the following

JUDGMENT

Facts and issues

The facts and the arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and procedure

1. On 14 May 1975 the applicant concluded with Prodexport, the Romanian State corporation for foreign trade, a contract for the delivery of 6 000 tonnes of seasoned bovine meat preparations coming under subheading 16.02 B III (b) I of the Common Customs Tariff (CCT), 3 000 tonnes of which were to be delivered during June, July and August 1975 and the remaining 3 000 tonnes during the last quarter of 1975 and the first quarter of 1976.

2. Article 21 of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal, English Special Edition 1968 (I), p. 187) provides *inter alia* as follows:

'1. If by reason of imports or exports the Community market in one or more of the products listed in Article 1 experiences or is threatened with serious disturbances which may endanger the objectives set out in Article 39 of the Treaty, appropriate measures may be applied in trade with third countries until such disturbance or threat of disturbance has ceased.'

Article 31 of the regulation provides as follows:

'This regulation shall be so applied that appropriate account is taken, at the same time, of the objectives set out in Articles 39 and 110 of the Treaty.'

Pursuant to Article 21 of the regulation, the Commission adopted Regulation (EEC) No 610/75 of 7 March 1975 on protective measures for certain beef and veal products falling within subheading 16.02 B III (b) 1 of the CCT (Official Journal L 63 of 8 March 1975, p. 37) which entered into force on 15 March 1975. Article 1 of that regulation reads as follows:

'Free circulation within the Community of products falling within subheading 16.02 B III (b) 1 of the Common Customs Tariff originating in third countries shall be suspended, with the exception of prepared or preserved bovine meat or bovine meat offal put up in sealed containers weighing not more than three kg net.'

The system thus established was replaced by Regulation (EEC) No 1090/75 of the Commission of 23 April 1975 on the issue by way of protective measures of import licences for certain beef and veal products (EXIM) (Official Journal L 108 of 26 April 1975, p. 1) which entered into force on 1 May 1975. The so-called EXIM system thus introduced made the issue of import licences subject to prior exportation of an equivalent quantity of beef or veal (Article 3).

However, under subparagraph (a) of the second paragraph of Article 1 of the regulation, no import licence was required for:

'prepared or preserved beef and veal or beef and veal offal in hermetically sealed containers weighing not more than 5 kg net.'

The second, third and penultimate recitals of the preamble to Regulation No 1090/75 read:

'Whereas the Commission is keeping a close watch on the market situation for beef and veal; whereas it has accordingly been noted that, as a result of imports, this market continues to be threatened by serious disturbances which are likely to jeopardize the objectives of Article 39 of the Treaty;

Whereas, however, it is evident that the market in beef and veal is tending to stabilize; whereas, in these circumstances, it is necessary to restructure the protective arrangements to allow a certain amount of trade to redevelop, but without creating an imbalance on the Community market;

...

Whereas the current position on the Community market enables import restrictions on certain products falling within subheading 16.02 B III (b) 1 of the Common Customs Tariff, which have a specific market, to be abolished entirely;'

The scope of the exception arising under the provision quoted was changed by Regulation (EEC) No 2033/75 of the Commission of 5 August 1975, amending the definition as laid down in Regulation (EEC) No 1090/75 (EXIM) of products falling within CCT subheading 16.02 B III (b) 1 (Official Journal L 207 of 6 August 1975, p. 8).

Article 1 of that regulation, after reproducing without amendment Article 1 (2) of Regulation No 1090/75, added the following paragraph to that article:

'4. Meat and offal which has been subject to seasoning (with pepper and salt, for example), whether minced, cut up or in a single piece shall not be regarded as falling under paragraph 2 (a) above, irrespective of the type of packing in which it is put up.'

The following reasons were given for the amendment in the fourth recital of the preamble to the regulation:

'Whereas there has been a steady growth in the importation of seasoned meats exempted ... from the protective measures; whereas the total imports effected and to be effected have reached a level incompatible with sound management of the market in beef and veal';

Although Regulation No 2033/75 was published in the Official Journal on 6 August 1975, under Article 2 thereof it entered into force only on 1 September 1975.

Regulation No 1090/75 was replaced by Commission Regulation (EEC) No 76/76 of 16 January 1976 setting up a system linking imports of beef and veal products effected by way of protective measures with the sale of beef held by intervention agencies (Official Journal L 10 of 17 January 1976, p. 21); it came into force on 19 January 1976.

Under Article 2 of the regulation the issue of import licences for, *inter alia*, seasoned beef and veal was subject to the purchase of an equal quantity of unboned frozen meat held by the intervention agencies.

Finally, changes were made in the system applicable to imports of beef and veal as a result of Council Regulation (EEC) No 425/77 of 14 February 1977, amending Regulation No 805/68 on the common organization of the market in beef and veal and adapting Regulation No 827/68 and Regulation No 950/68 on the Common Customs Tariff (Official Journal L 61 of 5 March 1967, p. 1); it was applicable as from 1 April 1977. Under the new regulation the importation of seasoned beef and veal is, *inter alia*, limited by the obligation to produce an import licence and the imposition of a levy (Articles 9 and 15 of Regulation No 805/68 as amended by Regulation No 425/77).

3. As a result of floods in Romania in June 1975 the machinery installed for the performance of the contract which the applicant had concluded with Prodexport suffered serious damage. In consequence, the applicant was able to import before the entry into force of Regulation No 2033/75 on 1 September 1975 only about 1 100 tonnes out of the 3 000 tonnes of meat, the delivery of which was due to have taken place during June, July and August 1975. The Prodexport company nevertheless insisted that the contract be performed.

The applicant thereupon applied both to the Commission and to the Einfuhr- und Vorratsstelle (the German import and storage authority) for measures exempting the 1 900 tonnes which it had not imported. Those requests were rejected.

4. Regulation (EEC) No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 25 of 31 January 1975, p. 10) contains a provision relating to *force majeure*. This is Article 20, which reads as follows:

'1. Where as a result of *force majeure* importation or exportation cannot be effected during the period of validity of the licence or certificate, the competent agency of the issuing Member State shall decide, at the request of the titular holder, either that the obligation to import or export be cancelled, the security being released, or that the period of validity of the licence or certificate be extended for such period as may be considered necessary in view of the circumstances invoked. Such extension may be granted after the period of validity of the document has expired.'

5. The present action is brought in relation to the rejection of the request described under 3 above.

The written procedure followed the normal course.

Upon 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, the oral procedure being restricted at this stage to the questions of the admissibility of the action and the liability of the Community, the questions of the origin of the damage and the nature and extent thereof being reserved.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Declare that the Commission is bound by way of damages to guarantee performance of the applicant's contract of 14 May 1975;
2. In the alternative, order the Commission to pay the applicant by way of damages the profit which it failed to make through the non-performance of the contract concluded on 14 May 1975.
3. Order the Commission to pay the costs.

In an 'annex to the reply' the applicant stated that the loss suffered amounted to DM 848 733.80.

The *Commission* contends that the Court should:

1. Dismiss the main application under 1 as inadmissible;
2. Dismiss the alternative application under 2 as in part inadmissible and as wholly unfounded;
3. Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility of the action

1. The *applicant* contends in its application that the latter is admissible under Article 178 and the second paragraph of Article 215 of the Treaty and also in so far as the applicant claims that the Commission did not ensure that the competent German authority applied the principles of *force majeure*. The action was not one to be brought against the Federal Republic of Germany. The complaint is concerned with the question whether the Einfuhr- und Vorratsstelle was, in the circumstances of the case, competent to apply Article 20 of Regulation (EEC) No 193/75. This question was answered in the negative not only by the German authority but in particular by the Commission, which is itself competent to decide whether a case of *force majeure* exists. The action for damages must therefore be brought exclusively against the Commission. Thus the loss was due to the Community's failure to act: see the judgments of the Court of 26 November 1975 in Case 99/74, *Grands Moulins* v *Commission* [1975] ECR 1531, of 21 May 1976 in Case 26/74, *Roquette* v *Commission* [1976] ECR 677 and of 27 January 1976 in Case 46/75, *IBC* v *Commission* [1976] ECR 65.

2. The *Commission* states that the application for a 'declaration that it is bound by way of damages to guarantee performance of the applicant's contract of 14 May 1975' is inadmissible. The damages claimed are not cash damages but 'compensation in kind'.

Since at the present time the importation of seasoned meat is in principle unrestricted, what the applicant is seeking is that the provisions of Community law making the licence and levy mandatory should be declared inapplicable in its particular case.

The Commission could act in accordance with the request made by the applicant only by formally amending the relevant regulations. These proceedings, which seek the promulgation of a legislative act of specific content are not intended to make good damage within the meaning of the

second paragraph of Article 215 of the Treaty but constitute an action for failure to act within the meaning of Article 175 of the Treaty.

The applicant's main claim is therefore subject to the conditions under which such an action is admissible. Those conditions do not obtain: the period for bringing an action under the second paragraph of Article 175 has expired, and the conditions contained in the third paragraph of Article 175 would be satisfied only if the Commission had power to accede to the applicant's request by promulgating a decision of direct and individual concern to the latter, which is not the situation in this case.

With regard to the applicant's alternative claim, the Commission points out that import licences for bovine meat have been issued unconditionally since 1 April 1977. The only relevant competent body in Germany is the Federal Authority for the organization of agricultural markets. Consequently, the applicant's alternative claim is admissible only in so far as it is based on the fact that, since 1 September 1975, imports of seasoned bovine meat have also been subject to a levy or a system equivalent to a levy.

3. The *applicant* replies by emphasizing that it has demanded compensation for damage pursuant to the second paragraph of Article 215 of the Treaty. The enforcement of its right to compensation means that the Commission must inform the competent authorities in the Federal Republic of Germany that the applicant is entitled to import the goods in question under the conditions in force before 1 September 1975. To do this, no formal amendment of the regulations involved is necessary.

The application of Article 175 of the Treaty is excluded by the fact that the Commission took a decision on the letters sent to it by the applicant.

The case-law of the Court has long established that an action for compensation for damage pursuant to the second paragraph of Article 215 of the Treaty is self-contained and independent of that provided for under Articles 173 and 175 of the Treaty.

The only question which therefore remains is whether the applicant can, under the second paragraph of Article 215, claim damages in kind. The answer is in the affirmative because the provision in question refers to the general principles common to the laws of the Member States: the German law, for example, on compensation for damage refers first to the principle of damages in kind.

The applicant's action does not seek to obtain a legislative measure but an individual measure. The fact that Article 176 of the Treaty refers to the second paragraph of Article 215 shows that the Court may, pursuant to the latter provision, impose obligations on the institutions of the Community which are wider than those provided for under Article 176.

The applicant goes on to dispute the Commission's contention that the importation of the products in question was not made economically impossible. In this connexion it points out that before 1 September 1975 the charge on importation of the product in question was DM 0.853 per kg for an article priced at DM 3.30 per kg; under the present system the charge is DM 7.12 per kg and its effect is equivalent therefore to a prohibition of importation.

Moreover from 1 September 1975 to 30 March 1977 linked-sales systems of various kinds were applied, in particular under Regulation (EEC) No 76/76. The 'intervention meat' the purchase of which was compulsory under these systems was from three to four DM dearer per kg than the meat purchased by the applicant in Romania. Thus from

an economic point of view an importation of meat preparations under the linked-sales system was out of the question for the applicant since it would have involved losses which it would not have been able to bear.

The reason why other importers were able to import under the linked-sales system is that they had bought expensive cuts of meat, the price of which was roughly equal to that of 'intervention meat'.

The applicant claims that its account of events shows that it did not remain inactive until about the time when it initiated proceedings. It points out that it knows three large-scale purchasers of meat preparations which would immediately purchase from it three to five thousand tonnes of meat and that Prodexport is still in a position to execute the contract which binds it to the applicant.

In the applicant's view this account of the facts demonstrates that the action is admissible.

4. In its rejoinder the *Commission* states that, being an application for a declaration, the applicant's main claim is admissible under the second paragraph of Article 215 of the Treaty only if the claimant has suffered manifest damage and is prevented from immediately submitting an application for enforcement only because he is not yet in a position to put an accurate figure on the amount of loss; see, in this connexion, the judgment of the Court of 2 June 1976 in Joined Cases 56 to 60/74, *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711. Those conditions do not obtain in this case.

The applicant wants the Commission to ask the competent German customs authority not to impose the levy on imports effected by it.

If the applicant is now in a position to make such a claim it must also be able to submit an application on the same lines in specific terms. In these circumstances, the mere declaration of a vague guarantee of performance has no purpose or effectiveness. The applicant can show no interest in legal protection.

Nor is the applicant's main head of claim any more admissible as an action for enforcement.

As it is worded, the application seeking to obtain an order that the defendant shall 'guarantee the performance of the contract concluded by the applicant on 14 May 1975' is not in sufficiently clear and specific terms to satisfy the requirements of Article 38 (1) of the Rules of Procedure of the Court.

If an attempt is made to give a positive meaning to the empty wording of that claim by referring to the text of the reply, it will be seen that it seeks a 'measure ensuring that the applicant is enabled to execute the contract'. Specifically, it asks 'that the Commission shall inform the competent authority in the Federal Republic of Germany that the applicant is authorized to import the contested product under the conditions which were in force prior to 1 September 1975'.

If the applicant is seeking an order actually prohibiting that it be required to pay the levies, this would inevitably involve a legislative measure within the meaning of Article 189 of the Treaty, namely a decision. The adoption of such a measure, rendering inoperative the legal duty to pay the levies, could be obtained only under the conditions laid down in Article 175 of the Treaty, and those conditions are not satisfied.

The actions for compensation referred to under Article 178 and the second paragraph of Article 215 of the Treaty can be instituted only for the purpose of obtaining financial compensation.

B — Substance

1. The *applicant* claims in the first place that by virtue of the principles of protection of legitimate expectations, of proportionality and of equality of treatment, the Commission ought, in addition to the transitional period provided for under Article 2 of Regulation No 2033/75, to have provided rules to make it possible for, *inter alia*, any contract concluded before 1 June 1975 to be performed. This claim is based on the following considerations:

(a) After suspending imports of beef and veal from third countries by Regulation No 2668/74 of 21 October 1974 temporarily suspending the issue of import licences and advance fixing certificates for beef and veal (Official Journal L 285 of 22 October 1974, p. 22), the Commission gradually relaxed this prohibition of imports of products coming under subheading 16.02 B III (b) 1 of the CCT, in particular by Regulation No 1090/75. In this connexion the applicant draws particular attention to the third and the penultimate recitals of the preamble to that regulation. This continued relaxation of the protective arrangements did not permit the provisions contained in Regulation No 2033/75 to be foreseen.

(b) In accordance with the principle of respect for legitimate expectations the Commission ought to have provided for transitional measures. The only limitation on that principle is the existence of an overriding public interest; on this subject see the judgment of the Court of 14 May 1975 in Case 74/74, *CNTA* v *Commission* [1975] ECR 533. In view of the relaxation of restrictions on the market in beef and veal there was no overriding interest calling for interference with definitely concluded contracts.

(c) Similarly, the transitional provision contained in Article 2 of Regulation No 2033/75 pays insufficient regard to the principle of equality of treatment. That provision amounts to discrimination against traders who had concluded contracts prior to 5 August 1975 but who were no longer able to import the goods before 1 September 1975. This is especially the case when importation was impeded by a case of *force majeure*.

2. Secondly, the applicant states that the Commission acted illegally in refusing to authorize the Federal Republic of Germany to permit it to import, under the conditions which apply to cases of *force majeure*, the 1 900 tonnes of meat affected by the machines being put out of action. It is for the Commission to assess the scope of the concept of *force majeure*. In the circumstances of the case the Commission could by various means have made the competent German institution apply that principle, in particular by extending the application of Article 2 of Regulation No 2033/75 to cases of *force majeure* by giving the Federal Republic of Germany internal authorization to apply Article 20 of Regulation No 193/75, at least by analogy, due regard being paid as necessary to considerations of natural justice, or by recognizing *force majeure* as having the force of a general principle of law.

In this connexion the applicant refers to the judgments of the Court in Case 25/70, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel* v *Köster and Others*, of 17 December 1970 [1970] ECR 1161, Case 36/70, *Getreide Import* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, of 16 December 1970, [1970] ECR 1107, and Case 3/73, *Hessische Mehlindustrie Karl Schöttler* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, of 11 July 1973 [1973] ECR 745. In all those cases the Court recognized that it was proper to have recourse to the concept of *force majeure* when importation was impeded by circumstances outside the control of the holder of an import licence.

In its judgment of 20 February 1975 in Case 64/74, *Reich* v *Hauptzollamt Landau* [1975] ECR 261, the Court found that special rules which provide for the case of *force majeure* are justified by reasons of natural justice. It accordingly applied the principle of *force majeure* by analogy to a case which was not expressly provided for.

The Commission ought to have recognized that similar considerations applied in the present case.

Finally, the applicant states that it is first and foremost for the Einfuhr- und Vorratsstelle to ascertain whether the conditions which constitute a case of *force majeure* are fulfilled in this case.

3. Thirdly, the applicant contends that in the light of the principle of the protection of legitimate expectations and in view of the circumstances of *force majeure* the Commission ought, at least in the context of the relaxation of the measures prohibiting imports, to have permitted performance of the contract of 14 May 1975 under the conditions applicable until 1 September 1975. This view of the applicant is based on a precedent. In fact, in the third recital of the preamble to Regulation No 819/75 of 25 March 1975 concerning the issue of import licences for beef and veal on production of contracts of sale concluded in accordance with Regulation (EEC) No 1790/74 (Official Journal L 78 of 27 March 1975, p. 93), the Commission provided that, with a view to increased flexibility of the protective measures, 'account should first be taken of contracts of sale of meat held by intervention agencies concluded under the linking system before the suspension of the issue of import licences and in respect of which it has not been possible to issue licences'.

On the nature of the loss sustained the applicant points out that the second paragraph of Article 215 of the Treaty does not make financial compensation obligatory and that the loss can therefore be made good in kind.

5. According to the *Commission* it is not true that the contract which the applicant concluded with its Romanian associates could not be performed because of the Community import systems promulgated on 1 September 1975. Under the contract the applicant undertook only to take away and pay for the seasoned meat produced. It was at no time impossible for it to discharge this obligation.

The Commission protests against the statement that the importation measures effective from 1 September 1975 prevented imports of seasoned meat or made them economically impossible. It states that:

— Import licences have also been issued without restriction for seasoned meats since 1 April 1977;

— At present market prices in the Community are in some sectors markedly higher than those in 1975 but the applicant need only pay the 1975 purchase price;

— For two years the applicant made no effort to find a purchaser in the Community; whereas

— Imports of meat coming under subheading 16.02 B III (b) 1 of the CCT have shown a very substantial increase in recent years and other meat importers have evidently managed to cope with current restrictions on imports.

6. In any case it was not any action on the part of the Commission which prevented the applicant from effecting the importations in time. The inclusion, under Regulation No 2033/75, of seasoned meats in the arrangements involving the protective clause applicable to beef and veal was published in the Official Journal of 6 August 1975 and came into force only on 1

September 1975. If the applicant was unable to make use of the opportunity which was thus offered him to import the remaining 1 900 tonnes of seasoned meats, it is not the Commission which is to blame for this but only the fact that the applicant's Romanian producers did not deliver in accordance with the conditions agreed. In any case, the Commission doubts whether the Romanian producer can still deliver or has any intention of doing so. It concludes that if the producer's delivery problems prevented the contested contract from being performed, the action loses its purpose.

7. The Commission has not infringed the principle of the protection of legitimate expectation. The applicant concluded the delivery contract at a time when the market in beef and veal had long been passing through a period of considerable and lasting crisis, during which protective measures appeared one after the other and imports of seasoned beef and veal were rightly subject to restrictions. At that time, therefore, the Commission gave the applicant no reason for believing that those seasoned meats would in future never again be subject to restrictions on imports. The Commission adds that it granted a more than adequate transitional period.

8. As regards the alleged discrimination against the applicant the Commission states that there were other undertakings who were unable to effect in time the whole of the seasoned beef and veal imports which they had bargained for. The Commission did not grant any exempting arrangements to any of those undertakings. The fact that the Commission treats the applicant in the same way as all the other undertakings concerned in the same situation and that it refuses to grant it special privileges denied to those other undertakings cannot amount to discrimination against the applicant.

9. The Commission further states that in all cases in which the Community agricultural regulations provide for exceptions on the ground of *force majeure* these are cases where the person concerned is himself bound to perform a specific act in relation to the Community or the authorities of the Member States acting on its behalf: for example to import or export the product during the period of validity of the licence (Article 2 of Regulation No 193/75, Official Journal L 25, p. 10), or not to put on the market milk products produced by himself during the period of the contract (Article 3 of Regulation No 1353/73, Official Journal L 141, p. 18).

As the Court has laid down in its decisions, *force majeure* constitutes an exception to the duty to respect obligations entered into when certain circumstances make it impossible for the person concerned to fulfil them.

The aforesaid conditions, which must be present to constitute a case of *force majeure*, do not correspond to the applicant's situation: in importing seasoned beef and veal the applicant fulfilled no obligation which was incumbent on him towards the Community, nor would any direct relationship be created between the Community and the applicant unless the latter applied for an import licence or declared its goods for the purpose of import formalities.

The position is quite different when the situation lies outside this type of legal relationship established by Community law. If the Commission were bound to adjust its import system to individual cases in accordance with the importer's original intentions, decisions regarding the level of charges applicable on importation would depend not on the factual situation on the market but on importers' assumptions and presumed intentions. This would bring to a halt the working of the system of foreign

trade under the common organization of the market.

The Commission contends that the principles of the prohibition of discrimination, of the protection of legitimate expectation and of *force majeure* cannot give rise to any legal obligation on its part to guarantee the applicant against any loss which may arise from the fact that its suppliers do not fulfil their contractual obligations.

10. In reply, the *applicant* states that even before the Commission brought seasoned meat preparations within the scope of the stricter protective measure it ought, generally speaking, to have excluded contracts concluded earlier or at least granted them a longer transitional period.

In this connexion it refers to the third and penultimate recitals of the preamble to Regulation No 1090/75 and contends that if the Commission was mistaken in the forecasts which it made in those recitals it was entitled to amend the rules. However, in the light of the principles of a market economy, there is no urgent need to make such amendment. Especially in the meat preparations sector there is no threat of disturbances on the market and there has been no importation of quantities of meat which would militate against sound management of the market in beef and veal. The principles of legal certainty and of protection of legitimate expectation require that authority be given for the performance within a suitable period of contracts which can be proved to have been firmly concluded, by reason of the two following factors: the establishment of a basis of trust in accordance with Regulation No 1090/75 and the absence of an emergency requiring the reintroduction of a protective measure. In the light of these two considerations, a transitional period from 6 August to 1 September 1975 is not particularly generous.

In any case, as regards the 1 900 tonnes still to be delivered, there is, in the applicant's view, no overriding public interest of any kind on the part of the Community which prevents the execution of the contract.

11. The applicant has not benefited from the transitional arrangements in the same way as other importers because, as the result of *force majeure*, the delivery of its goods was delayed. The fact that the existing linked-sales system can be used in different ways constitutes a further discrimination.

12. On the question of *force majeure* the Commission gives an incorrect account of the point of view contended for by the applicant. There is no question in this case of any exemption from the obligation to produce a licence or from the obligation to pay a levy. The applicant's only wish is to secure the application by analogy of Article 20 of Regulation No 193/75.

The fact that the applicant's situation amounts to a case of *force majeure* which would normally result in the extension of the licence was recognized by the Commission in its working document No VI/2039 bis/75. This document refers *inter alia* to:

— The delay in the importation of goods caused by the sudden and unforeseeable effects of the energy crisis; and

— The damage sustained by processing machines installed in the exporting country.

The strict interpretation placed by the Commission on the concept of *force majeure* cannot be deduced from the rules in force or from the general legal principles common to the laws of the Member States. The rule on *force majeure* is in fact a necessary relaxation of any special import system. In exceptional circumstances beyond the control of the importer, the rule should provide him with a guarantee that he

will be placed in the same legal position as he would have been if the exceptional event had not occurred.

Furthermore, there is a legal relationship between the applicant, on the one hand, and the Commission and the Federal Republic of Germany, on the other; this arises, first, as a result of Regulation No 1090/75, which abolished the import restrictions imposed on seasoned meat preparations and exempted importers of those products from the obligation to obtain a licence and, secondly, as a result of Article 1 (4) of Regulation No 1090/75 as amended by Regulation No 2033/75 under which those products became once more subject to the licence and linked-sales arrangements.

If the Community legislature had maintained the obligation to obtain a licence for meat coming under tariff subheading 16.02 B III (b) 1 of the CCT, within the ambit of Regulation No 1090/75, Article 20 of Regulation No 193/75 would have been directly applicable. The fact that, as part of the rules concerning protective clauses, seasoned meats were exempted from the obligation also to obtain a licence does not mean that, at the same time, the Community legislature excluded cases of *force majeure*.

13. Finally, the applicant claims that Article 1 (4) of Regulation No 1090/75 as amended by Regulation No 2033/75 is invalid as far as meat preparations are concerned.

When Regulation No 2033/75 was adopted, there was no serious disturbance on the market, any more than there was any threat of disturbance as regards seasoned meat preparations coming under subheading 16.02 B III (b) 1 of the CCT. The Community does not in fact have sufficient quantities of meat preparation. High quality 'intervention meat' is too dear to be used for sausages. The conditions laid down in Article 21 of Regulation No 805/68 were not therefore satisfied.

Any measures which restrict international trade in goods become constitutionally invalid, equally in terms of Article 21 of Regulation No 805/68, if they go beyond what is economically necessary and produce results which do not correspond to the objective of the regulations enacted.

If such disturbances on the market have occurred this is not in any way 'by reason of imports' as provided in Article 21 of Regulation No 805/68: the reasons are to be found exclusively in the sanctioning of a permanent intervention on the market in beef and veal.

Finally, the protective clause infringes the combined provisions of Article 31 of Regulation No 805/68 and Article 110 of the Treaty, in that it so restricts freedom of action in relation to trade policy that imports are made practically impossible.

But if Article 1 (4) of Regulation No 1090/75 as amended by Regulation No 2033/75 contains irregularities, the Commission must make good the damage suffered by the applicant owing to the fact that the latter has, until now, been unable to import the remaining 1 900 tonnes provided for under the contract with Prodexport.

14. In its rejoinder, the *Commission* emphasizes that its actions are governed by the principle of the legality of administrative measures. It is bound to observe the provisions adopted by the Council on the subject of levies and can allow exceptions only in so far as the levy system in force expressly recognizes its power to do so. That situation does not obtain in this case: none of the provisions of the levy system applicable under the common organization of the market in beef and veal as established by Regulation No 425/77 authorizes any special

exemption to be accorded to the applicant.

15. It is not necessary to consider whether the protective measures contained in Regulation No 1090/75 infringe general legal principles. If they were found to do so, this would at most involve the annulment or withdrawal of the regulation, which has already been repealed by Regulation No 76/76 and today no longer constitutes any hindrance to the importations contemplated by the applicant.

The applicant is mainly seeking exemption from the levy system established by the Council, which is nothing to do with Regulation No 1090/75. In order to set up any such system of exemption, the Commisson must in all cases be able to rely on a sound foundation in law, but such a legal basis is lacking in this case.

16. With regard to the applicant's alternative claim, the Commission points out that since it is neither bound nor empowered to declare inapplicable the obligation to impose the levy on seasoned meats, it is not infringing a higher rule of law for the protection of the applicant's rights by refusing to concede this claim and is not therefore bound to compensate.

17. Nor can any such obligation to compensate be founded on any legal irregularities in Regulation No 2033/75.

The formal requirements attaching to the application of the protective measure provided for in Article 21 of Regulation No 805/68 have been fulfilled. The crisis on the market in beef and veal which in 1974 gave rise to the first protective measures still exists and continues to prevent the attainment of the agricultural policy objectives pursued in the context of the common organization of the market in beef and veal provided for in Regulation No 805/68. A chronic surplus in the supply of beef and veal on the internal market has caused market prices to fall to a level well below that of the guide price. The Community's intervention system has not enabled this fall in prices to be avoided. In those circumstances the first requirement is to give Community production first claim on existing outlets in the Community, by far the most important of which are those offered by the processing industry. This objective cannot be attained merely through measures offsetting price levels but only by means of quantitative restrictions on meat imports.

Seasoned meats cannot be excluded from the system. Although the addition of a pinch of pepper converts normal processed meat into another product from the customs viewpoint it still remains the same as any other bovine meat so far as the processer is concerned. The use of seasoned meat does not secure any natural, technical or qualitative advantages for the processer. The advantage of its use lies solely in its cheapness. Seasoned meat was invented in order to render the provisions of the market organization inapplicable to the importation of processed meat by taking advantage of the technical distinctions established by the CCT, which are not, however, justified from the economic point of view.

Under one contract among many others the applicant alone placed an order for at least 6 000 tonnes of seasoned meat from a manufacturer. Nor did other big dealers show any more restraint. On a Community market already saturated with beef and veal such large quantities constituted a source of disturbance which could not be ignored.

Thus, in adopting Regulation No 2033/75 the Commission observed the conditions to which the adoption of protective measures are subject under Article 21 of Regulation No 805/68. In trade with third countries it adopted the appropriate measures to protect the

market of the Community against disturbances arising from imports which would have imperilled the objectives of Article 39 of the Treaty.

The obligations of the Community in the field of commercial policy were also complied with. Article 21 of Regulation No 805/68 expressly authorizes the Commission to apply 'appropriate measures ... in trade with third countries'. The importation of seasoned meats is not the subject of obligations of commercial policy or of guarantees by the Community with which Regulation No 2033/75 conflicted or could conflict.

18. Finally, the Commission notes that in its statement of 10 October 1977, lodged 14 days after the rejoinder, the applicant touches for the first time on the question of the calculation of its loss of profit and that of the amount which it is claiming as damages.

The applicant could have set out in its application the claims, arguments and documents which it put in late. The Commission's unsympathetic attitude to the applicant's claims and the reasons for it had long been known to the applicant, which, moreover, was in possession of the documents in question long before its application was lodged. During the course of the present procedure the Commission has not broached the question of the amount of damages.

Under Article 42 (2) of the Rules of Procedure the applicant is therefore out of time in raising any fresh issue relating to the amount of the damages.

Subject to this reservation the Commission adds that the applicant bases its claim for damages exclusively on legal defects affecting the validity of Regulation No 2033/75. The condition imposed by that regulation, which makes the importation of the contested seasoned meat subject to the prior exportation of an equivalent quantity of beef and veal, placed it in the position of being unable to effect the intended importations.

The Commission considers that Regulation No 2033/77 constituted an obstacle solely to those importations which could have been effected during the period of its validity. Importations rendered impossible by other obstacles which appeared later, as for example the linked-sales system established by Regulation No 76/76, or the levies at present in force, were not and are not impeded by Regulation No 2033/75. If, owing to other obstacles to importation independent of that regulation, the applicant is experiencing a certain loss of profit, this must be attributed not to the regulation or to any legal defects thereof but solely to those other obstacles.

If it is held that any legal irregularity in Regulation No 2033/75 gives rise to an obligation to make reparation the Commission can be held liable only for the loss of profit suffered by the applicant through being prevented from importing its meat during the period of validity of the regulation in question.

The calculation submitted by the applicant is based on factual premises which are wholly different. It compares the calculation of the results of its initial importations with those of notional importations to be achieved under the linked-sales system introduced by Regulation No 76/76.

IV — Oral procedure

The applicant, represented by Dietrich Ehle, and the Commisson, represented by its Legal Adviser, Peter Kalbe, acting as Agent, submitted their oral observations at the hearing on 6 December 1977.

The Advocate General delivered his opinion at the hearing on 18 January 1978.

Decision

1 By application lodged on 2 June 1977 against the Commission under Article 178 and the second paragraph of Article 215 of the EEC Treaty, IFG-Intercontinentale Fleischhandelsgesellschaft sought from the Court, first, a declaration 'that the defendant is bound by way of damages to guarantee performance' of a contract concluded by the applicant on 14 May 1975 with the Romanian State corporation for foreign trade, Prodexport, for the delivery of seasoned beef and veal preparations and, in the alternative, an order that the Commission is to pay it by way of damages the profit which it failed to make through the non-performance of the contract.

2 The contract in question was concluded at a time when beef and veal imports into the Communiy from third countries were regulated by the provisions of Regulation (EEC) No 1090/75 of the Commission of 23 April 1975 (Official Journal L 108 of 26 April 1975, p. 1), adopted in pursuance of the protective clause contained in Article 21 of Regulation (EEC) No 805/68 of the Council of 27 June 1968 on the common organization of the market in beef and veal (Official Journal L 148 of 28 June 1968, p. 24).

Under the terms of that regulation the issue of import licences was subject to the prior exportation of an equivalent quantity of beef and veal (the so-called EXIM system), except in the case of preparations or preserves of meat provided that they were put up in hermetically sealed containers weighing not more than 5 kg.

The contract of 14 May 1975 concerned seasoned meat of a kind which was covered by that exception.

3 As a result of floods in Romania in June 1975, the delivery of certain consignments of meat which should have taken place before 1 September 1975 was delayed until after that date.

That was the date of the entry into force of Regulation (EEC) No 2033/75 of the Commission of 5 August 1975 (Official Journal L 207 of 6 August 1975, p. 8), the effect of which was that seasoned meat was no longer exempt from the system provided for under Regulation No 1090/75.

The subject matter of the present action is the damage which the applicant claims to have suffered as the result of the application of Regulation No 2033/75 to the deliveries in question.

4 While the Commission raises no objection as to the admissibility of the alternative application for financial compensation, it has raised an objection of inadmissibility regarding the main application, arguing in effect that an application of this kind cannot be entertained in the form of an action for damages based on Article 178 and the second paragraph of Article 215 of the Treaty.

The main and alternative claims have, however, a common basis in that they assume that the Community is liable because of an unlawful act or attitude on the part of the Commission.

Consideration must therefore be given to this question of substance before any ruling is given on the admissibility of the main application.

5 Among the submissions relied upon by the applicant to establish the liability of the Community, consideration must first be given to that relating to the alleged illegality of the series of regulations in question, in particular of Regulation No 2033/75.

In this connexion the applicant claims that, in adopting that regulation, the Commission ignored the conditions arising from Articles 21 and 31 of the basic regulation, No 805/68, respecting the existence or the threat of serious disturbances on the market and the pursuit of the objectives set out in Articles 39 and 110 of the Treaty.

6 However, as the third and fourth recitals of the preamble to Regulation No 2033/75 make clear, the Commission found that 'the Community market in beef and veal continues to be threatened as a result of imports by serious disturbances which are likely to jeopardize the objectives of Article 39 of the Treaty' and that importation of seasoned meats exempted from the protective measures had 'reached a level incompatible with sound management of the market'.

Nothing warrants the conclusion that, in thus describing the situation on the market, the Commission exceeded the limits of its discretionary powers under Regulation No 805/68.

This submission cannot therefore be upheld.

7 The applicant further claims that the Commission infringed the principle of respect for legitimate expectation by not adopting a transitional measure which, even after the entry into force of the regulation of 1 September

1975, would have enabled contracts concluded before 6 August 1975, the date of publication of the regulation, to receive the benefit of the conditions for importation arising under the previous regulations.

However, the import system at issue required no previous authorization or any firm commitment on the part of the person concerned with respect to the authorities responsible for the management of the organization of the markets in question and the Commission conveyed nothing to importers which could have justified the expectation that, regardless of the development of conditions on the market, the previous rules would be maintained without alteration during the time when prior contracts were to be performed.

This submission must, accordingly, also be rejected.

9 Finally, the applicant claims that the Community incurs liability because the Commission refused to take account of *force majeure*, which prevented the performance of the contract before the entry into force of Regulation No 2033/75.

The applicant claims, first, that the conditions are satisfied for the application by analogy of Article 20 of Regulation No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 25 of 31 January 1975, p. 10) and, secondly, that the taking into account of *force majeure* is governed by a general legal principle which binds the Commission even in the absence of express authorization.

10 Article 20 of Regulation No 193/75 provides that where as a result of *force majeure* importation or exportation cannot be effected during the period of validity of the licence or certificate, the competent agency shall either cancel the obligation to import or export, the security being released, or extend the period of validity of the licence or certificate.

It is clear from the wording of that provision that it covers a situation where the person concerned has undertaken a specific commitment with respect to a competent agency and will, if that commitment is breached, be liable to a penalty in the form of loss of a security unless he is released from the obligation entered into under a *force majeure* clause.

The situation is quite different where the person concerned has not committed himself with respect to a competent agency and the expiry of a time-limit does not in consequence occasion any penalty in this connexion from which he should be exempted in the event of *force majeure.*

Because of this material difference the conditions governing an application by analogy of the provisions cited to the present case are wanting.

11 With regard to the reference to the existence of a general legal principle governing cases of *force majeure,* it is true that the legal systems of the Member States provide, in certain contexts and legal relationships, for the possibility of derogation from the strict requirements of the law, especially from the legal consequences resulting from the non-fulfilment of an obligation, on account of *force majeure.*

Nevertheless, in the relationship between an individual and the public administration, as in the present case, where to exceed the material date does not involve the non-fulfilment of any obligation binding the individual but merely renders the importations in question subject to a system less favourable than that in force before that date, the existence of a general legal principle to the effect alleged is not to be discerned in the national legal systems.

If an importer finds that the performance of the contract under the new system is detrimental to his interests he must seek the appropriate remedy on the basis of his legal relationship with his co- contractor, relying as necesary on the occurrence of *force majeure.*

Accordingly, the conduct of the Commission cannot be considered unlawful and is not therefore such as to render the Community liable.

12 Since, in the circumstances, the principal and alternative claims must, on the same ground, be dismissed as unfounded, no consideration need be given to the particular question of the admissibility of the principal claim.

Costs

13 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs.

As the applicant has failed in its application, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Kutscher Sørensen Bosco

Donner Pescatore O'Keeffe Touffait

Delivered in open court in Luxembourg on 14 February 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 18 JANUARY 1978 [1]

Mr President,
Members of the Court,

1. This case raises the issue of the possible liability of the Commission in respect of measures adopted by it in regulations and of its treatment of a particular undertaking in connexion with the management of the common organization of the market in beef and veal.

Before summarizing the facts I think it would be useful to recall the more important features of the legislation which is relevant to a consideration of the case.

The common organization of the market in beef and veal is based on Regulation (EEC) No 805/68 of the Council of 27 June 1968. Article 21 of the regulation contained a provision enabling the Commission to apply appropriate measures in trade with third countries if, by reason of imports or exports, the Community market in one or more of the products listed in Article 1 of the regulation (live animals of the domestic bovine species, meat of that species, edible offals of bovine animals, prepared or preserved meat or meat offals of bovine animals, etc.)

1 — Translated from the Italian.