JUDGMENT OF THE COURT
16 DECEMBER 1970[1]

Getreide-Import GmbH
v Einfuhr- und Vorratsstelle für Getreide und Futtermittel
(Reference for a preliminary ruling by the Bundesverwaltungsgericht)

Case 36/70

Summary

1. *Agriculture — Common organization of the markets — Cereals — Import and export licences — Period of validity — Overrunning — Case of* force majeure *accepted by the Member States — Incomplete communication to the Commission — Absence of legal effect (Regulation No 102/64 of the Commission, Article 8)*

2. *Agriculture — Common organization of the markets — Cereals — Import and export licences — Period of validity — Overrunning — Case of* force majeure *— Cancellation or extension of validity of licence in question — Request for exception to be made — Refusal by the administration — Acceptability (Regulation No 102/64 of the Commission, Article 8)*

1. As the communication provided for in Article 8(3) of Regulation No 102/64/EEC is only of a declaratory nature it has no legal effect in respect of individuals concerned, who may not take advantage of omissions therefrom.

2. In respect of the circumstances to be regarded as *force majeure* set out in Article 8(2) of Regulation No 102/64, as well as for those accepted by the Member States, the national authorities may, subject to review by the judicial authorities having jurisdiction, refuse to make an exception to the rule concerning cancellation or extension laid down in Article 8(1)(a) and (b) unless reasons are given for the request and it is justified.

In Case 36/70

Reference to the Court under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht (Federal Administrative Court) for a preliminary ruling in the action pending before that court between:

GETREIDE-IMPORT GMBH, Duisburg,

and

1 — Language of the Case: German.

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt-am-Main,

on the interpretation of Article 8 of Regulation No 102/64/EEC of the Commission of 28 July 1964

THE COURT

composed of: R. Lecourt, President, A. M. Donner (Rapporteur) and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore and H. Kutcher, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:
Under Article 16 of Regulation No 19 on the progressive establishment of a common organization of the market in cereals (OJ No 30 of 20.4.1962, p. 933) all imports into a Member State of cereals from third countries are subject to the presentation of an import licence. The issue of the licence is conditional on the lodging of a deposit for importation within the term of the licence, which shall be forfeited if the import does not take place within such period.
Nevertheless Regulation No 102/64/EEC of the Commission of 28 July 1964 concerning import and export licences for cereals, processed products derived from cereals, rice, brokens and processed products derived from rice (OJ No 126 of 5.8.1964, p. 2125) lays down in Article 8 a special rule for cases in which the import or the export cannot be effected during the term of validity of the licence owing to circumstances to be regarded as of *force majeure*.
The said Article 8 reads as follows:

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

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

(b) in the cases listed in paragraph (2)(e) to

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

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

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

(a) war and civil disturbances;

(b) Government ban on imports or exports;

(c) restrictions on navigation by acts of sovereignty;

(d) shipwreck;

(e) damage to ship or cargo;

(f) strikes;

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

(h) mechanical breakdown.

Application of the "extension clause" shall not be regarded as a case of *force majeure* within the meaning of paragraph (1) above.

3. If Member States recognize circumstances other than those set out in paragraph (2) above as of *force majeure* within the meaning of paragraph (1), they shall at once advise the Commission thereof, indicating whether the provisions applied are those of (1)(a) or (1)(b).

4. If a circumstance regarded as being of *force majeure*, concerning the country of origin in the case of imports or the country of destination in the case of exports, is invoked, such circumstances shall be recognized only if the country of origin or the country of destination was designated to the competent administration prior to the occurrence of the circumstance of *force majeure* and not later than one month after the date of issue of the licence.

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

The Federal Republic of Germany has accepted the blockage of ports ('Havenverstopfung') as a case of *force majeure* within the meaning of Article 8(3) and has advised the Commission of this.

It has not however indicated whether in this instance the provision applicable to the case is that of subparagraph (a) or that of subparagraph (b) of Article 8(1). In administrative practice it is subparagraph (b) which has been applied.

The Getreide-Import GmbH undertaking (hereinafter referred to as 'the plaintiff') was the holder of an import licence for 1 575 metric tons of maize, valid until 31 December 1965. It was however unable to take advantage of this licence because of a blockage in the unloading port (Rotterdam). In relying on *force majeure* it then by letter of 6 January 1966 asked the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (hereinafter referred to as 'the defendant') to free the deposit relative to the said licence. The defendant freely accepted that it was a case of *force majeure* but it offered only to extend the term of the validity of the licence. The plaintiff refused this offer, whereupon the defendant on 12 January 1966 declared the deposit in question to be forfeited to the amount of DM 2 694.84.

In the action brought against that decision, the defendant alleges in particular that in deciding whether it is appropriate to apply one or the other of the legal consequences which Article 8 (1) applies to cases of *force majeure*, it is not the unfettered discretion of the Member State, but the free choice of the importer which is the determining factor. The defendant on the contrary

considers that Article 8(1)(b) — a provision which, in its view, is applicable in the present instance — confers on every Member State the power to make an independent decision within the framework of the laws and regulations applicable, on request from the importer. It asserts furthermore that it committed no wrong in the exercise of its discretion.

The Verwaltungsgericht (Administrative Court) Frankfurt mentioned that the Federal Republic of Germany did not indicate in its communication to the Commission the classification, in relation to the said subparagraphs (a) and (b), of the case of blockage of ports and the Verwaltungsgericht decided that this case is not therefore classified. Consequently the deposit was wrongly forfeited.

Giving judgment on appeal, the Verwaltungsgerichtshof Hesse considered in particular that the recognition as cases of *force majeure* of 'other circumstances', within the meaning of Article 8(3) may be based not only on a legal rule but also on an administrative practice. In administrative practice blockage of ports is brought within the system of Article 8(1)(b).

Furthermore, the choice among the alternatives laid down in Article 8 in case of *force majeure* depends upon the unfettered discretion of the administration. The latter moreover has not, in the present case, exceeded its powers.

The plaintiff made an application for 'Revision' to the Bundesverwaltungsgericht and the latter found that Article 8 of Regulation No 102/64/EEC raised the following problems of interpretation which should be submitted to the Court of Justice.

If the notification provided for in paragraph (3) of the said Article 8 has a constitutive effect, a blockage of ports is not to be regarded in so far as Germany is concerned as a case of *force majeure* within the meaning of paragraph (1) of the article, since the Commission was not advised of the provision to be applied in this case (subparagraph (a) or subparagraph (b) of paragraph (1)).

If on the other hand the notification is merely of a declaratory nature, the question of the extent of the discretionary power vested in the Member States by virtue of that provision remains open. In that respect the Bundesverwaltungsgericht envisages three possibilities:

— either it may fall to the importer to choose between extending or cancelling the licence, a choice which the administration must then accept;

— or the decision on this point is within the discretionary power of the Member State;

— or the extension of the licence is the rule and it is only for exceptional reasons that the latter may be cancelled.

By an order of 12 June 1970, the Bundesverwaltungsgericht consequently decided to stay the proceedings and, in accordance with Article 177 of the EEC Treaty, to refer to the Court of Justice of the European Communities the following questions with a view to obtaining a preliminary ruling:

'(1) Under Article 8(3) of Regulation No 102/64/EEC, may a Member State accept also as a case of *force majeure* a circumstance other than those envisaged in Article 8(2) of which it has advised the Commission without indicating however whether the provision applicable is Article 8(1)(a) or (b)?

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

The order containing the reference was entered at the Court Registry on 23 July 1970.

Under Article 20 of the Statute of the Court of Justice of the EEC, written observations were lodged by the plaintiff in the main action and by the Commission of the European Communities.

On hearing the report of the Judge-

Rapporteur and the views of the Advocate-General, the Court decided to put questions to the German Government concerning the procedure followed by the latter for the notification to the Commission of its decision to accept blockage of ports as a case of *force majeure* and the form which the announcement of that decision took.
In reply to these questions the German Government explained by letter of 13 November 1970:

— that the official notification to the Commission must have been made by a letter from the German Permanent Representation to the European Communities, acting on an instruction to that effect of 10 November 1966 from the Federal Ministry of Food, Agriculture and Forestry.

— that the German Government is not in a position to submit a copy of that letter from its Permanent Representation;

— that without being the subject of a publication measure properly so-called, the decision to accept blockage of ports as a case of *force majeure* was by a letter of 21 July 1965 brought to the knowledge of the Central Association of German Traders in Cereals, Fodder and Fertilizers;

— that the said Association of which the plaintiff in the present proceedings is a member, communicated that decision to its members by its circular No 12/65 of 27 July 1965.

Furthermore the German Government states that the administration has always in cases of blockage of ports conformed to the provisions of Article 8(1)(b).
The plaintiff and the Commission of the European Communities presented oral argument at the hearing on 17 November 1970.
The Advocate-General delivered his opinion at the hearing on 2 December 1970.
The plaintiff was represented by Mr Redeker of the Bonn Bar.
The Commission of the European Communities was represented by its Legal Adviser, Dr Kalbe.

II — Summary of the observations of the parties

The observations of the parties may be summarized as follows:

1 — *The first question*

(a) Observations of the Commission

By way of introduction the *Commission* points out that within the framework of the inevitable distribution of duties which is a feature of the common organization of the markets, it devolves upon the Member States to issue the import licences envisaged by Community law, to supervise their use and as in the present case, to decide upon the recognition of a case of *force majeure* and the legal consequences to be deduced from it.
The effectiveness of the rules concerning import licences depends essentially on its uniform application in all the Member States. For this purpose Regulations Nos 111/63 and 108/64 [sic] endeavoured to link all the rules in Article 8 concerning exceptions to the narrow concept of *force majeure*. On the one hand it seemed appropriate to define that concept at least in respect of its most important and most frequent applications, as well as of its legal consequences (Articles 8(1) and (2)). On the other hand in view of the possible number of cases of application, that list could not be complete, and for this reason it is laid down in Article 8(3) that the Member States may accept other circumstances also as *force majeure*. As regards these cases the purpose of the obligation to advise the Commission was to ensure that the Commission would be informed of the practices followed by the Member States and that it would be in a position to control and coordinate these practices either by exercising a direct influence or by further legislative measures.

Within this framework the institution of an obligation of a 'constitutive' nature to advise the Commission would not have had any practical meaning unless the Commission had been granted a right of direct innovation in relation to cases of *force majeure* or of determination of the legal consequences in such cases, so that the effectiveness of the decision taken by the Member State in relation to the plaintiff would have depended upon the approval or the authorization of the Commission. However, such a power on the part of the Commission is contradicted by a certain number of facts:

— the wording of Article 8(3) suggests rather an independent power of decision of the Member States;

— In the absence of express provisions, the presumption of a power of decision by the Commission in the matter is contrary to the principle that the institutions of the Community and the Member States each carry out on their own responsibility, the duties devolving upon them under Community law;

— such a presumption is also contrary to the system of Article 8 under which the Member States and not the Commission decide upon the recognition of cases of *force majeure*.

Consequently the Commission proposes that there should be an affirmative reply to the first question.

(b) Observations of the Plaintiff

The *plaintiff* also claims that there should be an affirmative reply to this question.

2 — *The second question*

(a) Observations of the Commission

The *Commission* points out that the provisions of subparagraphs (a) and (b) of Article 8(1) of Regulation No 102/64 limit the possible legal consequences of a case of *force majeure* to the cancellation or extension of the licence, and further that they restrict the exercise of the discretionary power of the competent authorities by establishing a 'rule-exception' relationship. It asserts that these provisions apply equally to the cases of *force majeure* accepted as such by the Member States under Article 8(3). Any other interpretation would not only be contrary to the wording of this paragraph (3), but would also permit the Member States to create new categories of *force majeure*: besides those where they are bound by strict rules, there would be others where they could decide quite freely. The following facts militate against the acceptance of such a possibility:

— it is of the very essence of Article 8 to have as a foundation a uniform concept of *force majeure*;

— it is obvious from the provisions of Article 8 that the distinction between the cases mentioned in paragraph (2) and those mentioned in paragraph (3) is not based upon fundamental differences of substance, but that paragraph (2) only gathers together the typical and most frequent cases;

— the two different sets of priorities which under subparagraphs (a) and (b) of paragraph (1) may be legal consequences of a case of *force majeure* correspond to two distinct groupings, that is to say on the one hand cases in which the normal course of events justifies the presumption that the import cannot anyhow take place in due time (in which event the licence will in principle be cancelled) and on the other hand cases involving merely a certain delay in execution (extension of the licence). It is not difficult to link any case, to which paragraph (3) of Article 8 applies, to one or other of these groupings.

Furthermore the Commission mentions that although the Member States are thus restricted in selecting which consequence shall follow from a case of *force majeure*, nevertheless within these limits this selection must be the outcome of the exercise of a

discretionary power and may not be made by the importer concerned. In support of this argument the Commission claims in particular:

— that if the contrary were true it would have been useless to establish an order of priority to be accepted by the Member States;

— that the very wording of subparagraphs (a) and (b) implies some measure of discretion on the part of the Member States;

— that only the assumption that the Member States may exercise their discretion in making a decision meets the aim and the legal objectives of the rules in question;

— that in fact import licences are not only intended to allow as exact a forecast as possible of expected imports to be made (in which case the choice between extending or cancelling the licence would be immaterial, as the import could not in any event be effected within the period mentioned), but that they also determine the rate of levy so that in allowing the importer himself to choose between cancellation and extension of the licence, it would be in his power to choose between various rates of levy, which would go beyond the legal reasons on which Article 8 is based.

The Commission submits that the reply to the question should be that the provisions of Article 8(1)(b) of Regulation No 102/64/EEC do not require a Member State to decide that the requirement to import or to export is cancelled and that the deposit is not forfeited as soon as the person concerned requests it to do so and that on the contrary it may require the person concerned to provide it with special reasons justifying such an exception.

(b) Observations of the plaintiff

The *plaintiff* points out that when subparagraph (a) of Article 8(1) provides that in the cases of *force majeure* which it envisages, the obligation to import or to export is extinguished with the result that the deposit is not forfeited, it quite properly satisfies a general principle already laid down in other agricultural regulations (see in particular the fourth recital and Article 5 of Regulation No 97/63/EEC; Article 6 of Regulation No 136/64/EEC; Article 9 of Regulation No 174/66/EEC).
The further possibility of extending the duration of the licence at the request of the importer does not affect this principle at all and certainly does not grant the Member States a discretionary power in the matter.
If on the other hand Article 8(1)(b) were to be interpreted as meaning that it granted the Member States the power, according to the circumstances, of enforcing the extension of the licence, this would represent a departure from the abovementioned regulations relative to other agricultural sectors. The objective which is the basis of all these regulations, that of allowing the competent authorities to have a general view of the development of the markets, is the same for all agricultural sectors including that of cereals.
Consequently it is difficult to understand why it should be necessary in the cereals sector to grant the Member States a discretionary power concerning the suitability either of cancelling or of extending the licence whilst such a power has not appeared necessary in other sectors. Discrimination would follow from this because in the cereals sector traders would be subject to supplementary changes *vis-à-vis* fellow traders in other agricultural sectors.

Grounds of judgment

1 By an order of 12 June 1970, received at the Court on 23 July 1970, the Bundesverwaltungsgericht of the Federal Republic of Germany put to the Court under

Article 177 of the Treaty establishing the European Economic Community two questions for the purpose of obtaining an interpretation of Article 8 of Regulation No 102/64/EEC of the Commission of 28 July 1964 concerning import and export licences for cereals, processed products derived from cereals, rice, brokens and processed products derived from rice;

The first question

2 In the first question the Court is asked to rule whether under Article 8 (3) of the said Regulation a Member State may accept as a case of *force majeure* a circumstance other than those mentioned in paragraph (2) of that article, when in the communication provided for in paragraph (3), it has omitted to indicate whether the provisions of subparagraph (a) or those of subparagraph (b) of paragraph 1 of the article are applicable to the case.

3 The question thus has as its purpose the elucidation of the legal nature of the duty to advise the Commission laid down in Article 8 (3) and consequently, of the effect of any omissions occurring during the discharge of that duty upon the legal position of holders of licences.

4 Article 8 (1) governs the consequences arising from the fact that owing to circumstances to be regarded as *force majeure*, the intended import or export could not be effected during the term of the validity of the licence issued.

This paragraph provides the alternatives, either of cancellation of the obligation to import or to export, or extension of the term of the validity of the licence, both depending upon the nature of the circumstances accepted as *force majeure*.

Paragraph (2) of the article sets out the circumstances which 'shall be' regarded as being *force majeure*.

Lastly, paragraph (3) provides that, if the Member States recognize as *force majeure*, circumstances other than those set out in paragraph (2), they shall at once advice the Commission thereof and indicate whether the provisions applied are those of subparagraph (a) or of subparagraph (b) of paragraph (1).

5 It follows from the drafting and the general scheme of paragraphs (2) and (3) of Article 8 that the power of recognizing certain circumstances as *force majeure* is left to the Member States as paragraph (2) confines itself to setting out the circumstances which they are in any case required to recognize as such.

Thus the communication provided for in paragraph (3) deals with a decision of the Member State concerned which does not require the intervention of the Community authorities to be complete and take effect.

The communication is therefore of a declaratory nature.

6 Consequently omissions in the communication cannot affect its validity as regards persons affected by the act by which the State made use of the said power.
Nor can such omissions be relied on by persons affected against an act of the national authorities consequent upon the acceptance of a circumstance as *force majeure.*

7 It is therefore appropriate to reply that the omissions in the communication provided for in Article 8 (3) of Regulation No 102/64/EEC have no legal effect in respect of individuals concerned.

The second question

8 In the second question the Court is asked to rule whether the provisions of Article 8 (1) (b) require the Member State to decide that the licence carrying the obligation to import or to export is cancelled and that the deposit is not forfeited as soon as the person concerned requests it to do so or whether it may make the benefit of this exception to the rule of extension conditional upon the said person's providing it with special reasons justifying such an exception.

9 It appears from Article 8 (1) that the alternatives of cancellation or of extension of the licence do not apply in an arbitrary manner, in accordance with the wishes of the person concerned or the discretion of the administration concerned, but must be applied in accordance with a specific system, cancellation being the rule in certain circumstances and extension the rule in other circumstances recognized as *force majeure.*

10 The indication given in the article that an exception may nevertheless be made to the rule at the request of the person concerned confirms that the provision is intended to establish in the given circumstances an administrative practice in which either cancellation or extension is the rule, the alternative being applied only exceptionally.

11 Both the terms of Article 8 (1) and the duty of the Member States to indicate in their communications to the Commission whether in the circumstances which they have accepted as *force majeure* the provisions applied are those of paragraph (1) (a) or (b) prove that the system referred to applies not only to the cases of *force majeure* set out in paragraph (2), but also to all other circumstances which the Member States accept as such.

12 In the system thus established exceptions are allowed under paragraph (1) only at the express request of the person concerned and under an express exception which the administration of the Member State concerned 'may' adopt.

13 The exception does not therefore automatically take effect as soon as the person concerned requests it.

In fact since the possibilities in Article 8 are intended only to resolve difficulties which importers or exporters experience in meeting their obligation to import or to export within a fixed period, it would be contrary to this objective to allow the person concerned to benefit on the pretext of these difficulties by putting him in a position more favourable than that of his competitors who have not experienced comparable difficulties.

14 Consequently national administrations may refuse to make the exception requested when the grant of this would be contrary to the legitimate objectives or to the proper functioning of the organization of the market in question.

They may therefore, subject to review by the judicial authorities having jurisdiction, require that reasons should be given for the request for the grant of an exception and that it should be justified.

15 It is appropriate to reply in this sense to the second question.

Costs

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

17 The proceedings in so far as the parties to the main action are concerned, are in the nature of a step in the action pending before the Bundesverwaltungsgericht, and the decision as to costs is therefore a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the oral observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 177 and 189;
Having regard to Regulation No 102/64/EEC of the Commission of 28 July 1964, especially Article 8;
Having regard to the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities,

THE COURT

in answer to the questions referred to it by the Bundesverwaltungsgericht of the Federal Republic of Germany in accordance with the order made by that court on 12 June 1970, hereby rules:

1. **Omissions in the communication provided for in Article 8 (3) of Regulation No 102/64/EEC of the Commission of 28 July 1964 have no legal effect in respect of individuals concerned;**

2. **Subject to review by the judicial authorities having jurisdiction, national administrations may refuse to make an exception to the rule concerning cancellation or extension laid down in Article 8 (1) (a) and (b) unless reasons are given for the request and it is justified.**

Lecourt Donner Trabucchi
Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 16 December 1970.

A. Van Houtte — R. Lecourt

Registrar — President