Article 9 (1) of Regulation No 473/67 of the Commission must be interpreted as meaning that the period of validity of an export licence for which the refund has been fixed in advance may be extended for a period of time which has expired — that is to say, retroactively — where the competent authority has wrongly refused to grant in due time an extension justified by a case of *force majeure* and where as a result it has been necessary for the export to be effected on the basis of a fresh licence relating to the same transaction; in such a case, the fresh licence has no legal effect and must be formally cancelled.

Pescatore Due Bahlmann

Delivered in open court in Luxembourg on 16 December 1982.

The Registrar
by order

H. A. Rühl

Principal Administrator

P. Pescatore

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 DECEMBER 1982 [1]

Mr President,
Members of the Court,

The facts of the reference for a preliminary ruling on which I give my opinion today may be summarized as follows:

Firma H. und J. Brüggen, the plaintiff and respondent in the appeal on a point of law in the main action, carries on a cereal processing business in Lübeck. On payment of a desposit it was issued by what was then the Einfuhr- und Vorratsstelle für Getreide and Futtermittel [Import and Storage Agency for Cereals and Feeding-stuffs] with a licence for the export to Peru of 595 920 kg of groats in which the refund was fixed in advance and which was valid until 31 May 1970. The groats were to be manufactured from oats which should have been delivered to Lübeck by inland waterways from the German Democratic Republic in two consignments, one in the first and the other in the second half of April 1970. However, owing to the exceptionally severe winter which resulted in the lengthy blockage by ice of the inland shipping routes in the German Democratic Republic, delivery of the

1 — Translated from the German.

oats was delayed, so that by 31 May 1970 the plaintiff had been able to export only 298 039 kg of groats against the licence issued.

In view of this situation the plaintiff had already applied on 13 May 1970 for an extension of the licence by two months, pursuant to Article 9 (1) (b) of Regulation No 473/67 of the Commission of 21 August 1967 on import and export licences for cereals and products processed from cereals, rice, broken rice and products processed from rice (Amtsblatt L 204, 24. 8. 1967, p. 16). That provision lays down *inter alia* that the period of validity of a licence may be extended on request if the export within that period is prevented by circumstances which are to be regarded as cases of *force majeure*, which according to Article 9 (2) (g) include the suspension of shipping owing to the formation of ice.

The request for an extension was refused by a decision of 20 May 1970 on the ground that there was no case of *force majeure* to justify such an extension and the plaintiff was therefore compelled in June 1970 to export the remaining quantity under a new licence with a less favourable rate of refund.

Brüggen successfully challenged the decision refusing its application before the Verwaltungsgericht (Administrative Court] Frankfurt am Main. The Hessischer Verwaltungsgerichtshof [Higher Administrative Court, Hesse] also dismissed the appeal by the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], the successor of the Einfuhr- und Vorratsstelle, and decided that in accordance with the claim, which had in the meantime been amended, the plaintiff should be placed in the same position as it would have been in if its original request for an extension of the export licence had been granted. The defendant brought an appeal on a point of law [Révision] against that decision before the Bundesverwaltungsgericht (Federal Administrative Court]. The plaintiff claimed that the appeal should be dismissed and in the alternative resumed its original claim for a retroactive extension of the period of validity of the export licence.

The Seventh Senate of the Bundesverwaltungsgericht considered that that claim raised a question concerning the interpretation of Regulation No 473/67. Like the lower courts, it assumed that in this case it had been impossible to make full use of the export licence in due time as a result of *force majeure* and that the defendant was therefore bound to grant the request for an extension of the export licence. However, the court had considerable doubts whether it was possible to extend the period of validity of a licence *ex post facto*, in relation to a period which was already past. In the event of such an *ex post facto* extension, it would in its opinion be possible for the groats exported in June 1970 to be transferred from the licence then newly obtained for that purpose to the first, extended, licence, with the result that the plaintiff could then enjoy the more favourable rates of refund provided for by the first licence. However, according to the Bundesverwaltungsgericht, such a procedure would appreciably impair the reliability of the Community licensing system as an indicator of market development, as in effect it would amount to a kind of temporary extension of the period of validity of the licence by the licence-holder and the second licence would serve only as a provisional substitute. On the other hand, the national court concedes that that result would be scarcely satisfactory as far as the legal protection of the citizen is concerned, since claims to have the period of validity of a licence extended could not succeed in the face of a refusal on the part of the competent authority, because they would

normally be extinguished through lapse of time before the issue could be resolved before the courts. In view of that conflict of interests, the Seventh Senate of the Bundesverwaltungsgericht by order of 17 December 1981 stayed the proceedings and referred the following question to the European Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"Does Article 9 (1) of Regulation No 473/67/EEC of the Commission of 21 August 1967 (Amtsblatt L 204, 24. 8. 1967, p. 16) permit the validity of an export licence in which the amount of the refund is fixed in advance to be extended for a period already past, thus giving it retroactive effect, in order to enable an exporter the validity of whose licence was not extended in due time and who therefore effected the export on the basis of a fresh licence to benefit in respect of that export from the rate of refund which had been fixed in advance?"

My view on this question is as follows:

As the national court states in its order, the plaintiff in the initial proceedings is really seeking to avoid the legal difficulties in which it finds itself as a result of the refusal of the defendant, in the circumstances, to grant its request for an extension of Licence Number B-10 755. The Bundesverwaltungsgericht accepts that the plaintiff was prevented by *force majeure* from exporting the goods in question within the period covered by that licence and that consequently the defendant, by refusing the request for an extension, which was submitted to it before the expiry of that period, acted unlawfully in view of Article 9 (1) (b) of Regulation No 473/67 under which, in those conditions, the *period of validity must be extended*, acted unlawfully. Since in the court's opinion the defendant cannot be required to remedy the consequences of its action by "adjusting" the plaintiff's licence "on the basis of a hypothetical export of the full amount", the success of the appeal therefore depends on whether the period of validity of a licence may be extended under Article 9 (1) of the regulation in question for a period which has already passed. In addition, however, the *ex post facto* extension of the first licence is only of value to the plaintiff if at the same time it is possible *ex post facto* to annul the second licence, by means of which the remaining goods were exported. If that were in fact impossible, the plaintiff would lose the deposit paid in respect of that licence, as the second licence would not have been exhausted on account of the *ex post facto* transfer of the export to the first licence. Consequently, as is stressed by all the parties to the proceedings, the Court of Justice must first decide whether in view of the circumstances set out a licence may be extended after its period of validity has expired and whether the substitute licence which has been used in order to effect the export may be annulled *ex post facto* and with retroactive effect.

1. In relation to the first question, the court of reference and the parties to the proceedings correctly start out from the assumption that the question of an *ex post facto* extension of the period of validity of a licence is not expressly determined in Regulation No 473/67. It is also essentially common ground that this lacuna in the rules can ultimately be filled only by balancing the interests of the protection and proper working of the Community licensing system and the

protection of the licence-holder concerned. However, opinions are divided as to which of the two should in the end have priority.

The court of reference and the defendant in the initial action admit that a refusal to extend the validity of an export licence *ex post facto* may leave an unsatisfactory result as regards the legal protection of the citizen but they consider that the reliability and proper working of the licensing system as an indicator of market development is of greater importance. If the evidential value of licences is not to be jeopardized, it is in the opinion of the Bundesanstalt für landwirtschaftliche Marktordnung indispensable that, apart from certain narrowly-defined and expressly-stated exceptions, the obligations to import and export connected with them should be fulfilled.

On the other hand, the plaintiff in the initial action and the Commission, which similarly do not dispute the need for a reliable licensing system, after considering all the circumstances reach the conclusion that the unfavourable effects of an *ex post facto* extension of the period of validity of licences on the functioning of the licensing system would remain within narrow limits, whereas the legal protection of the person concerned in the case of a refusal to extend the validity of the licences for a period already passed would be very inadequate. In a case such as this, priority must therefore be given to enabling the person concerned fully to enforce his rights.

In my view — to anticipate the conclusion — the latter view must be preferred for the following reasons.

(a) It is indeed true that the Community licensing system enables the Community agencies responsible for the common organization of the market to predict the development of the market and the rules on deposits which are used to enforce the obligation to import and export are intended to ensure that such predictions are as reliable as possible. To this extent, contrary to the plaintiff's submission, it can scarcely be denied that to some extent the *ex post facto* amendment of two licences jeopardizes the reliability of the system of import and export licences for agricultural products in the framework of the common organization of the market. Both the defendant and the Commission have rightly pointed out in this connection that, in order to obtain a view of future developments of the market, the Community authorities must in principle be able at the beginning of the period of validity of a licence to rely on the fact that applicants will comply with their obligations to import or export, and it will not always be possible, for technical and administrative reasons, for that to be directly checked. In this regard two import or export transactions are covered by the issue of a double licence, while, if the first licence is extended and the second annulled, only *one* import or export transaction actually takes place.

However, contrary to the contention of the defendant in the main action, such a "double entry" cannot in itself jeopardize the evidential value of the licensing system. For the purpose of a comprehensive market forecast, absolutely precise knowledge of import and export transactions is not required

but it must be sufficient if their order of magnitude may be ascertained as accurately as possible. The public interest, which requires as accurate a survey as possible of import and export trends in the individual Member States, must at the same time, as the Court of Justice has stressed *inter alia* in the Case of *Kampffmeyer*, [1] be reconciled with the necessity, which also derives from the public interest, that trade between Member States should not be hampered by too rigid obligations. That is why the regulation in question, No 473/67, also lays down special rules for those cases in which, as a result of *force majeure*, it is not possible to effect the import or export within the period of validity of the licence. As the court making the reference correctly observes, a case of *force majeure* is, according to the well-established case-law of the Court of Justice (for example, see Cases 158/73, [1] 3/74, [2] 11/70 [3] and 4/68 [4]), only to be accepted if the circumstance which prevents the import or export arises from an unusual event, outside the control of the exporter, the occurrence and consequences of which could not have been avoided in spite of the exercise of all the care which might reasonably be expected of a prudent and diligent trader. From that definition it follows that cases of *force majeure* must always be based on objective factual circumstances which may easily be checked and which are beyond the control of the person concerned. However, that relatively strict criterion, which must be applied by the authorities and courts in determining whether there is in fact a case of *force majeure*, ensures that well-founded applications for annulment or extension of the period of validity of licences will not be very common and that the negative effects on the functioning of the licensing system will therefore also be very limited.

This case is also to that extent different from the facts which related to the judgment of the Court of Justice in the *Hirsch* [5] Case, to which the Bundesverwaltungsgericht refers. That case concerned the question whether and to what extent declarations of intent to be made under Community law may be cancelled on the ground of error in accordance with the rules of national law. However, an error, unlike cases of *force majeure*, is based on subjective failure and originates in an area in which the person concerned is himself responsible. As there is to this extent a danger of fraudulent dealings, the Court of Justice ruled in that judgment *inter alia* that an application for the grant of an import licence could not be cancelled on the ground of error.

If it must therefore be accepted that the exceptions, narrowly-defined and limited to cases of *force majeure*, do not in principle jeopardize the reliability of the licensing system, it is to that extent unimportant whether the period of validity of licences is extended before or

1 — Judgment of 30 January 1974 in Case 158/73, *E. Kampffmeyer v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1974] ECR 101.

2 — Judgment of 28 May 1974 in Case 3/74, *Einfuhr- und Vorratsstelle für Getreide und Futtermittel v Firma Wilhelm Pfutzenreuter*, [1974] ECR 589.

3 — Judgment of 17 December 1970 in Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, [1970] ECR 1125.

4 — Judgment of 11 July 1968 in Case 4/68, *Firma Schwarzwaldmilch GmbH v Einfuhr- und Vorratsstelle für Fette*, [1968] ECR 377.

5 — Judgment of 12 December 1978 in Case 85/78, *Bundesanstalt für landwirtschaftliche Marktordnung v Jacob Hirsch & Sohne GmbH*, [1978] ECR 2517.

after its expiry. Moreover, as the plaintiff rightly points out, it may also be deduced that such an *ex post facto* extension is permissible, from Article 36 (2) of Commission Regulation No 3183/83 of 3 December 1980 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 1980, L 338, p. 1), which is now in force; that provision provides that a request to extend the period of validity of a licence may be made up to 30 days after the expiry of the licence. If however even the request for an extension may be made after the expiry of the licence, then the subsequent decision on that request may also be adopted *ex post facto*, with the result that the extension then applies retroactively to the period between the expiry of the licence and the decision on the request for an extension.

(b) Moreover, if an *ex post facto* extension of the period of validity of the export licence were to be rejected, the legal protection of the licence-holder concerned would be totally inadequate. In that case, as the court making the reference, the plaintiff in the initial action and the Commission all rightly stress, the claims by licence holders under Article 9 of the regulation in question for an extension of the period of validity of a licence could not in practice succeed in the face of a refusal on the part of the competent administrative authority because they, unlike claims for release of a deposit, are normally extinguished by lapse of time before it is possible for the issue to be determined by the courts. In such a case interim measures are also of little assistance as in practice they would anticipate the decision on the main issue, and furthermore the exporter would run the risk of effecting the export on a very uncertain legal basis since the final decision on legality is not taken until later.

Finally, the remedy of damages would also not always enable the persons concerned to obtain their rights, as under national law claims for damages are to some extent available against national authorities only in so far as they have acted wrongfully. However, in cases of *force majeure* such wrongful conduct would be difficult to prove.

In addition, against a reference of the persons concerned to the possibility of claiming damages under national law it must be remembered that damages would then be payable out of the national budget or by the official concerned, whereas the forfeiture of the security and the reduction in the amount of the export refund would benefit Community finances.

Finally, a purely declaratory judgment to the effect that the authority was bound to extend the licence at the time at which the request was made would no doubt result in the release of the wrongly-forfeited deposit but would not mean that the refund fixed in advance would also be paid to the person concerned since the goods were exported under the substitute licence.

Therefore, since the grounds relating to the legal protection of the licence-holder are of such importance and an *ex post facto* extension will not appreciably affect the reliability of the licensing system, an extension of the licence under Article 9 (1) of Regulation No 473/67 even retroactively should be regarded as permissible.

2. However, because such an *ex post facto* extension of the first licence is, as has already been stated, of value for the person concerned only if it is at the same time possible to cancel *ex post facto* the second licence, on the basis on which the goods were exported, the further question arises of the legal basis for such cancellation. It cannot be disputed that Article 9 of Regulation No 473/67 is not directly applicable in such a case as the second licence has not remained unused by reason of *force majeure*.

Whilst the Bundesanstalt für landwirtschaftliche Marktordnung, in the interests of the proper functioning of the licensing system, in this respect too opposes a wide interpretation, the Commission proposes that an obligation should be established on the part of the national authority to cancel the second licence by an analogous application of the provisions of Article 9 (1) (a) and (3) of the regulation in question which provide that circumstances other than those referred to in paragraph (2) may be recognized as cases of *force majeure*.

In view of the considerations set out above, I take the view that here too the Court of Justice should follow the Commission's proposal and make it clear that by an analogous application of the provisions cited the second licence must be cancelled. In this regard it must be borne in mind that that licence was requested only because the predecessor in office of the Bundesanstalt für landwirtschaftliche Marktordnung wrongly refused to extend the first licence in a case of *force majeure*. To that extent the refusal too must be regarded as an event outside the control of the plaintiff which has arisen as a result of the case of *force majeure*, the occurrence and consequences of which it could not avoid despite all the care which might reasonably be expected of a prudent and diligent trader. Here again it was a question of circumstances outside the control of the licence-holder, which will therefore not be very common. The negative effects on the working of the licensing system resulting from a cancellation of the licence will therefore also remain within narrow limits, whereas the cancellation on the other hand appears necessary in order to ensure effective legal protection for the persons concerned. In addition, since the derogative provision applicable to cases of *force majeure* contained in Article 9 (1) of the regulation in question is based on *considerations of equity*, I should have no hesitation in establishing an obligation to cancel the second licence by an analogous application of that provision.

3. In conclusion I therefore propose that the Court of Justice should answer the question put to it by the Bundesverwaltungsgericht as follows:

The period of validity of an export licence for which the refund has been fixed in advance may be extended under Article 9 (1) of Regulation No 473/67/EEC of the Commission of 21 August 1967 even after the expiry of its period of validity where the competent authority has wrongly refused to grant an extension in due time and where as a result it has been necessary for the export to be effected on the basis of a fresh licence. In that case the licence issued later must be cancelled.