such behaviour in the light of factual circumstances.

4. Where an import licence is lost, a request for cancellation and release of the security may be submitted after the period of validity of the licence has expired.

In Case 158/73

Reference to the Court under Article 177 of the EEC Treaty by the Verwaltungsgericht of Frankfurt-on-Main for a preliminary ruling in the action pending before that court between

FIRMA E. KAMPFFMEYER, Hamburg,

and

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

on the interpretation of Regulation No 1373/70 of the Commission, dated 10 July 1970, on common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products subject to a single price system (OJ L 158, 20. 7. 1970, p. 1).

THE COURT

composed of: R. Lecourt, President, M. Sørensen, President of Chamber, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher and C. Ó Dálaigh (Rapporteur), Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

The facts of the case, the subject matter of the request and the views of the parties may be summarized as follows:

I — Facts and procedure

1. The plaintiffs in the main action, a

firm of importers in Hamburg, received from the defendant in the main action, in response to their application, an import licence dated 15 June 1972, valid until 31 October 1972, in respect of 2 000 metric tons of wheat bran pellets.

The plaintiff firm used the licence in the first instance for imports totalling 820 960 kg, and then sent it by registered post on 17 October to the firm of Peterson's Havenbedrijf N.V., in Rotterdam, which was to carry out a penultimate importation of 66 460 kg.

Immediately after customs clearance Peterson's were to send the certificate by express delivery to the firm of Bachmann in Bremen for the final importation.

On 24 October the plaintiffs drew Peterson's attention to the imminent expiry of the period of validity of the licence, and the obligation resting with Bachmann to carry out the importation of the remaining quantity in time.

Peterson's, after having had a quantity amounting to 63 960 kg endorsed on the licence on 19 October, allegedly dispatched it by ordinary post to Bachmann on 25 October, but the licence never arrived at its destination. The plaintiffs, treating it as lost, applied to the defendant on 16 November 1972 for the issue of a duplicate.

The defendant, after issuing this duplicate, declared security in the sum of 11 408·66 DM deposited by the plaintiffs to be forfeit, by reason of the imports falling below the amount fixed to the extent of 1 039 040 kg. The defendant claimed that according to Article 15 (4) of Regulation No 1373/70 of the Commission the loss of a licence does not in any circumstances constitute a case of *force majeure,* that a duplicate does not authorize importation, and that the risk of loss of a licence rests with the titular holder. The deposit lodged by the plaintiffs was released *pro rata* in respect of the quantities actually imported, and the amount corresponding to the quantities not imported was declared forfeit.

2. The following are the relevant legal provisions:

Regulation No 120/67 of the Council, dated 13 June 1967, on the common organization of the market in cereals, requires, under Article 12 (1), the submission of a licence in respect of all imports of cereals into the Community, such licence being issued to importers by the Member States. The issue of such a licence is conditional upon the lodging of a deposit guaranteeing that importation will be effected during the period of validity of the licence; the deposit is forfeit in whole or in part if the transaction is not effected, or is only partially effected, within this period.

Detailed rules for implementation were laid down by the Commission in Regulation No 1373/70, dated 10 July 1970, which provides that an import licence shall authorize and require the importation, under that licence, of the net quantity of the product during the period of validity of the licence.

Article 15 provides that upon loss of a licence it is possible for a duplicate to be issued but that the duplicate may not be submitted for purposes of effecting import transactions.

Finally, where importation cannot be effected during the period of validity of the licence as a result of *force majeure,* Article 18 (1) provides that, at the request of the titular holder, the State may decide that the obligation to import is cancelled, the security being released.

The parties were at variance on the following points: whether the loss of the licence cancels the obligation to import; whether the duplicate constitutes a licence or merely serves to release the deposit on the basis of the customs endorsements; and whether the element of release provided by a case of *force majeure* can be relied upon in the event of loss of a licence.

3. The plaintiffs appealed to the Verwaltungsgericht of Frankfurt-on-Main against the defendant's decision

and that court decided to suspend the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling, in accordance with Article 177 of the EEC Treaty:

I. Is Article 2 (1), first sentence, in conjunction with Article 15 (4) of Regulation No 1373/70/EEC of the Commission, to be interpreted as meaning that when an import licence is lost, not only does the right to import lapse but also the obligation to do so, with the result that the security must be released, or that when the import licence is lost the right lapses but the obligation remains, with the result that the security is forfeit?

II. (a) Is the loss of the licence a case of *force majeure* within the meaning of Article 18 of Regulation No 1373/70 of the Commission?

(b) Does it constitute compliance with the duty of care expected of a reasonably diligent trader in the context of his activity within the Community if he sends a licence by ordinary post?

(c) Can a request be made under Article 18 (1) of Regulation No 1373/70 of the Commission even after the period of validity of the licence has expired?

4. The order of the Verwaltungsgericht of Frankfurt-on-Main was registered at the Court of Justice on 7 August 1973.

The plaintiffs and the Commission of the European Communities submitted written observations in accordance with the provisions of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

After hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to open the oral procedure without any preparatory enquiry.

II — Written observations submitted to the Court in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of European Economic Community

(a) On the first question put by the Verwaltungsgericht

In the Commission's view, the duplicate merely affords the party concerned a means of proof securing the partial release of the deposit in proportion to the quantities already imported, and cannot under any circumstances produce the same consequences as attached to the original document.

The Commission does not believe that the obligation to import is so closely linked to the right to import that the one is extinguished with the other, and that therefore the security must be released since no reason or justification remains for it.

In fact, as regards the licence holder, the loss of the right to import, bound up with the obligation undertaken, in no way entails the extinction of the legal relation created. An example of this is afforded by the fact that, under Article 15 of Regulation No 1373/70, when the obligation to import is not fulfilled within the fixed period, the existence of this legal relationship entails the forfeiture of the security.

The copy of the licence issued to the applicant does not in itself constitute or create a right or an obligation to import but is merely a method of proof, the loss of which has no direct bearing on the legal situation of the party concerned.

The theory according to which the licence represents the right and the obligation to import, so that their very existence depends upon that of the document, does not allow of the satisfactory solution of the most frequent cases of loss of licence.

For example, where the holder cannot find the licence although it is certainly still in his possession, this theory would entail the extinction of all the rights deriving from the licence and the suppression of the levy fixed therein.

Further, the holder of a licence can voluntarily give up the right to import by transferring the document to third parties; but he does not thereby obtain release from his obligation to import. According to Article 3 of Regulation No 1373/70 this obligation still rests with the titular holder even though he may no longer have the right or the opportunity to use the licence.

The Commission believes that the position cannot be any different in a case of loss.

The real question is in fact to determine whether the deposit should be released or forfeit. The licence holder who has lost his licence is in the same position as the holder who still possesses the licence but no longer has any goods, because, for example, these have been destroyed.

The Commission therefore suggests the following reply:

— the loss of Copy No 1 of the import licence issued to the applicant does not entail the automatic extinction of the right to import endorsed thereon, nor of the obligation to import associated therewith;

— the rule under which the security is forfeit in whole or in part if the importation is not effected within the period of validity applies also in the event of loss of a licence.

The plaintiffs in the main action maintain that the problem of the loss of a licence is not fully covered by any legislative provision.

Article 15 of Regulation No 1373/70 is silent as to the actual legal consequences of the loss of a licence. This article merely provides implementing rules. It cannot therefore be inferred *a contrario* from the second sentence of paragraph 4 that the obligation to import survives, paragraph 4 being limited to providing that the duplicate does not authorize importation (its sole function being to replace the original as proof of imports already carried out).

The first paragraph of Article 2, under which the licence authorizes *and* requires importation, places the importer in an impossible position in the event of loss of a licence: the original does not authorize importation since the importer no longer has it in his possession, nor does the duplicate authorize importation since Article 15 (4) forbids this.

But the right and the obligation are extinguished simultaneously since they are inseparable. The security is consequently released since its sole purpose is to guarantee the undertaking, that is to say the fulfillment of the obligation.

The plaintiffs are of the opinion, however, that the principle of release of the deposit applies only in cases where the loss of the licence is not due to any fault on the part of the importer.

The plaintiffs accordingly submit that, a least in cases where the importer is not responsible for the loss, the loss of an import licence entails the cancellation not only of the right to import but also of the obligation to do so, with the result that the deposit must be released. The question of determining whether the loss is or is not the fault of the importer is a matter for the national court to decide.

(b) On the other questions of the Verwaltungsgericht

The *Commission* first recalls the general rule under which the deposit is forfeit in proportion to the quantity of goods which could not be imported within the time limit.

There are several objections to applying the exceptional procedure provided under Article 18.

Force majeure does not in fact apply except in cases where importation within

the time limit has been rendered impossible because, for example, the goods have-deteriorated. Article 15, by allowing the interested party to obtain a duplicate but not a second licence equivalent to the original, disposes of the matter conclusively without leaving room for any exception. Otherwise the door would be open to serious speculation as to levies fixed in advance, or even to the 'loss' of a licence by a titular holder wishing to avail himself of a circumstance of *force majeure.*

Nevertheless the Commission concedes that the present text of Regulation No 1373/70 is equally open to a less strict interpretation, according to which Article 15 (4) does not absolutely prohibit the application of the exceptional procedure provided for cases of *force majeure,* and Article 18 does not expressly preclude the loss of the licence being included as a case of *force majeure.*

However, all the conditions necessary for recognizing the existence of *force majeure* must be fulfilled beyond all possible doubt, according to the definition given in the case law of the Court (Cases 4/68, *Firma Schwarzwaldmilch GmbH v Einfuhr und Vorratsstelle für Fette,* Rec. 1968, p. 549, and 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr und Vorratsstelle für Getreide und Futtermittel,* Rec. 1970, p. 1125).

The Commission is of the opinion that there should not be *force majeure* unless 'abnormal difficulties beyond the importer's control' have prevented him from effecting the importation within the time limit, and that this circumstance could not 'be avoided despite all possible care being taken except at excessive cost' (cases cited).

Finally the Commission considers that a request for the recognition of circumstances of *force majeure* can be submitted even after the period of validity of the licence has expired. In fact, the problem is to determine the maximum period which may be allowed to intervene between the time the obstacle to importation arises and the time the request is submitted, once the titular holder definitely knows he will no longer be able to adhere to the original time limit. This period should be very brief, so that the competent authority can make decisions based on information as recent and as easily verifiable as possible and so that there may be no doubt as to the impossiblity of adhering to the original time limit in order to avoid any speculative action.

The Commission suggests the following reply:

— the text of Regulation No 1373/70 does not entirely exclude the possibility of investigating whether cases in which loss of the import licence has prevented adherence to the time limit set for importation can be considered as cases of *force majeure,*

— in the absence of any evidence of fraud, the request for recognition of the existence of a case of *force majeure* may be submitted after the expiry of the period of validity of the import licence.

The *plaintiffs* emphasize that up to the present, within the framework of Article 18, the Court has only had to decide cases in which the inability to effect importation derived from the product itself.

Article 18 does not give an exhaustive list of the various circumstances capable of constituting *force majeure.* The case law of the Court has not limited the concept of *force majeure* to absolute impossibility. If this case law is applied here, the loss of the licence, in so far as no blame attaches to the importer, also constitutes a case of *force majeure.*

In the plaintiffs' view, the contention that a trader only complies with the duty of care incumbent upon him if he sends the licence by registered post can only be upheld if this is current practice and if dispatch by registered post constitutes a

complete safeguard against the loss of the letter.

No blame can attach to the plaintiffs' agent for acting in the same way as the competent national authorities, especially since the Court left to the latter the choice of ways and means of dispatch (Case 61/72, *Mij PPW internationaal NV v Hoofdproduktschap voor Akkerbouwprodukten*, [1973] E.C.R., 301)

According to national and international conventions and regulations the purpose and effect of dispatch by registered post is restricted to making available a limited right to claim damages or breach of warranty against the postal authorities in respect of the loss of any letter so dispatched, and to providing proof for those whom it may concern that the letter was sent or received. It follows from this that a registered letter is treated no differently from an ordinary letter in the course of its transit through the post.

Finally the plaintiffs stress that it suffices that the authorities be informed of the impossibility of effecting importation, so that they may correct their assessments of market trends and release the deposit. The law providing that a request for extension may be made even after the expiry of the period of validity fixed initially entails as a necessary corollary that a request for cancellation of the obligation to import can also be submitted after the expiry of the period of validity. The request cannot be postponed indefinitely, but this can never be so in a case of loss of the licence, since the request for the issue of a duplicate to evidence imports already effected serves to inform the authorities of the event which entails the extinction of the obligation to import and the release of the deposit.

The plaintiffs therefore suggest the following answers to the second question:

— the loss of a licence, if independant of fault, is a case of *force majeure* within the meaning of Article 18;

— the importer discharges the duty of care expected of a reasonably diligent trader in the context of his activity within the Community even in a case where he sends a licence through the post by ordinary mail;

— the request provided for under Article 18 can be submitted even after the period of validity of the licence has expired.

The oral procedure was opened on 27 November 1973.

The plaintiffs were represented by Barbara Festge, associate of Dr Fritz Modest, both advocates of the Hamburg bar, and the Commission of the European Communities was represented by its Legal Adviser, Peter Kalbe, acting as agent.

The Advocate-General presented his opinion at the hearing on 13 December 1973.

Grounds of judgment

1 By order dated 27 June 1973, registered at the Court on 7 August 1973, the Verwaltungsgericht of Frankfurt-on-Main referred several questions pursuant to Article 177 of the EEC Treaty on the interpretation of Regulation No 1373 of the Commission, dated 10 July 1970, on common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products subject to a single price system (OJ L 158, of 20 July 1970, page 1).

The main action is an appeal against a declaration of forfeiture of deposit in an amount corresponding to the quantity of bran not imported by the plaintiffs, made on the ground that the loss of an import licence following dispatch by non-registered letter does not constitute a case of *force majeure*, the risk of such loss falling upon the holder of the licence.

2 Regulation No 120/67 of the Council, dated 13 June 1967 (OJ No 117 of 19 June 1967, p. 2269), which is the basic regulation on the common organization of the market in cereals, states in the 13th recital of its preamble that 'the competent authorities must be in a position constantly to follow trade movements in order to assess market trends and to apply the measures laid down in this Regulation as necessary'.

Article 12 of the same Regulation provides that 'imports into the Community or exports therefrom . . . shall be subject to the submission of an import or export licence . . . the issue of such licences shall be conditional on the lodging of a deposit guaranteeing that importation or exportation is effected during the period of validity of the licence; the deposit shall be forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period'.

With regard to the first question

3 The first question posed is whether Article 2 (1), first sentence, in conjunction with Article 15 (4) of Regulation No 1373/70/EEC of the Commission must be interpreted as meaning that when an import licence is lost, not only does the right to import lapse but also the obligation to do so, with the result that the security must be released, or as meaning that when the import licence is lost the right lapses but the obligation remains, with the result that the security is forfeit.

4 Article 2 (1) of implementing Regulation No 1373/70 provides that 'an import licence shall authorize and require the importation . . ., under that licence, of the net quantity of the specified product during the period of validity of the licence . . .'

Article 15 (2) states that 'release of the security shall be subject to production of proof . . ., as regards imports, of completion of the customs formalities'.

Paragraph 4 of the same Article provides that 'where a licence or extract from a licence is lost, issuing agencies may, exceptionally, supply the party concerned with a duplicate thereof . . . (which) may not be submitted for purposes of effecting import transactions . . .'

According to the terms of Article 16 (2) 'where the obligation to import or export has not been fulfilled the security shall be forfeit'.

Article 18 (1), however, provides that 'where, as a result of *force majeure,* import or export cannot be effected during the period of validity of the licence or certificate, the Member State issuing the licence or certificate shall decide, at the request of the titular holder, either that the obligation to import or export is cancelled, the security being released, or that the period of validity of the licence or certificate is extended for such period as may be considered to be necessary in view of the circumstances invoked . . .'

5 It is apparent from these provisions that the system of lodging deposits is intended to ensure completion of the imports and exports for which licences or certificates are requested, so that both the Community and the Member States may be certain of knowing exactly what transactions are intended.

In view of the obligation imposed on Member States by Article 12 of the basic Regulation No 120/67 to issue import and export licences to any applicant, any forecast would be meaningless if the licences did not impose on recipients an obligation to act in accordance therewith.

The system established pursuant to the principles contained in the basic Regulation No 120/67 by the implementing Regulation No 1373/70 releases traders from their undertaking only in cases where the import or export transaction cannot be carried out during the period of validity of the licence as a result of a case of *force majeure.*

6 The answer to the first question therefore should be that Articles 2 (1) and 15 (4) of Regulation (EEC) No 1373/70 of the Commission must not be interpreted as meaning that loss of an import licence automatically entails the lapse of the obligation to import created by its issue.

With regard to the first part of the second question

7 The first part of the second question asks whether the loss of the licence constitutes a case of *force majeure* within the meaning of Article 18 of Regulation No 1373/70 of the Commission.

8 Since the concept of *force majeure* differs in content in different areas of the law and in its various spheres of application, the precise meaning of this concept has to be decided by reference to the legal context in which it is intended to operate.

Any interpretation of the concept of *force majeure* employed in the Regulation in issue must therefore take account of the special nature of the relationships at public law existing between the importers and the national administration, as well as of the objectives of that Regulation.

It is apparent from these objectives, as well as from the actual provisions of the regulations in question, that the concept of *force majeure* is not limited to cases of absolute impossibility.

9 The public interest, which requires as accurate a forecast as possible of import trends in each Member State and justifies the deposit of security against the grant of authorization to import, must be reconciled to the necessity of not hampering trade between States by too rigid obligations, a necessity which also derives from the public interest.

The threat of forfeiture of security is intended to encourage the fulfillment of the obligation to import by importers enjoying the authorization and thus to ensure the accurate forecasting of import trends required by the general interest mentioned above.

It follows that, in principle, an importer who has exercised all reasonable care is released from the obligation to import when external circumstances render it impossible for him to complete the importation within the period of validity.

10 The answer to the first part of the second question should therefore be that the loss of such an import licence constitutes a case of *force majeure* within the meaning of Article 18 of Regulation No 1373/70 when such loss occurs

despite the fact that the titular holder of the licence has taken all the precautions which could reasonably be expected of a prudent and diligent trader.

With regard to the second part of the second question

11 The question is then asked whether a reasonably diligent trader fulfills his duty of care within the context of his activity within the Community if he sends a licence by ordinary post.

12 This question seeks to have established the standard of care that can reasonably be expected of a prudent and diligent trader.

In the absence of any express provision of community law, it is for the national court to say whether such a trader has or has not exercised all reasonable care, bearing in mind the circumstances of the case.

This is not a question of interpretation but one of application, reserved for the national court.

13 The answer should therefore be that it is for the competent national court to decide, after weighing all the factual circumstances in which the trader was placed, whether the titular holder of a licence has acted as a prudent and diligent trader.

With regard to the third part of the second question

14 Finally, the question is asked whether a request made pursuant to Article 18 (1) of Regulation No 1373/70 may be submitted after the period of validity of the licence has expired.

15 The provisions of Article 18 (1) concern requests for extension of the period of validity of the licence as well as requests for cancellation of the obligation to import or export and for release of the security.

The said paragraph expressly provides that such extension may be granted after the expiry of the period of validity of the licence, but remains silent with regard to requests for cancellation and release of security.

Since the loss of a licence may occur at a date close to the expiry of the period of validity of the licence, the importer might be prevented from submitting his request before the expiry of that period.

Further, the importer may not even have notice of the occurrence until after that date.

16 Thus, in the absence of any provision in the Regulation, such a request may be submitted after the period of validity of the licence has expired.

The answer to the third part of the second question should therefore be in the affirmative.

Costs

17 The costs incurred by the Commission of the European Communities, which has submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision as to costs is 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 plaintiffs in the main action and of the Commission;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulation (EEC) No 1373/70 of the Commission, dated 10 July 1970, especially Articles 2 (1), 15 (4) and 18;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;

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 Verwaltungsgericht of Frankfurt-on-Main by order of that court dated 27 June 1973, hereby rules:

1. Articles 2 (1) and 15 (4) of Regulation (EEC) No 1373/70 of the Commission must not be interpreted as meaning that the loss of an import licence automatically entails the lapse of the obligation to import created by its issue.

2. The loss of an import licence constitutes a case of *force majeure* within the meaning of Article 18 of Regulation No 1373/70 when such loss occurs despite the fact that the titular holder of the licence has taken all the precautions which could reasonably be expected of a prudent and diligent trader.

3. It is for the competent national court to decide, after weighing all the factual circumstances in which the trader was placed, whether the titular holder of a licence has acted as a prudent and diligent trader.

4. A request made pursuant to Article 18 (1) of Regulation No 1373/70 may be submitted after the period of validity of the licence has expired.

Lecourt	Sørensen	Monaco	
Mertens de Wilmars	Pescatore	Kutscher	Ó Dálaigh

Delivered in open court in Luxembourg on 30 January 1974.

A. Van Houtte	R. Lecourt
Registrar	President