OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 25 JANUARY 1979 [1]

Mr President,
Members of the Court,

In the reference for a preliminary ruling with which we have to deal today an interpretation is required of the concept of "day of importation" contained in Article 15 (1) of Regulation No 120/67 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33), on which the rate of import levy depends.

In the early part of 1975 the appellant in the main action imported maize and maize pellets from the United States of America into the Netherlands. For this purpose it chartered a ship and gave instructions that it should leave New Orleans at the latest at 6 in the morning of 14 February 1975. The appellant wished to ensure in this way that the importation into Rotterdam would take place at the latest on 28 February 1975, that is to say at a time at which a lower rate of levy would apply than on 1 March 1975. For that reason it was impossible to use the whole capacity of the ship so that the appellant had to pay the shipping line 30 000 guilders as dead freight.

However, the transportation of the goods and their arrival in Rotterdam met with various difficulties which frustrated the realization of the original time-table for importation. Thus the departure of the ship was delayed by thick fog. A further delay arose from the fact that the ship approached the South-West Pass, which may only be used in daylight, only towards five in the evening. At Europoort, Rotterdam, it was only possible for the appellant's shipbroker, who had been informed 72 hours in advance of the arrival of the ship, to be allotted Buoy No 3. The departure of another ship berthed there, which had been expected to take place in the morning of 28 February 1975, was however repeatedly delayed owing to engine trouble. For that reason the ship chartered by the appellant had to lie at anchor outside the harbour breakwater and was able to enter harbour on 28 February only after 9.15 p.m.; it was fully moored at Buoy No 3 by 1.15 a.m. on 1 March.

As regards the import formalities, a corn factor, who was due to carry out the customs formalities on behalf of the appellant, had submitted the import forms on 27 February 1975 and on 28 February had issued the import declaration, which was also stamped for that date. In addition when the ship entered harbour at about 11.30 p.m. on 28 February a customs official came on board. On the same day he accepted the general customs declaration and affixed the words "Inspected for entry" which, under Netherlands law, places the goods under a general customs procedure although customs examination is not to be regarded as having been effected.

When the import forms were subsequently forwarded to the Hoofdproduktschap voor Akkerbouwprodukten, the respondent in the main action, the customs authorities stated however that 1 March 1975 was the day of importation. Since the Hoofdproduktschap was

1 — Translated from the German.

also of the opinion that both under Netherlands law and Community law 1 March 1975 was to be regarded as the day of importation, it accordingly charged the higher levy valid as from 1 March 1975.

The appellant refers to the fact that the customs declaration on importation and the other import forms had been accepted by the customs on 28 February and that on that day a customs officer accepted the general customs declaration on board the ship chartered by the appellant; it therefore takes the view that the day of importation within the meaning of Article 15 of Regulation No 120/67 can only be 28 February 1975. The appellant therefore claimed from the Hoofdproduktschap an appropriate reduction in the levy and when this had been refused brought an action for the repayment of a portion of the levy paid by it.

The College van Beroep voor het Bedrijsleven, before which the matter came, took the view in considering the matter that national law provided no support for the view that only 1 March 1975 could be regarded as the day of importation. With reference to Community law it is not quite clear how in a case such as this one the day of importation is to be defined. By a judgment of 2 May 1978 it therefore stayed the proceedings and asked the Court of Justice to give a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

1. Does it follow from a proper interpretation of Article 15 of Regulation No 120/67 that in no circumstances can a day before the date on which the products in question are brought to a place which is accepted by the customs department charged with receiving the import declarations and the other import documents be regarded as the "day of importation" within the meaning of Article 15 (1)?

2. If that question must be answered in the negative does it follow from a proper interpretation of Article 15 (1) of Regulation No 120/67 that the "day of importation" is to be or can be taken to be the day on which, in respect of goods transported by ship, both a general declaration is issued by the customs by virtue of which the products are classified as goods which have entered the country and are subject to customs supervision and on which the customs declarations and other import documents have also been accepted by the customs in a situation in which the products were not brought to the place referred to in Question 1 exclusively and solely because that place was not available for extraneous reasons which cannot be ascribed to the importer or its agents?

The position appears to be as follows.

1. With reference to the first question the relevant case-law must first be recalled. The question how the "day of importation" within the meaning of Article 15 of Regulation No 120/67 is to be defined was decided in Case 113/75 (*Giordano Frecassetti* v *Amministrazione delle Finanze dello Stato*, judgment of 15 June 1976, [1976] ECR 983) to the effect that it depends on the day on which the customs department accepted the declaration whereby the importer shows his intention to release the goods to the market. This acceptance may not take place until the goods have reached the place prescribed by the customs for the process of customs clearance.

It is accordingly clear that in cases in which acceptance of the import declaration precedes the arrival of the goods at the above-mentioned place,

only the latter-mentioned period has any significance. Furthermore the judgment confirms the opinion of the Commission in accordance with which the concept of "day of importation" which is of significance for the levy is to be defined as being closely dependent on customs law. This is made clear by a look at the Council Directive of 30 July 1968 on harmonization of the provisions laid down by law, regulation or administrative action relating to: 1. Customs treatment of goods entering the customs territory of the Community; 2. Temporary storage of such goods (Official Journal, English Special Edition 1968 (II), p. 416). Article 2 of that directive runs as follows:

"All goods entering the customs territory of the Community . . . shall be subject to customs control.

They shall immediately be conveyed, by the route designated by the competent national authorities, to a customs office or other place designated by those authorities and under the supervision of the customs authorities."

Furthermore in Article 4 of the directive on the subject of the summary customs declaration to be lodged for the goods mentioned in Article 2, it is stated that this declaration is to be lodged immediately by the person responsible for the goods or by his agent, but that the competent national authorities may fix a time-limit for lodging of the declaration of not more than 24 hours after arrival of the goods at the customs office or place referred to in Article 2 (2).

It follows therefore that for the purpose of customs clearance — and that is what is significant for the "day of importation" — the goods must actually be present and that the customs authorities must be in a position to inspect them and thus to carry out the necessary check. It is also obvious that in this respect it is not possible to dispense with objective criteria. This is required by legal certainty and the consideration that only in this way can the possibility of speculation, which would otherwise exist for importers, can be excluded.

Admittedly it must be added that Community law does not lay down with absolute precision a point of time which is decisive for import. As we have seen, it lays down only the requirement that the goods shall be brought to a place designated by the customs authorities and under their supervision. This plainly leaves a certain scope for national provisions and national administrative practice. This doubtless covers the conception of the Netherlands customs authorities to the effect that in the case of imports from non-member countries by sea reference must be made to the complete berthing of the ship. However, other equally objective criteria are conceivable. Apparently it is by reference to such criteria, according to the statements of the appellant, that other Member States determine when imported goods are present for customs, namely with the entry of a ship into the waters of the harbour, which is also to be entered in the log book, at which stage pilots and customs officers frequently are taken on board. In actual fact there is no reason why this should exclude a sufficiently effective customs control. At any event it does not seem clear that for the needs of the customs authorities in imports by sea it is the mere mooring of the ship which is important — and this moreover, as we have seen, may be variously understood — and in particular mooring to a buoy from which in certain

circumstances a ship cannot be unloaded at all.

In my view it is not possible to say any more than this from the point of view of Community law in answer to the first question put by the College van Beroep voor het Bedrijfsleven.

2. We still have to inquire whether, if the goods imported cannot be brought to the place specified by the customs because it is not available for reasons not ascribable to the importer, the day of importation may be reckoned to be the date on which the customs administration has delivered the general declaration according to which the goods are to be regarded as imported under a customs procedure and has also accepted the import declaration and the other import papers. We therefore have to consider whether circumstances which may be regarded as *force majeure* or comparable phenomena can influence the definition obtained of the concept of "day of importation".

In this connexion one is tempted at first sight to start from the observation made in connexion with the first question, namely that, as regards the determination of the time of importation, Community law leaves the national customs administrations a certain scope. This certainly makes it possible to a certain extent to take into account also circumstances such as those referred to in the second question. Thus it is conceivable that in such a situation the customs might, deviating from their normal practice, which requires final berthing of the ship at the place at which it is to be unloaded, with corresponding customs supervision, regard it as sufficient if the goods are present in the customs area and a certain customs check is possible. This might perhaps be accepted from the time at which the ship with the imported goods on board has entered the harbour of importation and has on board customs officers who, even if they are not competent to carry out the customs inspection and to undertake clearance into free circulation, are nevertheless authorized to accept the general customs declaration with which the goods become subject to customs control and are put under a customs procedure. In my opinion it would be hard to accept that the customs would be overstretched in taking into consideration unusual situations such as those in the main action. Actually the issue does not involve — at least according to the way in which the questions have been put — situations lying a considerable way back in the past, a check on which might also be rendered more difficult for reasons of distance in space, quite apart from the fact that the authorities in the country of importation, in connexion with the forfeiture of the deposit, also have to take into consideration all possible circumstances of *force majeure* which also do not fully exclude the risk of an abuse.

Furthermore according to the explanations which have been made during the proceedings it has also been made clear that from the point of view of Community law there is no ground for supplementing or amending the concept of "day of importation", as already determined, with reference to cases of *force majeure.*

In contrast to Case 6/78 (*Union Française de Céréales* v *Hauptzollamt Hamburg-Jonas,* judgment of 11 July 1978, [1978] ECR 1675), which dealt with accession compensatory amounts for goods lost in transport which were to have been exported to one of the new Member States and a guarantee of

Community preference for this purpose, it is not possible in the present case actually to speak of a lacuna in Community law which should be filled by the application by analogy of provisions regarding *force majeure.* One's thoughts go rather to the judgment in Case 68/77 *(IFG-Interkontinentale Fleischhandelsgesellschaft mbH & Co. KG v Commission of the European Communities,* judgment of 14 February 1978, [1978] ECR 354) and what it has to say with regard to the application by analogy of Article 20 of Regulation No 193/75 (Official Journal 1975, L 25 of 31 January 1975, p. 10) — a provision dealing with the taking into consideration of *force majeure.* According to that judgment the important point is whether given obligations, the breach of which entails the sanction of forfeiture of the deposit, were entered into *vis-à-vis* a competent authority or whether the failure to observe a given time-limit has as its consequence only the application of less favourable rules for import. Obviously we have here an example of the last type of case. In the case of imports there is in general no obligation to act by given dates and if an importation cannot be undertaken by reason of *force majeure* within the period of validity of a licence then according to Article 20 of Regulation No 193/75 this may be prolonged. But, as the Commission rightly stressed, an importer can guard against the risk of a higher levy as a result of later importation by an advance fixing of levy as is provided in Article 15 (2) of Regulation No 120/67.

These considerations actually make it possible to state that there is no ground for having recourse to different or supplementary criteria in relation to the concept of "day of importation" in the even of unusual circumstances such as are present in the main action.

3. Accordingly my view is that the following answers may be given to the reference of the College van Beroep voor het Bedrijfsleven for a preliminary ruling:

The day on which the goods in question were brought to the place designated by the customs administration charged with receiving the import declaration and the other import papers and on which customs supervision becomes possible is to be regarded as the "day of importation" within the meaning of Article 15 of Regulation No 120/67.

Circumstances not attributable to the importer and his servants or agents and which may be regarded as *force majeure* do not alter the position; from the point of view of Community law they cannot have the consequence that an earlier day, on which, in respect of goods transported by ship, both a general declaration is issued by the customs by virtue of which the products are classified as goods which have entered the country and are subject to customs supervision and on which the customs declarations and other import documents have also been accepted by the customs, can be regarded as the day of importation.