# OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 16 JANUARY 1980 [1]

*Mr President,*
*Members of the Court,*

1. The question on which the Court is called upon to deliver a preliminary ruling is concerned with the applicability of the exonerating effect of *force majeure* in the field of monetary compensatory amounts.

The facts of the case may be summarized thus:

In November 1977 the company Butter- und Eier-Zentrale Nordmark, of Hamburg, sold to an English undertaking some 18 tonnes of butter. The selling price was calculated on the basis of the purchase price to the German merchant, from which were deducted the "accession" compensatory amount for the United Kingdom and in addition the monetary compensatory amounts on export from Germany and on import into the United Kingdom. In regard to the last of these, it is necessary to make clear that in relations between the United Kingdom and the Federal Republic of Germany the burden of payment falls upon the exporting State rather than the importing State, such having been stipulated under an agreement within the meaning of Article 2a of Regulation No 974/71 of the Council of 12 May 1971 (subsequently amended by Regulation No 1112/73 of 30 April 1973). Therefore, in the present case all the monetary compensatory amounts would have had to have been paid by the German authorities.

The goods were loaded on 10 November 1977 on board the vessel "Hero" in the Danish port of Esbjerg. Unfortunately, on 13 November the vessel foundered with a total loss of its cargo. The insurance company paid the seller the price of the goods (which had been agreed as cif Manchester) and the German customs authorities remitted to it both the "accession" compensatory amount and the monetary compensatory amount on export; but they declined to pay in addition the monetary compensatory amount on import, maintaining that the latter was not due, since the goods had not arrived at their destination. The company appealed against that refusal to the Finanzgericht [Finance Court] Hamburg. That judicial body, by order of 20 February 1979, stayed the proceedings and referred the following question to this Court for a preliminary ruling:

"Is Article 11 (2) of Regulation (EEC) No 1380/75 of the Commission of 29 May 1975 to be interpreted, by analogy with Article 6 (1) of Regulation (EEC) No 192/75 of the Commission of 17 January 1975, as meaning that, if goods exported from a Member State perish in transit as a result of *force majeure*, the exporter thereof, in the event of the monetary compensation being granted by the exporting instead of the importing State in accordance with Article 2a of Regulation (EEC) No 974/71 of the Council of 12 May 1971, has a claim for payment by the exporting Member State of the same monetary compensation as would have been due to him if the goods had reached their destination and if customs import formalities had been completed there?"

1 — Translated from the Italian.

2. Regulation No 1380/75 of the Commission of 29 May 1975, which lays down detailed rules for the application of monetary compensatory amounts, provides in Article 11 (2) that payment of the monetary compensatory amount on importation is conditional on proof that the customs import formalities have been completed. That Regulation does not contemplate the case in which, although exportation has taken place (the customs export formalities having been completed and the product having left the geographical territory of the Member State from which the exportation took place: cf. Article 10 (1)), it has not been possible for importation to take place because the goods have perished in transit by reason of *force majeure*. It is, therefore, reasonable to inquire how a case of that kind is to be treated.

In my opinion there are three possible alternatives: either the existence in the system of Community law of an exonerating effect attaching to *force majeure* may be affirmed as a general principle which is also appropriate to a solution of the case described, or the provisions of Regulation No 192/75 of the Commission of 17 January 1975 concerning refunds on exports to third countries, which expressly stipulate payment of an export refund in the event of the goods being lost in transit by reason of *force majeure*, may be applied by analogy, or, finally, if the conditions necessary to give rise to an application by analogy are not satisfied, it may be concluded that Regulation No 1380/75 intended that, as regards the payment of monetary compensatory amounts on importation, the risk of the goods being lost in transit should fall upon the importer. It is necessary at all events to point out that if one opts for the third of these solutions, in a case where an agreement envisaged by Article 2a of Regulation No 974/71 has been concluded between the two Member States concerned, the risk of the goods being lost in transit will fall back upon the seller who, not being in a position to show that importation of the goods has taken place, will not be able to claim payment of the monetary compensatory amounts on importation from the customs authorities of the exporting State and who, on the other hand, will receive an insurance indemnity equivalent to the price as previously calculated with such amounts deducted.

3. I believe that there cannot be said to exist, in Community law, any general principle which protects the interests of a person subject to a legal obligation by sheltering him from any detrimental consequence of its non-fulfilment by reason of *force majeure*.

In the case-law of this Court the concept of *force majeure* has been developed by reference to specific provisions of agricultural regulations, applied sometimes directly and sometimes by analogy. However, as I observed in my opinion of 5 December last in the case of *Ferriera Valsabbia and Others*, "the existence of a general principle, begetting a uniform concept of *force majeure* applicable to all sectors of Community law" has not been established. The judgment of this Court of 11 July 1968 in Case 4/68 *Schwarzwaldmilch* ([1968] ECR 377, especially at p. 385) recognized indeed that "the concept of *force majeure* is not identical in the different branches of law and the various fields of application" and accordingly that "the significance of this concept must be determined on the basis of the legal framework within which it is intended to take effect". The judgment of 30 January 1974 in Case 158/73 *Kampffmeyer* ([1974] ECR 102) also confirmed the finding that the concept of *force majeure* has a variable effect by laying down that its meaning "has to be decided by reference to the legal context in which it is intended to operate". Finally, the judgment of 14 February 1978 in Case 68/77 *IFG* ([1978] ECR 353) made reference to the legal systems

of the Member States providing for the relieving effect of *force majeure*, but only in "certain contexts and legal relationships".

From the tenor of the case-law of this Court it must therefore be deduced that there is no general principle of *force majeure* and I maintain the view that there are no valid reasons for adopting a different attitude. From the very fact that certain secondary legislation provides, in relation to particular situations, for exoneration on account of *force majeure*, it appears that the Community legislature has adopted the premise that a general principle is lacking. It may be added that in some cases *force majeure* is relied upon to spare the person subject to an obligation from the penalty arising on his failure to fulfil it; in other cases it is relied upon in order to permit that person to benefit equally from an advantage normally granted on condition that the obligation has been fulfilled. This shows the diversity of the functions which the relieving effect of *force majeure* may perform — a diversity which helps to explain the fact that no general principle has been developed.

4. I now turn to consider the second of the three alternatives indicated above. It involves ascertaining whether there may be applied by analogy to monetary compensatory amounts the provision which, in regard to export refunds for agricultural products, states that the exporter may obtain payment without having to furnish proof of importation into the non-member country of destination when the goods have perished in transit by reason of *force majeure* (Article 6 of the above-mentioned Regulation No 192/75 of the Commission).

In various cases, this Court has considered the possibility of applying by analogy Community rules which prevent a failure to perform certain obligations towards the public administration by reason of *force majeure* from having prejudicial effects for the defaulting trader. In particular, the judgment of 24 June 1970 in Case 73/69 *Oehlmann* v *Hauptzollamt Münster* ([1970] ECR 467) opened the way in principle for this possibility whilst excluding its application in the case in question because of the considerable difference encountered between the two situations which were compared. Thereafter, the judgment of 20 February 1975 in Case 64/74 *Reich* v *Hauptzollamt Landau* ([1975] ECR 261) applied to the system of levies, by way of analogy, the provisions on *force majeure* contained in Article 8 (3) of Regulation No 87/62 of the Commission of 25 July 1962, holding that "the levy fixed in advance under Article 2 (1) and (2) of Regulation No 31/63 of the Council in respect of the importation of maize from a Member State continues to apply to such importation, even if it is not effected during the month indicated in the application for the licence, provided the delay which thus occurred is not due to the conduct of the importer or to

circumstances that can normally be foreseen, but to *force majeure*, as referred to in Article 8 (3) of Regulation No 87/62".

Finally, more recently, the Court has had occasion to apply by way of analogy the provisions of Article 6 (1) of Regulation No 192/75 concerned with export refunds to the subject of "accession" compensatory amounts. The judgment of 11 July 1978 in Case 6/78 *Union Française des Céréales* v *Hauptzollamt Hamburg-Jonas* ([1978] ECR 1675) confirmed that Article 5 (2) of Regulation No 269/73 of the Commission, which makes payment of "accession" compensatory amounts subject to proof of completion of the import formalities, must be interpretd, by analogy with Article 6 (1) of Regulation No 192/75, as meaning that where goods exported from an original Member State to a new Member State had perished in transit as a result of *force majeure* the exporter was entitled to the same compensatory amounts as would have been due to him if the goods had reached their destination and if import formalities had been completed there. The Court reached this conclusion above all on the basis of the principle of Community preference, which had to be observed in trade between the Community as originally constituted and the new Member States before the full and complete integration of the latter into the common organization of agricultural markets. It held that in the event of the goods perishing in transit as a result of *force majeure*, the exporter would suffer a genuine loss if the "accession" compensatory amounts were not paid to him, since the insurance taken out in favour of the purchaser pursuant to the cif contract would cover only the value of the goods in terms of the prices prevailing in the importing country and not in terms of the higher common prices prevailing in the exporting country.

In order to ascertain whether there is any justification for resorting for a second time to Article 6 of Regulation No 192/75 by extending by analogy the exonerating effect of *force majeure* to the field of monetary compensatory amounts also, it appears to me to be appropriate to begin by comparing the respective purposes of export refunds, "accession" compensatory amount and monetary compensatory amounts.

As I had occasion to note in my opinion delivered in the case just cited, *Union Française des Céréales* ([1978] ECR 1675, at p. 1687) refunds are intended to "cover the difference between quotations and prices for those products within the Community and on the world market" (cf. the first recital of the preamble to Regulation No 139/67 of the Council of 21 June 1967); in order to attain that goal it is thought necessary that "provision must be made for varying the amount of the refund according to the destination of the products, since markets in the countries of destination are at varying distances from Community markets and special conditions apply to imports in certain countries of destination" (cf. the fifth recital of the preamble to the aforementioned Regulation). In short, as Regulation No 87/75 of the Council of 13 January 1975 makes clear in its preamble, "the refund constitutes an instrument for permitting the continuation of exports of cereal products towards third countries".

So far as "accession" compensatory amounts are concerned, these were

introduced by the Act concerning the Conditions of Accession and the Adjustments to the Treaties. Articles 51 and 52 of the Act allow the new Member States, during the transitional period, to have a level of prices for agricultural products which is different from that of the common prices. That difference in levels is corrected by means of a system of compensatory amounts which applies in trade between the new Member States and the Community as originally constituted. That mechanism, as the preamble to Regulation No 229/73 explains, has the purpose of ensuring that, despite the difference in price levels, the movement of goods takes place in a satisfactory manner.

Monetary compensatory amounts, finally, came to be introduced as a remedy for the imbalances which have occurred in recent years between the currencies of the Member States. The Court is aware that, as from the time of the devaluation of the French franc in 1969, the exchange rates applied in the framework of the Common Agricultural Policy to the uniform prices fixed in national currency no longer correspond to the rates applied to national currencies on the exchange market. The system of monetary compensatory amounts, introduced by Regulation No 974/71, has the purpose of neutralizing the consequences for the agricultural policy of external monetary factors which reduce the degree of correspondence between the exchange rates used in the agricultural policy and the rates in force on the exchange market. In order to attain that goal, a monetary compensatory amount is fixed for the currency of each Member State in such a way as to compensate for the difference between the different exchange rates.

The three mechanisms which I have briefly described therefore pursue technically different objectives; and yet, looking beyond those differences — which reflect the specific function of each one of them — they present one common, essential characteristic. All three in fact have the purpose of allowing the free movement of agricultural products (between the Community and third countries, between the original Member States and the new Member States, and between the Member States in general, respectively) by removing the obstacles linked to the differences between prices in force on the various markets expressed in national currency, these being obstacles which would adversely affect trade in those products and therefore jeopardize the working of the Common Agricultural Policy.

The presence of this basic common feature is a primary reason for acknowledging the possibility of drawing an analogy, not only between the rules on export refunds and those on "accession" compensatory amounts (as the Court has already done), but also between the former rules and the system of monetary compensatory amounts.

But there is more. If regard is had to the specific function of monetary compensatory amounts, a further ground may there be found for applying the exonerating effect of *force majeure*. It has been noted in fact that those amounts aim to protect intra-Community trade in agricultural products from currency fluctuations. But in cases such as that which we are considering, if the seller could not receive the monetary compensatory amount on importation, he would suffer,

without any fault on his part, a loss directly linked, as effect is linked to cause, to currency fluctuations. On that view of matters then, the system of monetary compensatory amounts would not achieve the results for which it was introduced.

5. However, before agreeing that recourse should be made to analogy in the present case, it is necessary to take a further step and to examine the specific situations provided for in Regulations Nos 192/75 and 1380/75 with the object of checking whether, apart from being found in a general framework which has certain common objectives, they present, in addition, sufficient important similarities.

The said Article 6 of Regulation No 192/75 makes payment of refunds conditional upon proof of the importation of the goods into the third country of destination whenever there is serious doubt as to the true destination of the product or where the product may possibly be reintroduced into the Community by reason of the difference between the applicable rate of refund and the (lower) customs duty falling on the like category of goods on importation into the territory of the Community. Analogous provisions are contained in Article 10 (2) of Regulation No 1380/75 in regard to monetary compensatory amounts. The purpose of both provisions is that of avoiding fraud: Regulation No 192/75 seeks to ensure that an exported product may not re-enter the Community following receipt of the refunds; Regulation No 1380/75 similarly seeks to prevent a product which has been exported to one Member State being imported into a different State following receipt of the compensatory amounts fixed for the State to which the goods had been destined (this operation would be advantageous whenever the compensatory amount for the purported country of exportation was greater than that fixed for the country of actual destination).

It is therefore clear that Regulations Nos 192/75 and 1380/75 (as also Regulation No 269/73 on "accession" amounts) make receipt of the subsidies conditional upon actual importation into the country of destination in order to achieve the same result, namely, that of preventing the commission of fraud.

It is then necessary to ask what is the reasoning behind the express provision in Article 6 of Regulation No 192/75 for exoneration in the event of *force majeure*. Evidently, the Community legislature considered that loss of the goods by reason of *force majeure* obviates the risk of the exported goods fraudulently re-entering the Community territory and, consistently with this premise, it equated destruction in transit by reason of *force majeure* with effective importation. An identical situation may also arise in regard to payment of "accession" amounts, and in that case this Court has already held that the provisions on *force majeure* should be applied by analogy. But there is no doubt that in regard to monetary compensatory amounts also, the destruction of the goods by reason of *force majeure* after exportation obviates the risk of fraud. It would thus make no sense to refuse payment of that part of the amounts which serves to balance out currency fluctuations above the "neutral" level and which is paid, as a rule, by the authorities of the importing State.

These considerations lead me to the belief that the application of the exception on the ground of *force majeure* provided for in Article 6 of Regulation No 192/75 in regard to export refunds must be extended to the system of monetary compensatory amounts. I do not consider that it is sound to advance, as a contrary argument, the risk that acceptance of the exonerating effect of *force majeure* may also give rise to fraud. Such a concern, suggested by the Commission, cannot in my view invalidate the arguments which have been developed and which have led to the identification of a lacuna in Regulation No 1380/75 and to its being made good by means of recourse to another rule designed for a wholly analogous case.

6. Further, it appears to me to be helpful to emphasize the similarity which exists, in regard to the detailed rules for their application, between the system of refunds and that of monetary compensatory amounts. Regulation No 1380/75 of the Commission, which is concerned with the system of compensatory amounts, in fact repeats a whole series of rules which characterize the system of export refunds, namely:

(a) Article 8, in order to determine the rate of compensatory amount to be granted, specifies the manner in which the date of exportation is to be determined and the conditions which must be fulfilled in order for the customs export formalities to be deemed to have been completed.

Those provisions match, almost to the letter, Article 2 of the said Regulation No 192/75 on export refunds.

(b) Article 10 (1) in turn corresponds substantially to the content of the first paragraph of Article 4 of Regulation No 192/75 of the Commission. It provides that payment of the compensatory amount is conditional upon production of proof that the product in respect of which the customs export formalities were completed has left the geographical territory of the Member State in which those formalities were completed.

In this respect I confirm what I have already stressed in my opinion in the *Union Française des Céréales* case, namely, the great importance of the fact that "it thus appears that the two systems in question were guided by the criterion that the exportation of the product constitutes the essential condition for granting the refund or compensatory amount" ("accesssion" amount or ordinary monetary amount).

(c) Article 10 (2) provided, moreover, that payment of the monetary compensatory amount on import was to be conditional on production of proof that customs import formalities had been completed and that the duties and charges having equivalent effect had been charged. This latter condition no longer operates in as much as under Articles 32 and 36 of the Act of Accession customs duties and charges having equivalent effect may no longer be charged after 1 July 1977. In its current scope, the provision just cited finds its equivalent in Article 6 of Regulation No 192/75, which also makes payment of a refund conditional upon the product in question having been imported into a non-member country, albeit only in the two cases indicated therein.

7. Finally, confirmation of the justification for applying by way of analogy the rules on *force majeure* is to be drawn in this case (as in the case of *Union Française des Céréales,* decided by the aforementioned judgment of 11 July

1978) from the principle of Community preference. In this regard, it is to be recalled that the Federal Republic of Germany and the United Kingdom have concluded an agreement, pursuant to Article 2a of Regulation No 974/71, according to which the authorities of the exporting State undertake to pay the compensatory amounts, including the amount arising on import. That being so, if *force majeure* did not have a dispensing effect in the present case or in similar situations, the authorities of the exporting State would not pay the compensatory amounts on import; with the result that the seller — who, in accordance with commercial practice, had sold on a cif basis — would recover from his insurer only the price of the goods which had been calculated taking account of the additional revenue furnished by the compensatory amount on import. The seller would thus suffer a real loss, in order to avoid which he would in future have to take out an *ad hoc* insurance. From this would flow an increase in costs and a corresponding rise in price. Quite different, however, is the situation of sellers in non-member countries exporting to the Community. They insure their goods at world market prices, which are lower than those of the Community, and the lower cost of insurance is reflected in the level of prices quoted by them. Accordingly, it appears to me to be sensible to have recourse to analogy in order to avoid similar distortions in competition, detrimental to intra-Community trade.

I do not consider that this difference in insurance costs may be regarded — as the Commission appears to submit — as a manifestation of the "physiology" of the system. Indeed, within the system itself it is possible to find a satisfactory answer to this apparent contradiction by means of the application of the rules on *force majeure*.

8. For all the reasons which I have discussed, I conclude by suggesting to the Court that the question submitted by the Finanzgericht Hamburg by order of 20 February 1979 for a preliminary ruling should be answered as follows:

The provisions of Article 6 (1) of Regulation No 192/75 of the Commission of 17 January 1975, under which, in the event of exported goods having perished in transit by reason of *force majeure*, payment of an export refund is permitted as an exception to the normal rule that goods shall have been imported into a non-member country, apply by analogy in regard to monetary compensatory amounts. Accordingly, Article 11 (2) of Regulation No 1380/75 of the Commission of 29 May 1975 must be interpreted as meaning that, where the monetary compensatory amount on import is to be paid by the exporting State instead of the importing State under Article 2a of Regulation No 974/71 of the Council of 12 May 1971, and the exported goods have perished in transit as a result of *force majeure*, the exporter is entitled to payment of the same compensatory amount as would have been due to him if the goods had reached the Member State of destination and if customs import formalities had been completed there.