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 Bundesfinanzhof by its order of 21 October 1969, hereby rules;

1. **Examination of the question referred to the Court by the Bundesfinanzhof has not revealed anything which could affect the validity of Article 17 (2) of Regulation No 19 of the Council of the EEC of 4 April 1962;**

2. **The rules set out in Article 9 of Regulation No 87/62 of the Commission of the EEC of 25 July 1962, in conjunction with Article 7 of Regulation No 54/62 of the Council of the EEC of 30 June 1962, cannot be applied by analogy to the importation of oats from the Netherlands.**

Lecourt Monaco

Donner Trabucchi Mertens de Wilmars

Delivered in open court in Luxembourg on 24 June 1970.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 14 MAY 1970[1]

Mr President,
Members of the Court,

The case with which we have to deal concerns the evaluation and interpretation of rules governing the common organization of the market in cereals that were laid down in Regulation No 19 of the Council (OJ 1962, p. 933) and supplemented by various other regulations.

In this connexion I should like first of all to remind you of the following matters. As you know, the essential aim of the common organization of the market in cereals was to stabilize the prices of cereals, which at that time were not yet uniformly fixed for

1 — Translated from the German.

the Community as a whole but were laid down by each Member State within certain limits fixed by the Community, at a level above that prevailing on the world market and in some cases above the level of prices in other Member States. For this purpose the market organization instituted a system of basic target prices (with a monthly graduation, monthly increase) fixed by the Member States representing the optimum prices obtainable for the product in question based on the marketing centre of the zone with the largest deficit. These prices were guaranteed by basic intervention prices (also subject to monthly graduation) which were fixed at a level which differed slightly from the basic target prices and at which the Member State to which they applied was obliged to but the quantities of cereals offered to it. As a guarantee against imports (from third countries where prices were at world-market price level or from other Member States with a lower price level) there was a system of levies intended to force the prices of imported products up to the level of the basic target prices. The levy was equal to the difference between the target price projected to the frontier (the so-called 'threshold price' also subject to monthly graduation) and, where the goods were imported from third countries, the c.i.f. price, that is to say, the lowest price recorded by the Commission on the world market during a determined period, calculated at the place at which the goods crossed the frontier of the importing Member State. For imports from Member States, the free-at-frontier price was applied instead of the c.i.f. price. This was the lowest price recorded by the Commission during a determined period on the most representative market for exports. In addition, in order to guarantee a preference, the intra-Community levy was reduced by a fixed amount. As a principle it was further provided that the rate of levy to be applied was that prevailing on the day of importation. There was an exception, at first limited to imports from third countries, namely, that the levy might be fixed *in advance*. In that case, the levy applicable was that prevailing on the day when the application was made. To the levy was added a premium for each month following the month when the application was lodged. The premium was equal to the difference between the c.i.f. price for immediate deliveries and the c.i.f., price for forward deliveries. In addition, the levy on the day of the application was adjusted by the difference between the threshold price on that day and the threshold price for the month of the proposed imports. In the case of the levy fixed in advance it must be noted, and this is of importance in the present case, that if the imports were delayed the levy was adjusted in accordance with the threshold price prevailing at the date of importation and in accordance with the highest rate of premium ruling at the date of application. However, in a case of *force majeure* (for example, if a shipment was delayed by ice blockage), the principle was not applicable, and in spite of the fact that the imports were delayed, only the levy fixed in advance was applied. The scope of this exception was nevertheless subsequently restricted by Regulation No 111/63 whereby only the adjustment in accordance with the highest premium rate in force on the date of the application was not made, leaving an adjustment on the basis of the threshold price ruling on the date of importation. The fixing of the levy in advance was not at first provided for intra-Community trade; this was introduced later, although only for certain products. The relevant provisions here are Regulation No 130/62 and, with regard to the products concerned in the proceedings before the German court, Regulation No 31/63. However no special rules were made for cases of *force majeure*. These provisions are of concern to the plaintiff in the main action, a commercial undertaking established in Oldenburg. It had bought oats in Holland, apparently in August 1962, with the intention of importing them by boat into Germany. The expected date of arrival was 9 January 1963. The oats were resold in advance for this date. However, the boat was held up by ice in a Dutch canal and the shipment was delayed, so that it was not until 22 March 1963 that the plaintiff was able to apply for customs clearance at the Münster Customs Office. This office then applied the rate of levy applicable on that day (DM 91.53 per metric ton). The plaintiff, however, con-

siders that this is wrong, and that the levy should have been that applicable at the date of the planned importation (9 January 1963) (namely DM 78.35 per metric ton). It maintains that Regulation No 19/62 is incomplete in so far as it does not provide for the fixing of the levy in advance in intra-Community trade. However as it had been prevented by *force majeure* from achieving the punctual completion of its importation the above provisions governing imports from third countries (Article 9 of Regulation No 87/62 in conjunction with Article 7 of Regulation No 54/62) must be applied analogously particularly in view of the fact that the German market had in fact already been affected in January 1963 by the plaintiff's resale transaction. The plaintiff therefore lodged an objection with the Hauptzollamt, Münster, against the assessment. This objection and the subsequent appeal to the Finanzgericht, Münster, were unsuccessful. The Finanzgericht held in fact that no objection could be made to the fact that the fixing of the levy in advance was limited to imports from third countries and therefore there could be no question of the analogous application of special provisions that had been created to cover the case of fixing the levy in advance. Not satisfied with these reasons, the plaintiff further appealed to the Bundesfinanzhof where it reiterated its view that as the draftsman had not thought of the possibility of a case of *force majeure* in imports from Member States, it was necessary to reason by analogy and apply the provisions governing imports from third countries. In view of this situation, that is to say, recognizing that its decision in the case depended on the solution of a problem of Community law, the Bundesfinanzhof, at the plaintiff's suggestion, stayed the proceedings and by an order of 21 October 1969 referred the following questions for a preliminary ruling in accordance with Article 177 of the EEC Treaty:

(a) 'Is it compatible with the Treaty establishing the European Economic Community that the rules laid down in Article 17 (2) of Regulation No 19 of the Council of the European Economic Community of 4 April 1962, providing for the progressive establishment of a common organization of the market in cereals (fixing of the levy in advance) are only applicable to imports from third countries and are not also applicable to imports from Member States?

(b) If Question (a) is answered in the affirmative:
Can it therefore be deduced that, in a case of the importation of oats into the Netherlands, when transport was delayed by *force majeure*, before the entry into force of Regulation No 31/63 of the Council of the European Economic Community of 2 April 1963 (OJ 1963 p. 1225), it is necessary to charge not the levy applicable on the day on which the importation actually took place but the levy in force on the day originally planned for the importation, as Article 9 of Regulation No 87 of the Commission of 25 July 1962 (OJ 1962, p. 1895) in conjunction with Article 7 of Regulation No 54 of the Council of the European Economic Community of 30 June 1962 has laid down in respect of imports from third countries?

(c) If Question (a) or (b) is answered in the negative:
Are the rules laid down in Article 9 of Regulation No 87/62 in conjunction with Article 7 of Regulation No 54/62 — charge of the agreed levy where the importation has been delayed by *force majeure* — also applicable by analogy to the importation of oats from the Netherlands, that is, must the levy in force on the planned date of importation be charged where the importation was delayed by *force majeure*, before the entry into force of Regulation No 31/63 which itself contains no analogous rules?

The applicant and the Commission of the European Communities have submitted written observations on these questions in accordance with Article 20 of the Protocol on the Statute of the Court of Justice. These two parties were also the only parties to express their views at the oral proceedings. My opinion on the questions raised is as follows:

1 — The first questions

As you know, as far as the first question is concerned, the Commission contends that it cannot be said that, by failing to provide for the fixing of the levy in advance for intra-Community trade, Regulation No 19 violates an express or implied principle of the Treaty. The legislating organ of the Community has a wide discretion in the formulation of organizations of markets. It is not for the Court, however, to review the value or suitability of a levying system. The plaintiff, on the other hand, maintains that the Community legislature does not have such a wide discretion. In the present case the decisive factor is that in the import trade (and even if it is restricted to the Community) the importer must know precisely what charges will be imposed on future imports because purchased goods must be resold immediately, that is to say, long before they are imported. If the levies are not fixed in advance it becomes considerably more difficult to make commercial arrangements. This was, moreover, recognized by the Community legislature when, in Regulation No 130/62, it introduced the fixing of the levy in advance in intra-Community trade for certain types of cereals and, in Regulation No 31/63, extended this provision to oats (the commodity in question here). Furthermore, the principle of Community preference demands that in all essential matters the legal position of intra-Community trade should at least be no less favourable than trade with third countries. Before examining these arguments, we should consider a point which the Commission in particular emphasized at the 'oral proceedings when it claimed that we have no power in judicial proceedings to examine whether a body of rules is good, relevant and appropriate, that is to say, to consider questions of suitability. This is in fact not possible, since the discretion vested in the legislature would then be replaced by that of the Court. Consequently, the only thing that we can do is to ascertain whether the rules in question violate *principles of law*, although it must certainly be conceded that on this point it is not always easy to determine where the border-line is to be drawn. Within these limits of our examination it must certainly be allowed that the plaintiff is right in saying that the fixing of the levies in advance facilitates transactions in the international trade in cereals. Economic reasons in general appear to demand that arrangements for the time after the importation should be made well in advance, in fact immediately after the purchase of the goods to be imported. Regulations Nos 130/62 and 31/63, moreover, attempted to take this factor into account for certain products (including oats) by introducing the fixing of levies in advance in the case of intra-Community trade. It was provided that the levy should be assessed by adjusting the rate applicable at the date of application in accordance with the threshold price in the importing Member State in the month of import and with the monthly graduation of the target price in the exporting Member State for the same month. When I spoke just now of an *attempt* this seems justified because the fact that it was an experiment for a limited period emerges not only from the preamble to Regulation No 130/62 but also from the fact that the provision was twice extended for a certain period, namely by Regulations Nos 56/64 and 63/65. Obviously, it is extremely difficult to arrange a system of this kind adequately, particularly owing to the absence of reliable information on forward transactions and the impossibility therefore of fixing premiums.

This circumstance must certainly be taken into account when an attempt is made to answer the decisive question in the present case, namely, the question whether the former system violated a principle of law, namely, the principle of Community preference, which the Court has already held to be an important principle of the Treaty (Case 5/67 *W. Beus GmbH and Co.* v *Hauptzollamt München* [1968] E.C.R.). I should like to anticipate the answer at this stage: in fact I agree with the Commission that in the present case there is no violation of this principle. This conclusion is decisively supported in particular by two points put forward by the Commission. First of all, there are important differences of fact between intra-Community trade with third countries (apart from those

already mentioned). It appears that in trade with third countries, particularly in overseas trade, forward transactions, which extend over a longer period, are of greater importance than in intra-Community trade. Distances are greater and c.i.f. prices are frequently subject to more violent and unforeseeable fluctuations that entail corresponding fluctuations in the levies, which makes it seem absolutely essential to fix the levies in advance. In intra-Community trade, on the other hand, not only are forward transactions of a narrower scope but also shorter distances and shorter periods of time are involved. However, in particular, the price fluctuations remain within narrower limits, since a fall in prices is prevented in the exporting State by the system of intervention prices and a rise by the system of target prices combined with the possibility of effecting imports. Therefore, only small changes occur in the levies and their pace is slower. That these differences justify a divergent treatment for intra-Community trade, or at any rate permit one to say that the limits of the discretionary power have been observed, is in my opinion a perfectly tenable viewpoint. Moreover, there is also the fact that even without the equality of treatment which the applicant finds lacking, preference is ensured for intra-Community trade, which means that the principle of Community preference thus seems to be observed. This may be said since, as the Commission has shown, both a *commercial* and *financial* preference is effective. The commercial preference is guaranteed by the effect of the fixed amount by which the threshold prices are lowered in intra-Community trade, and therefore also the levies. A financial preference exists in so far as the levy applied to third countries is calculated uniformly on the basis of the lowest world-market price, irrespective of the price level in the exporting State, while within the Community the levies were established in each case according to the price level in the exporting Member State. In effect, all this should prove that adequate preference is ensured for intra-Community trade. At all events, it may be said, without going into the details of the parties' theoretical dispute (the Commission's 'balance theory' versus the 'reflection theory' advanced by the plaintiff) that experience has not shown that the introduction of the system of fixing the levy in advance has directly entailed a serious disadvantage for the flow of intra-Community trade and jeopardized Community preference. I believe that these considerations are sufficient to resolve the first question. In my opinion they permit the Court to hold that the absence of the possibility of fixing the levy for intra-Community trade in advance does not constitute a breach of the Treaty. It is therefore unnecessary to answer the second question as it was posed only in the event of an affirmative response to the first question.

2 — The third question

With its third question the court making the reference asks whether the provisions of Article 9 of Regulation No 87, in conjunction with Article 7 of Regulation No 54, whereby only the levy fixed in advance was to be imposed when the import was delayed by *force majeure*, could be applied by analogy to imports from other Member States, for which no such provision was made, that is to say, whether the levy could be fixed on the basis of the rate in force on the date anticipated for the import.

The Commission, referring to the clear wording of Article 17 of Regulation No 19/62, contends that this question also should be answered in the negative. Here again the plaintiff maintains the opposite point of view. It argues that the market is decisively influenced at the date for which the import is planned and for which the re-sale is already made before the importation. The levy can only achieve its purpose of price approximation if this date is applied and not the date of the subsequent import. Apart from this the plaintiff contends that the limitation of the exception provided for cases of *force majeure* to imports from third countries conflicts with the principle of proportionality which is expressed in the term 'measures required' used in Article 40 of the Treaty. This

limitation is not required to achieve the objectives pursued in the common organization of the market; to extend the special provision to intra-Community trade would not endanger the Common Market. On the other hand, it could not be demanded of importers that they should bear the risk of seeing their imports prevented for reasons of *force majeure*, as there is no way in which they could adequately guard against it.

In reply to this argument, first of all it must be observed that the absence of a body of rules for cases of *force majeure* in intra-Community trade does not constitute an omission attributable to the inadvertence of the legislature. As can be seen from the clear wording of Article 17 of Regulation No 19/62, whereby the date of import is in principle decisive for the calculation of the levy, this is, on the contrary, a deliberate decision of the Council. This alone should be sufficient to counteract any inclination to reason that these special provisions, created for a different situation should be applied by analogy. Essentially, this can only be considered if the principle established by Article 17 proves to be contrary to the Treaty and therefore the necessity to rectify the intention of the legislature is demonstrated.

On the other hand it must not be forgotten that the said special rules were appreciably altered by Regulation No 111/63, as I have already mentioned when setting out the facts. The effect of this amendment is that in cases of *force majeure* the levy is now based on the threshold price applicable on the *date of importation*, that is, the levy *fixed in advance* is not applied (and that if, therefore, one wished by analogy to apply this provision to intra-Community trade, there could be no question of calculating the levy on the basis of the planned date of importation). This new provision seems appropriate, in view of the monthly graduation, that is to say, the raising of the target and threshold prices. In fact, it enables the importer to obtain a higher price upon sale in case of a delay in importation, unless he has neglected (which must be considered an error on his part) to make an appropriate reservation when selling before the event constituting a case of *force majeure* has occurred. At all events, I consider it significant that the Commission was able to declare, without being contradicted, that no one has so far criticized the new rules as being unsuitable.

As for the applicant's further contention that the market has already been influenced at the date of the projected importation by the effect of the reselling [Durchhandeln] of the goods, it is clear that this argument is not entirely without foundation. However, in itself it is of no help in a system of *general* levies (which at most may be described as unsuitable, but not illegal). In this system, the absence (which as we have seen is perfectly legal) of any fixing of the levy in advance in intra-Community trade would in fact entail considerable difficulties in determining precisely the date on which the market was influenced. This reason alone would seem to suffice to reject the plaintiff's contention as impracticable, quite apart from the fact that the delayed import, when it actually occurs, may obviously itself influence the market.

Thus the only question that remains to be resolved is whether the applicant is right when it contends that the absence of a provision for cases of *force majeure* in intra-Community trade is incompatible with the principle of proportionality. First of all it is not necessary here to determine whether this principle always governs the legislative acts of the Community institutions. Similarly, we need not decide the question whether the principle can be derived from the term 'measure required' used in Article 40, although the wording of this provision rather gives the impression that it is not intended to restrict the powers of the Council but to grant that body freedom in the establishment of market organizations, or, in other words, that it has a positive content. One thing can certainly be said against the applicant's argument. The decisive question is not whether the extension of the special rules in issue *jeopardizes* the Common Market, for even if this were to be answered in the negative, that would not suffice to prove that the Community institutions had an obligation to effect this extension. As the Commission correctly emphasizes, it is on the contrary significant in the present context

that there is a wide area of discretion in the formation of market organizations, and therefore it may in any case be questioned whether the exercise of this discretion has entailed for those concerned restrictions and handicaps that must be regarded as discriminatory or excessive. Posed in these terms, the question does not seem to present any difficulty. Regardless of the fact that there are also no special rules for imports from third countries without the fixing of the levy in advance, there can scarcely be any question of discrimination in view of the disparity in the factual situations, particularly when one takes into account the small fluctuations in the levies in intra-Community trade (which are explained by the fact that the target prices in the exporting Member State are also constantly rising in the course of the financial year). As for the risk that importers must bear of having their imports prevented by cases of *force majeure*, it must be observed that there is no principle of law that requires that rules issued in the exercise of sovereign powers should always place those concerned in the position in which they would have been if the case of *force majeure* had not arisen. Moreover, it may also be assumed (and this is equally important) that a sufficient safeguard is available and appropriate, on private initiative (for example, by means of transport insurance). In my opinion, the Commission has convincingly shown this by referring to the existing Community preference which in addition to the fixed amount already mentioned results from the fact that marketing costs of a certain amount are taken into account in the calculation of the free-at-frontier price (that is, the price in force in the exporting market). Moreover, when the Commission mentioned in addition the possibilities for making a profit in the intra-Community cereals trade that were revealed in other proceedings, this merely reinforced its argument.

Finally, all this leads to the conclusion that by refraining from issuing a body of rules governing the case of *force majeure* in the intra-Community cereals trade the legislature of the Community remained within the limits which its discretion must be assumed to have in the field in question. Consequently, there can be no question of a breach of the principle of proportionality. But this also excludes the idea of any analogous application of provisions (modified, moreover, in the meantime) which were designed to cover a different situation, not to mention the necessity, in a case like the one in the main action, of calculating the levy on the basis of the date planned for the import.

3 — Summary

I would therefore propose the following answers to the questions submitted:

(1) It is not contrary to the EEC Treaty that the rules contained in Article 17 (2) of Regulation No 19/62 (fixing of the levy in advance) was initially restricted to imports from third countries.

(2) Before Regulation No 31/63 entered into force the levy to be imposed on the importation of oats from the Netherlands into Germany was the levy applicable at the date of importation in accordance with Article 17 (1) of Regulation No 19/62, even though the importation had been delayed by *force majeure*. There was no necessity to impose the levy applicable at the date planned for the import.

In accordance with the practice hitherto followed in proceedings concerned with preliminary rulings, it is for the court making the reference to deal with the question of costs.