JUDGMENT OF THE COURT
24 JUNE 1970[1]

Firma H. Oehlman and Co. v Hauptzollamt Münster (Reference for a preliminary ruling by the Bundesfinanzhof)

Case 73/69

Summary

1. *Agriculture — Common organization of markets — Cereals — Imports from third countries — Levy — Advantages not provided by the rules governing the intra-Community levy — Violation of the principle of Community preference — Absence*

2. *Agriculture — Common organization of markets — Cereals — Imports from third countries — Delay owing to force majeure — Consequences as regards fixing the levy — No application by analogy to intra-Community levies*
(Regulation No 54/62 of the Council of the EEC, Article 7; Regulation No 87/62 of the Commission of the EEC Article 9)

1. The regulations which provide, as regards imports of cereals from third countries, for the possibility, designed to protect those concerned from excessive price fluctuations, of fixing the levy in advance, and lay down provisions in connexion therewith for cases of *force majeure* without doing the same for intra-Community trade are not in breach of Community preference.
This conclusion is not invalidated merely by the fact that the application of a particular provision of the rules relating to imports from third countries might have rendered a dealer engaged in intra-Community trade subject, in an exceptional case, to a smaller levy than that actually applicable.

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 a Member State.

In Case 73/69

Reference to the Court under Article 177 of the EEC Treaty by the Bundesfinanzhof for a preliminary ruling in the action pending before that court between

FIRMA H. OEHLMANN AND CO., Oldenburg,

1 — Language of the Case: German.

and

HAUPTZOLLAMT MÜNSTER

on the validity of Article 17 (2) of Regulation No 19 of the Council of the EEC of 4 April 1962 and on the interpretation of 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,

THE COURT

composed of: R. Lecourt, President, R. Monaco, President of Chamber, A. M. Donner (Rapporteur), A. Trabucchi and J. Mertens de Wilmars, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows;

On 22 March 1963, Firma H. Oehlmann and Co. (hereinafter referred to as 'the plaintiff') asked the customs office, Münster, to give customs clearance for 99 086 kg of oats imported from the Netherlands. In calculating the levy, payable by virtue of the common organization of the market in this sector (cereals) the customs office based itself on the rates applicable on the date given.

The plaintiff lodged an objection against this fixing of the levy before the Hauptzollamt (Principal Customs Office), Münster, (hereinafter referred to as 'the defendant'). It maintained that the rate of levy applicable should be that in force on 9 January 1963, the date on which the goods would have been cleared through customs, if the transport by waterway had not been delayed by ice.

The plaintiff appealed against the dismissal of its objection to the Finanzgericht (Finance Court), Münster. In particular it argued that Regulation No 19 of the Council of the EEC of 4 April 1962, relating to the progressive establishment of a common organization of markets in the sector of cereals (OJ 1962, p. 933) reveals a gap, in that it does not provide for the fixing of levies in advance for intra-Community

trade. It argued, however, that it was for the courts to fill the gap by means of analogy. In this case analogous application should be made of Article 9 of Regulation No 87/62 of the Commission of the EEC of 25 July 1962, dealing with the establishment of detailed rules of application relating to import licences and export certificates for cereals and processed products (OJ 1962, No 66) in conjunction with Article 7 of Regulation No 54/62 of the Council of the EEC of 30 June 1962, dealing with the criteria for fixing the scale of premiums for imports of cereals originating in third countries. (OJ 1962, No 54). These articles provide that in fixing the levy in advance for products coming from third countries the levy is to be calculated on the basis of the threshold price for the month of importation referred to, if the actual importation was delayed because of *force majeure*. These rules are reasonable in that, from an economic point of view, the relevant time for fixing the rate of the levy is the time at which the goods produce an effect on the internal market of the country of their destination. In this case, that time is January 1963.

The Finanzgericht dismissed the appeal, taking the view that the fact that the possibility of fixing the levy in advance is restricted, by Regulation No 19, to trade with third countries does not constitute a gap but an express provision which is not illegal. Further, Article 9 of Regulation No 87/62 in conjunction with Article 7 of Regulation No 54/62 is not capable of application by analogy. Indeed it is a special provision — moreover also legal — only applicable to cases of fixing the levy in advance.

The plaintiff brought an appeal against this decision before the Bundesfinanzhof (Federal Finance Court). It argued that cereals are generally bought and resold in the market of their destination long before they are actually imported. The common organization of markets in the sector of cereals took account of this in as much as it allows the fixing of the levy in advance in respect of trade with third countries. Such a fixing in advance is less necessary in respect of intra-Community trade.

Nevertheless, in intra-Community trade, the importers' ability to calculate the levy in advance is equally limited if the importation is delayed as the result of *force majeure*, This aspect was neglected by the Community authorities. According to the meaning and the aim of the organizations of the markets of the EEC, the Community legislature could not have intended to exclude special rules in this case: there is here a genuine gap which should be filled by the analogous application of the provisions of Article 9 of Regulation No 87/62 in conjunction with Article 7 of Regulation No 54/62.

By a decision of 21 October 1969, the Bundesfinanzhof asked the Court of Justice, in accordance with Article 177 of the EEC Treaty, for a preliminary ruling on the following questions:

'(a) Is it incompatible with the Treaty establishing the European Economic Community that the rules laid down by 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 markets in the sector of cereals (OJ 1962, p. 933) (fixing 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 from the Netherlands, where transport was delayed by *force majeure*, before the entry into force of Regulation No 31 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 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 (OJ 1962, p. 1581) 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 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 text of the provisions in question is as follows:

Article 17 of Regulation No 19

'(1) The amount of the levy to be charged between Member States *vis-à-vis* third countries shall be the amount applicable on the day of importation.

(2) Provided always that in the case of imports from third countries of the products set out in Article 1 (a) and (b) the levy applicable on the day on which the application for the certificate is lodged, adjusted in ratio with the threshold price in force at the expected date of importation, shall, at the request of the party concerned, be applied to imports to be effected within the term of validity of the certificate, such request to be presented when applying for the certificate. In this event, there shall be added to the levy a premium determined at the same time as the levy. The scale of premiums shall be decided by the Commission on the basis of criteria to be determined by the Council, before 1 May 1962, by unanimous vote on a proposal of the Commission.'

Article 7 of Regulation No 54/62

'If the import shall not have taken place during the month stated at the time of the request, and saving any exception the definition and particulars of which shall be determined in accordance with the provisions of Article 26 of Regulation No 19 of the Council, which shall apply by analogy:

(a) the levy which was applicable on the day on which the request for a certificate was lodged, shall be adjusted in ratio with the threshold price in force at the date of imports and

(b) the premium applicable shall be the highest premium laid down for the products in question in the scale of premiums in force on the day on which the request for a certificate was lodged.'

Article 9 of Regulation No 87/62

'The provisions of Article 7 of Regulation No 54 of the Council shall not apply where the goods have not been imported during the month stated in the application for the certificate for reasons which would justify a case being treated as exceptional under Article 8 (2) and (3) of this Regulation' (*force majeure*).

The order for reference was registered at the Court Registry on 4 December 1969.
The plaintiff and the Commission of the European Communities submitted written observations in accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.
Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided not to hold a preparatory inquiry.
The applicant, represented by its authorized agent *ad litem*, C. Brändel, Advocate of Hamburg, and the Commission of the European Communities, represented by its Legal Adviser, C. D. Ehlermann, presented oral argument at the hearing on 21 April 1970.
The Advocate-General delivered his opinion at the hearing on 14 May 1970.

II — Observations submitted in accordance with Article 20 of the Protocol on the Statute of the Court of Justice.

A — *On the first question*

1 — The observations of the plaintiff

The plaintiff states that, as a general rule, cereals are bought and resold in the country of their destination long before they are given customs clearance. It follows that a quantity of cereals exercises an influence on the market of its destination before it is in fact imported. When Regulation No 19 was drafted, this situation was taken into account by giving the importer the ability to request the fixing in advance of the levy payable on the imports. However this right was only given for imports coming from third countries (Article 17 (2) of Regulation No 19). For imports in respect of which such a fixing in advance had in fact been requested, the subsequent provisions (Article 9 of Regulation No 87/62 in conjunction with Article 7 of Regulation No 54/62) provided that the levy applicable was at the rate in force on the day originally planned for the imports.

In contrast, for intra-Community trade, the levy was always payable at the rate in force at the date of actual importation. This difference in treatment seems to arise from the fact that, in intra-Community trade, only a short time elapses between the purchase and the importation, and that price fluctuations are much smaller than on the world market. Nevertheless cases such as this one show clearly that the need for a similar rule exists equally in intra-Community trade. Indeed since Regulation No 19 came into force, the Council has adopted regulations which also allow for the fixing of levies in advance in respect of intra-Community trade as well (in respect of oats particularly, Regulation No 31/63 of the Council of the EEC of 12 April 1963, OJ 1963, p. 1225).

From all this the applicant draws the conclusion that when the Community rules first restricted the application of the system of fixing in advance, and, accordingly, of Article 9 of Regulation No 87/62, to imports of cereals from third countries only, the solution was based on a mistaken evaluation of economic necessities. However this restriction was in breach of the EEC Treaty in that it made intra-Community trade more difficult, although the Treaty particularly states that intra-Community trade has priority over trade with third countries.

In fact the concept of 'Community preference' means essentially that intra-Community trade should at least not be treated less favourably than comparable commercial transactions with third countries.

2 — The observations of the Commission

The Commission takes the view that the concept of 'Community preference' does not require that the rules relating to intra-Community trade should correspond in every respect exactly but more favourably to the rules relating to trade with third countries. It is sufficient if comparison of the two systems reveals that, as a whole, trade between Member States has priority over trade with third countries. If these considerations are accepted as a starting point then there can be no doubt that there is no breach of the concept of 'Community preference'.

(a) Regulation No 19 favours intra-Community trade, both by the effect of the fixed amount (set out in Article 2 of the Regulation) by which intra-Community levies are reduced and by the fact that intra-Community levies are calculated on the basis of the market price in each of the Member States, thereby allowing exporters from all the Member States to sell under equal conditions on a given market. On the other hand levies in respect of third countries are calculated on the basis of the lowest price on the world market in such a way that exports from third countries at a higher price level can only enter the Common Market at a price higher than the Community price.

(b) The circumstances which make the possibility of fixing levies in advance

necessary for trade with third countries, that is, on the one hand the considerable delays between purchase and importation and on the other the frequent and substantial fluctuations in prices on the world market, do not exist in intra-Community trade. As the factual situation is different, it is quite natural and quite fair that the rules should be different as well.
Whilst it is true that the fixing of the levy in advance in respect of intra-Community trade was introduced for certain types of cereals, the rules were in any case of a temporary and experimental nature.
Fixing the intra-Community levy in advance has always given rise to difficulties as is shown by Cases 106 and 107/63 and others.
From all these considerations it follows that the impossibility of fixing the levy in advance for intra-Community trade does not constitute a gap but was the intention of the Council.

B — *On the second question*

1 — The observations of the plaintiff

The plaintiff recalls that Article 40 (2) of the Treaty provides that 'the common organization ... may include all measures required to attain the objectives set out in Article 39 ...'. By adopting the concept of 'measures required' ['measures nécessaires'] the Treaty had recognized the applicability to Community law of the principle of proportionality. This implies that the measures taken must be necessary and appropriate in order to attain the objectives of the Treaty. The provisions of Article 9 of Regulation No 87/62 in conjunction with Article 7 of Regulation No 54/62 do not comply with these criteria inasmuch as they only apply to trade with third countries. In fact instead of pursuing the objectives set out in Article 39, the restriction to trade with third countries amounts to discrimination to the detriment of intra-Community trade, and it imposes on imports from Member States risks, and, consequently, burdens which are disproportionate and unnecessary. In such a situation it is for the national administrations to repair the omissions of the Community authorities, which means in this case that they should also apply the rules relating to *force majeure* from Member States. The applicant therefore proposes that the second question should be answered in the affirmative.

2 — Observations of the Commission

As the second question is only put if the first question is answered in the affirmative, the Commission believes that in view of its observations on the first there is no need for it to go into the second question.
Nevertheless, during the oral proceedings it gave its view on the question whether the principle of proportionality must be applied to Community measures. The Commission observed in this respect that, if this principle were to be admitted, it could not be solely on the basis of Article 40 of the Treaty but rather as a general principle, governing all the legislative activity of the Community. In addition it reiterated that acceptance of this principle could not lead the Court to substitute its assessment of the appropriateness of the measures to be taken for that of the Community 'legislature'.

C — *On the third question*

1 — The observations of the plaintiff

The fact that the rules relating to *force majeure* only apply to imports from third countries is on the one hand not 'required' in the sense of Article 40, nor, on the other hand, the consequence of an intentional decision of the Council but resulted from an erroneous evaluation of the economic necessities of intra-Community trade. Therefore this was a genuine gap to be filled in by an analogous application of the above-mentioned rules.

2 — Observations of the Commission

The Commission believes that this question should be answered in the negative.
The problem of a delay in imports because of *force majeure* is well known to the legislature as is shown by Regulations Nos

54 and 87. Where there are no special rules for calculating levies which have not been fixed in advance this is not due to a gap in the law but to the intention of the legislature. There is no general principle of law which puts the legislature under an obligation to make any special rules, in particular that sought by the plaintiff.

The rules providing for the fixing in advance of the intra-Community levy contain no provision equivalent to Article 9 of Regulation No 87. In any case that provision remained an exception which has already been abolished by Article 4 of Regulation No 111/63/EEC of the Commission of 13 October 1963 (OJ 1963, p. 2490) which limits the non-applicability of Article 7 of Regulation No 54/62 in cases of *force majeure* to subparagraph (b) above. The legality of this amendment has never been questioned.

The Commission states that rules such as those sought by the plaintiff would scarcely be applicable. The special rules envisaged by the Bundesfinanzhof were already substantially different from those requested by the plaintiff. The plaintiff's view presupposes the existence of a system of individual levies while Regulation No 19 establishes a system of general levies.

Grounds of judgment

1 By an order dated 21 October 1969, which reached the Court Registry on 4 December 1969, the Bundesfinanzhof, pursuant to Article 177 of the Treaty establishing the EEC, referred to the Court three questions on the validity and interpretation of certain provisions of Community law relating to the cereals trade.

The first question

2 The first question referred by the Bundesfinanzhof asks whether it is compatible with the EEC Treaty that the provisions contained in Article 17 (2) of Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of a common organization of the market in cereals (OJ 1962, p. 933) only apply to imports from third countries and not to imports from Member States.

3 This provision provides, in particular, for the possibility of fixing in advance the levy on imports from third countries.

4 As can be seen from the file submitted and the observations made by the plaintiff in the main action, this question concerns a possible incompatibility with the principle known as Community preference or with the spirit of Article 40 of the EEC Treaty. The dispute in the main action arises from the fact that the plaintiff imported from the Netherlands oats whose arrival in Germany is said to have been delayed by the freezing of canals. Because of this, it is alleged that the plaintiff had to pay a higher levy than it would have had to pay if the importation had taken place on the date originally planned. The plaintiff in the main action claims

that it would not have been subjected to such treatment if the Community rules governing delays in importation due to *force majeure* had been applicable to it, and contends that those rules were not applied to it because they were intended solely for the cases covered by Article 17. It therefore claims that this article is invalid. It alleges in particular that this provision on the one hand creates an advantage in favour of imports of cereals from third countries as against intra-Community trade, which is contrary to the principle of Community preference, and on the other hand is more restrictive than necessary, which conflicts with the principle of proportionality enshrined, in its opinion, in Article 40 of the Treaty.

5 The provisions which Regulation No 19 makes for cereals and cereal products coming from third countries on the one hand and from Member States on the other are too diverse for their detailed provisions to be compared on all points. Although Regulation No 19 provides for the collection of a levy on all cereal products imported into the Member States, in order to raise their prices to the level of the 'threshold price' in the Member State concerned, the actual impact of this levy varies essentially according to whether it is imposed on imports from third countries or on intra-Community trade. As regards imports from third countries the reference price for the calculation of the levy is based on the world market price which is usually much lower than the threshold price in the Member States, so that in such cases levies of large amounts are collected. On the other hand, the intra-Community levy is based on the free-at-frontier price in the exporting Member State which is usually closer to the threshold price in the importing Member State; in addition, this levy is further reduced by a fixed amount in accordance with Article 2 of the Regulation, so that the intra-Community levy is relatively modest and often even nil. Moreover, price fluctuations in the Common Market are much smaller than in the world market, precisely because of the Community rules, and the situation may be further aggravated by the fact that the lines of communication with the principal exporting third countries are generally longer than the intra-Community routes.

6 Although, in view of these differences, the regulations have provided, as regards imports from third countries, for the possibility, designed to protect those concerned from excessive price fluctuations, of fixing the levy in advance, and have laid down provisions in connexion therewith relating to delays caused by *force majeure*, without doing the same for intra-Community trade, such a distinction cannot be considered as a breach of Community preference.

7 This conclusion cannot be invalidated merely by the fact that the application of a particular provision of the rules relating to imports from third countries might have rendered a dealer engaged in intra-Community subject, in an exceptional case, to a smaller levy than that actually applicable.

8 The plaintiff in the main action further seeks to deduce from the fact that subsequent regulations provided for the fixing of the levy in advance in the case of intra-Community imports also, that the limitation imposed by Article 17 (2) of Regulation No 19 to trade with third countries proved to be unnecessary, and is therefore contrary to the spirit of Article 40 of the Treaty which merely empowers the Council to issue the rules necessary for the functioning of a common agricultural market.

9 However, with the risk of manipulation to which the right to fix the levies in advance gives rise, and in view of the fact that this risk becomes greater the shorter transport distances are, it was permissible for the Council to withhold this facility from intra-Community trade until after experience of it had been obtained in trade with third countries, which is easier to verify and which, moreover, had greater need of it.

10 There is therefore nothing in the particulars submitted to the Court that would justify an affirmative reply to the first question.

The second question

11 This question was put only in the event of an affirmative reply to the first question and is therefore superfluous.

The third question

12 In this question the Bundesfinanzhof asks whether the provisions of 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 30 June 1962 (OJ 1962, p. 1581), on the imposition of the levy fixed in advance when imports have been delayed by *force majeure*, also apply by analogy to the importation of oats from the Netherlands.

13 The question asks whether the levy applicable on the date planned for the importation is to be charged if the importation has been delayed as a result of *force majeure*.

14 The articles mentioned govern the consequences of the fixing of the levy in advance, particularly where the importation has not taken place in the month stated at the

time of the application to fix the levy in advance (Article 7 of Regulation No 54/62) and where this delay is due to circumstances justifying exceptional treatment (Article 9 of Regulation No 87/62).

15 These provisions presuppose the existence of a certificate fixing the levy in advance which includes a counter-obligation to carry out the importation at a date also fixed in advance in the certificate, and the performance of this obligation must, moreover, be guaranteed by the deposit of security. It is not apparent how they could be applied to a completely different situation characterized merely by the fact that the importation took place at a date other than that originally intended. This situation is too different from the situation envisaged by the provisions in question to make it possible to justify their application by analogy.

16 The third question must therefore be answered in the negative.

Costs

17 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, are not recoverable.

18 As these proceedings are, so far as the parties to the main action are concerned, a step in the action pending before the Bundesfinanzhof, costs are a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the observations of the plaintiff in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 40 and 177;
Having regard to Regulation No 19 of the Council of the EEC of 4 April 1962;
Having regard to Regulation No 54/62 of the Council of the EEC of 30 June 1962;
Having regard to the Protocol on ths Statute of the Court of Justice of the EEC, 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 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.