

In Case 11/70

Reference to the Court under [Article 267 TFEU] by the Verwaltungsgericht (Administrative Court) Frankfurt-am-Main, for a preliminary ruling in the case pending before that court between

INTERNATIONALE HANDELSGESELLSCHAFT MBH, the registered office of which is at Frankfurt-am-Main,

and

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

on the validity of the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals and Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products,

THE COURT

composed of: R. Lecourt, President, A. M. Donner and A. Trabucchi, Presidents of Chambers, R. Monaco, J. Mertens de Wilmars, P. Pescatore (Rapporteur) and H. Kutscher, Judges.

Advocate-General: A. Dutheillet de Lamothe

Registrar: A. Van Boutte

gives the following

JUDGMENT

Grounds of judgment

- 1 By order of 18 March 1970 received at the Court on 26 March 1970, the Verwaltungsgericht Frankfurt-am-Main, pursuant to [Article 267 TFEU], has referred to the Court of Justice two questions on the validity of the system of export licences and of the deposit attaching to them-hereinafter referred to as 'the system of deposits'-provided for by Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ Special Edition 1967, p. 33) and Regulation No 473/67/EEC of the Commission of 21 August 1967 on import and export licences (OJ 1967, No 204, p. 16).
- 2 It appears from the grounds of the order referring the matter that the Verwaltungsgericht has until now refused to accept the validity of the provisions in question and that for this reason it considers it to be essential to put an end to the existing legal uncertainty. According to the evaluation of the Verwaltungsgericht, the system of deposits is contrary to certain structural principles of national constitutional law which must be protected within the framework of [Union] law, with the result that the primacy of supranational law must yield before the principles of the German Basic Law. More particularly, the system of deposits runs counter to the principles of freedom of action and of disposition, of economic liberty and of proportionality arising in particular from Articles 2 (1) and 14 of the Basic Law. The obligation to import or export resulting from the issue of the licences, together with the deposit attaching thereto, constitutes an excessive intervention in the freedom of disposition in trade, as the objective of the regulations could have been attained by methods of intervention having less serious consequences.

The protection of fundamental rights in the [Union] legal system

- 3 Recourse to the legal rules or concepts of national law in order to judge the

validity of measures adopted by the institutions of the [Union] would have an adverse effect on the uniformity and efficacy of [Union] law. The validity of such measures can only be judged in the light of [Union] law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as [Union] law and without the legal basis of the [Union] itself being called in question. Therefore the validity of a [Union] measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

- 4 However, an examination should be made as to whether or not any analogous guarantee inherent in [Union] law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the [Union]. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the [Union] legal system.

The first question (legality of the system of deposits)

- 5 By the first question the Verwaltungsgericht asks whether the undertaking to export based on the third subparagraph of Article 12 (1) of Regulation No 120/67, the lodging of a deposit which accompanies that undertaking and forfeiture of the deposit should exportation not occur during the period of validity of the export licence comply with the law. . .
- 6 According to the terms of the thirteenth recital of the preamble to Regulation No 120/67, 'the competent authorities must be in a position constantly to follow trade movements in order to assess market trends and to apply the measures .., as necessary' and 'to that end, provision should be made for the issue of import and export licences accompanied by the lodging of a deposit guaranteeing that the transactions for which such licensee are requested are effected'. It follows from these considerations and from the general scheme of the regulation that the system of deposits is intended to

guarantee that the imports and exports for which the licences are requested are actually effected in order to ensure both for the [Union] and for the Member States precise knowledge of the intended transactions.

- 7 This knowledge, together with other available information on the state of the market, is essential to enable the competent authorities to make judicious use of the instruments of intervention, both ordinary and exceptional, which are at their disposal for guaranteeing the functioning of the system of prices instituted by the regulation, such as purchasing, storing and distributing, fixing denaturing premiums and export refunds, applying protective measures and choosing measures intended to avoid deflections of trade. This is all the more imperative in that the implementation of the common agricultural policy involves heavy financial responsibilities for the [Union] and the Member States.
- 8 It is necessary, therefore, for the competent authorities to have available not only statistical information on the state of the market but also precise forecasts on future imports and exports. Since the Member States are obliged by Article 12 of Regulation No 120/67 to issue import and export licences to any applicant, a forecast would lose all significance if the licences did not involve the recipients in an undertaking to act on them. And the undertaking would be ineffectual if observance of it were not ensured by appropriate means.
- 9 The choice for that purpose by the [Union] legislature of the deposit cannot be criticized in view of the fact that that machinery is adapted to the voluntary nature of requests for licences and that it has the dual advantage over other possible systems of simplicity and efficacy.
- 10 A system of mere declaration of exports effected and of unused licences, as proposed by the plaintiff in the main action, would, by reason of its retrospective nature and lack of any guarantee of application, be incapable of providing the competent authorities with sure data on trends in the movement of goods.
- 11 Likewise, a system of fines imposed *a posteriori* would involve considerable administrative and legal complications at the stage of decision and of execution, aggravated by the fact that the traders concerned may be beyond the reach of the intervention agencies by reason of their residence in another

Member State, since Article 12 of the regulation imposes on Member States the obligation to issue the licences to any applicant 'irrespective of the place of his establishment in the [Union].'

- 12 It therefore appears that the requirement of import and export licences involving for the licensees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals.
- 13 The principle of the system of deposits cannot therefore be disputed.
- 14 However, examination should be made as to whether or not certain detailed rules of the system of deposits might be contested in the light of the principles enounced by the Verwaltungsgericht, especially in view of the allegation of the plaintiff in the main action that the burden of the deposit is excessive for trade, to the extent Of violating fundamental rights. . .
- 15 In order to assess the real burden of the deposit on trade, account should be taken not so much of the amount of the deposit which is repayable—namely 0.5 unit of account per 1000 kg—as of the costs and charges involved in lodging it. In assessing this burden, account cannot be taken of forfeiture of the deposit itself, since traders are adequately protected by the provisions of the regulation relating to circumstances recognized as constituting *force majeure*.
- 16 The costs involved in the deposit do not constitute an amount disproportionate to the total value of the goods in question and of the other trading costs. It appears therefore that the burdens resulting from the system of deposits are not excessive and are the normal consequence of a system of organization of the markets conceived to meet the requirements of the general interest, defined in Article 39 of [TFEU], which aims at ensuring a fair standard of living for the agricultural [Union] while ensuring that supplies reach consumers at reasonable prices.
- 17 The plaintiff in the main action also points out that forfeiture of the deposit in the event of the undertaking to import or export not being fulfilled really

constitutes a fine or a penalty which the Treaty has not authorized the Council and the Commission to institute.

- 18 This argument is based on a false analysis of the system of deposits which cannot be equated with a penal sanction, since it is merely the guarantee that an undertaking voluntarily assumed will be carried out.
- 19 Finally, the arguments relied upon by the plaintiff in the main action based first on the fact that the departments of the Commission are not technically in a position to exploit the information supplied by the system criticized, so that it is devoid of all practical usefulness, and secondly on the fact that the goods with which the dispute is concerned are subject to the system of inward processing are irrelevant. These arguments cannot put in issue the actual principle of the system of deposits.
- 20 It follows from all these considerations that the fact that the system of licences involving an undertaking, by those who apply for them, to import or export, guaranteed by a deposit, does not violate any right of a fundamental nature. The machinery of deposits constitutes an appropriate method, for the purposes of [Article 40(2) TFEU], for carrying out the common organization of the agricultural markets and also conforms to the requirements of Article 43 [TFEU].

The second question (concept of 'force majeure')

- 21 By the second question the Verwaltungsgericht asks whether, in the event of the Court's confirming the validity of the disputed provision of Regulation No 120/67, Article 9 of Regulation No 473/67 of the Commission, adopted in implementation of the first regulation, is in conformity with the law, in that it only excludes forfeiture of the deposit in cases of *force majeure*.
- 22 It appears from the grounds of the order referring the matter that the court considers excessive and contrary to the abovementioned principles the provision in Article 1 [sic] of Regulation No 473/67, the effect of which is to limit the cancellation of the obligation to import or export and release of the deposit only to 'circumstances which may be considered to be a case of *force majeure*'. In the light of its experience, the Verwaltungsgericht considers

that provision to be too narrow, leaving exporters open to forfeiture of the deposit in circumstances in which exportation would not have taken place for reasons which were justifiable but not assimilable to a case of *force majeure* in the strict meaning of the term. For its part, the plaintiff in the main action considers this provision to be too severe because it limits the release of the deposit to cases of *force majeure* without taking into account the arrangements of importers or exporters which are justified by considerations of a commercial nature.

- 23 The concept of *force majeure* adopted by the agricultural regulations takes into account the particular nature of the relationships in public law between traders and the national administration, as well as the objectives of those regulations. It follows from those objectives as well as from the positive provisions of the regulations in question that the concept of *force majeure* is not limited to absolute impossibility but must be understood in the sense of unusual circumstances, outside the control of the importer or exporter, the consequences of which, in spite of the exercise of all due care, could not have been avoided except at the cost of excessive sacrifice. This concept implies a sufficient flexibility regarding not only the nature of the occurrence relied upon but also the care which the exporter should have exercised in order to meet it and the extent of the sacrifices which he should have accepted to that end.
- 24 The cases of forfeiture cited by the court as imposing an unjustified and excessive burden on the exporter appear to concern situations in which exportation has not taken place either through the fault of the exporter himself or as a result of an error on his part or for purely commercial considerations. The criticisms made against Article 9 of Regulation No 473/67 lead therefore in reality to the substitution of considerations based solely on the interest and behaviour of certain traders for a system laid down in the public interest of the [Union]. The system established, under the principles of Regulation No 120/67, by implementing Regulation No 473/67 is intended to release traders from their undertaking only in cases in which the import or export transaction was not able to be carried out during the period of validity of the licence as a result of the occurrences referred to by the said provisions. Beyond such occurrences, for which they cannot be held responsible, importers and exporters are obliged to comply with the provisions of the agricultural regulations and may not substitute for them considerations based upon their own interests.
- 25 It therefore appears that by limiting the cancellation of the undertaking to

export and the release of the deposit to cases of *force majeure* the [Union] legislature adopted a provision which, without imposing an undue burden on importers or exporters, is appropriate for ensuring the normal functioning of the organization of the market in cereals, in the general interest as defined in Article 39 of [TFEU]. It follows that no argument against the validity of the system of deposits can be based on the provisions limiting release of the deposit to cases of *force majeure*.

Costs

- 26 The costs incurred by the Government of the Kingdom of The Netherlands, the Government of the Federal Republic of Germany and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable.
- 27 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the Verwaltungsgericht Frankfurt-am-Main, the decision as to costs is a matter for that court.

On those grounds,

Upon reading the pleadings;

Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the plaintiff in the main action and the Commission of the European [Union];

Upon hearing the opinion of the Advocate-General;

Having regard to the Treaty [on the Functioning of the European Union], especially [Article 3 TEU], Articles 39, 40, 43 and 267;

Having regard to Regulation No 120/67/EEC of the Council of 13 June 1967 and Regulation No 473/67/EEC of the Commission of 21 August 1967;

Having regard to the Protocol on the Statute of the Court of Justice of the European [Union], especially Article 20;

Having regard to the Rules of Procedure of the Court of Justice of the European [Union],

THE COURT

in answer to the questions referred to it by the Verwaltungsgericht Frankfurt-am-Main, by order of that court of 18 March 1970, hereby rules:

Examination of the questions put reveals no factor capable of affecting the validity of:

- (1) the third subparagraph of Article 12 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 making the issue of import and export licences conditional on the lodging of a deposit guaranteeing performance of the undertaking to import or export during the period of validity of the licence;
- (2) Article 9 of Regulation No 473/67/EEC of the Commission of 21 August 1967, the effect of which is to limit the cancellation of the undertaking to import or export and the release of the deposit only to circumstances which may be considered to be a case of 'force majeure'.

Lecourt

Donner

Trabucchi

Monaco

Mertens de Wilmars

Pescatore

Kutscher

Delivered in open court in Luxembourg on 17 December 1970.

A. Van Rutte

R. Lecourt

Registrar

President