

JUDGMENT OF 17. 12.1970 — CASE 25/70

In Case 25/70

Reference to the Court under [Article 267 TFEU] by the Hessischer Verwaltungsgerichtshof (Higher Administrative Court of the Land of Hesse), Kassel, for a preliminary ruling in the action pending before that court between

EINFUHR- und Vorratsstelle für Getreide und FUTTERMITTEL, Frankfurt-am- Main,

and

Köster, BERODT & Co., having its registered office in Hamburg,

on the validity of Regulation No 102/64/EEC of the Commission of 28 July 1964 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 Lamoignon

Registrar: A. Van Houtte

gives the following

JUDGMENT

Grounds of judgment

- 1 By order of 21 April 1970 received at the Court on 28 May 1970, the Hessischer Verwaltungsgerichtshof, by virtue of [Article 267 TFEU], has asked the Court to give a ruling on 'the validity of Regulation No 102/64/EEC of the Commission of 28 July 1964, on import and export licences for cereals and

processed cereal products, rice, broken rice and processed rice products (OJ 1964, p. 2125) and, in particular, on the question whether Articles 1 and 7 of that regulation are valid in so far as they relate to export licences and deposits lodged for the purpose of obtaining export licences.

- 2 It appears from the order referring the matter that the question put was raised in the context of an appeal against a judgment of the Verwaltungsgericht Frankfurtam- Main, annulling a decision of the Einfuhr- und Vorratsstelle für Getreide und Futtermittel which had declared a deposit forfeited on the failure of the respondent to effect within the prescribed period an export covered by a licence issued under Article 7 of Regulation No 102/64. In view of the grounds of the judgment at first instance and of the submissions made by the respondent in the appeal concerning the legality of the system of deposits established by Articles 1 and 7 of Regulation No 102/64, the Hessischer Verwaltungsgerichtshof has formulated its question by way of four subordinate questions which it is appropriate to consider separately.

1 — The question relating to the 'Management Committee' procedure

- 3 The Court is asked first whether the procedure laid down by Article 26 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), in implementation of which Regulation No 102/64 of the Commission was adopted, must be considered to be contrary to the [FEU] Treaty and whether in particular that procedure is compatible with [Articles 43(2) and (3) TFEU, the first paragraph of Article 17 TEU, Articles 263, 267 and the first paragraph of Article 288 TFEU].
- 4 This question concerns the legality of the so-called Management Committee procedure introduced by Articles 25 and 26 of Regulation No 19 and re-enacted by numerous other agricultural regulations. The abovementioned provisions of the Treaty reveal that the question put concerns more particularly the compatibility of the Management Committee procedure with the [Union] structure and the institutional balance as regards both the relationship between institutions and the exercise of their respective powers.
- 5 It is alleged in the first place that the power to adopt the system in dispute belonged to the Council which, under the terms of the [Articles 43(2) TFEU], should have acted on a proposal from the Commission and after consulting the Assembly and that therefore the procedure followed derogated from the procedures and powers fixed by this provision of the Treaty.
- 6 Both the legislative scheme of the Treaty, reflected in particular by [fifth sentence of the first paragraph of Article 17 TEU], and the consistent practice of the [Union] institutions establish a distinction, according to the legal concepts recognized in all the Member States, between the measures directly based on the Treaty itself and derived law intended to ensure their implementation. It cannot therefore be a requirement that all the details of the regulations concerning the common agricultural policy be drawn up by the Council according to the procedure in Article 43. It is sufficient for the purposes of that provision that the basic elements of the matter to be dealt with have been adopted in accordance with the procedure laid down by that provision. On the other hand, the provisions implementing the basic regulations may be adopted according to a procedure different from that in Article 43, either by the Council itself or by the Commission by virtue of an authorization complying with [the first paragraph of Article 17 TEU].

- 7 The measure dealt with by implementing Regulation No 102/64 of the Commission do not go beyond the limits of the implementation of the principles of basic Regulation No 19. The Commission was thus validly authorized by Regulation No 19 to adopt the implementing measures in question, the validity of which cannot therefore be disputed within the context of the requirements of Article 43 (2) [and 3] of the Treaty.
- 8 Secondly, the respondent in the main action criticizes the Management Committee procedure in that it constitutes an interference in the Commission's right of decision, to such an extent as to put in issue the independence of that institution. Further, the interposition between the Council and the Commission of a body which is not provided for by the Treaty is alleged to have the effect of distorting the relationships between the institutions and the exercise of the right of decision.
- 9 [The first paragraph of Article 17 TEU] provides that the Commission shall exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter. This provision, the use of which is optional, enables the Council to determine any detailed rules to which the Commission is subject in exercising the power conferred on it. The so-called Management Committee procedure forms part of the detailed rules to which the Council may legitimately subject a delegation of power to the Commission. It follows from an analysis of the machinery set up by Articles 25 and 26 of Regulation No 19 that the task of the Management Committee is to give opinions on draft measures proposed by the Commission, which may adopt immediately applicable measures whatever the opinion of the Management Committee. Where the Committee issues a contrary opinion, the only obligation on the Commission is to communicate to the Council the measures taken. The function of the Management Committee is to ensure permanent consultation in order to guide the Commission in the exercise of the powers conferred on it by the Council and to enable the latter to substitute its own action for that of the Commission. The Management Committee does not therefore have the power to take a decision in place of the Commission or the Council. Consequently, without distorting the [Union] structure and the institutional balance, the Management Committee machinery enables the Council to delegate to the Commission an implementing power of appreciable scope, subject to its power to take the decision itself if necessary.
- 10 The legality of the so-called Management Committee procedure, as established by Articles 25 and 26 of Regulation No 19, cannot therefore be disputed in the context of the institutional structure of the [Union].
- 11 The respondent in the main action has also criticized the Management Committee procedure inasmuch as that machinery has deprived the Court of Justice of certain of its functions by instituting 'a right of annulment' reserved to the Council for measures taken by the Commission. :
- 12 That objection is based on a false analysis of the Council's right to take over the decision. The procedure laid down by Article 26 of Regulation No 19 has the effect of enabling the Council to substitute its own action for that of the Commission where the Management Committee gives a negative opinion. The system is therefore arranged in such a way that the implementing decisions adopted by virtue of the basic regulation are in all cases taken either by the Commission or, exceptionally, by the Council. These measures whatever their author, are capable of giving rise in identical circumstances either to an application for annulment under [Article 263 TFEU] or to a reference for a preliminary ruling under [Article 267 TFEU]. It therefore appears that the exercise by the Council of its right to take over the decision in no way limits the jurisdiction of the Court of Justice.

- 13 The Court is asked to rule whether Regulation No 102/64 of the Commission is deprived of a valid basis of authorization in that it lays down in Article 1 thereof the obligation to export involved by the export licence, in Article 7 (1) thereof the necessity to lodge a deposit in order to obtain that licence and in Article 7 (2) thereof forfeiture of the deposit should the obligation to export not be fulfilled, or whether the Commission's powers in this connexion are to be found in either the [FEU] Treaty in general or the combined provisions of Article 16 (2) and (3) or Articles 19 and 20 of Regulation No 19 of the Council.
- 14 It appears from both the grounds of the judgment at first instance and the observations of the respondent in the main action that this question concerns a doubt as to the authority of the Commission to extend the system of deposits both to exports of cereals and to imports or exports of processed cereal products. Since this doubt springs from the wording of Article 16 of Regulation No 19, it should be ascertained whether that provision supplies a sufficient basis of authority for the implementing measures taken within the framework of Regulation No 102/64 with regard to exports and to processed products in general.
- 15 Under the terms of Article 16 (1) of Regulation No 19, any importation or exportation of the products referred to in Article 1 is conditional on the presentation of an import or export licence. To this general provision, paragraph (2) of the same article adds various details with regard to the duration of the import licence for cereals, adding that 'the issue of a licence shall be conditional on the lodging of a deposit...'. Lastly, paragraph (3) provides that 'the detailed rules for the application of this article ... shall be adopted in accordance with the procedure laid down in Article 26', specifying that the provision applies 'in particular' to the fixing of the duration of the validity of the import licence for processed cereal products. The wording of that article has given rise to the question whether, since the system of deposits is only mentioned in Article 16 (2) in relation to import licences for cereals properly so called, the Commission was legitimately able to extend it, through implementing Regulation No 102/64, to exports and processed products.
- 16 These various provisions must be interpreted in the light of the scheme and objectives both of Article 16 and of Regulation No 19 as a whole. Article 16 (1) reveals the intention to establish a system intended to govern indiscriminately imports and exports of all the products subjected to an organization of the market by Regulation No 19. In the same way, paragraph (3) refers to the procedure laid down in Article 26 for the determination of all detailed rules of application to be adopted in the context of Article 16.
- 17 Paragraph (2), which is placed between these two provisions of general scope, constitutes a special measure of application intended to implement a part of the provisions envisaged in paragraph (1). An interpretation which restricted the guarantees of effectiveness provided for by the regulation merely to import licences and to a part only of the products subject to the organization of the market would have the effect of disturbing the harmonious functioning of the system.
- 18 Article 16 must therefore be interpreted as having included, in the reference to the measures of application mentioned in paragraph (3) all provisions intended to supplement the partial measures laid down in paragraph (2), according to the pattern of that same provision. The Commission was thus

authorized to include in Regulation No 102/64, as regards export licences, the provisions relating to the obligation to export and to the deposit, which form the subject-matter of Articles 1 and 7, as well as those which concern processed products, a category into which the goods the non-exportation of which is at the origin of the dispute fall.

19 Thus, it does not appear necessary to examine the extent to which Articles 19 and 20 of Regulation No 19 could have provided a legal basis for the provisions of Regulation No 102/64.

3 — The question relating to the principles of economic freedom and proportionality

20 The Court is asked to rule whether the provisions of Regulation No 102/64 of the Commission, relating to the obligation to export inherent in every export licence (Article 1) and the lodging and forfeiture of the deposit lodged for the purpose of obtaining export licences (Article 7) violate a principle whereby the administration is obliged to apply only measures proportionate to the objective to be attained or prohibiting it from recourse to excessive measures and whether this is so in particular in the case referred to in Article 7(1) where the deposit is lodged for the purpose of obtaining export licences in respect of which the amount of the refund is not fixed in advance.

21 It appears from the grounds of the judgment at first instance that the Verwaltungsgericht considered the undertaking attached to the issue of the import or export licences, under Article 1 of Regulation No 102/64, and the deposit provided for by Article 7 (1) of the same regulation guaranteeing the fulfilment of that obligation to be invalid, because it allegedly constitutes an *ultra vires* measure contrary to the principles of economic freedom and proportionality. According to the court, these principles which are intended to guarantee protection of fundamental rights form an integral part of both international law and the supranational legal order, such that a [Union] measure contrary to these concepts must be considered null and void.

22 Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. It is therefore appropriate to inquire, in replying to the question referred to the Court and in the light of the principles invoked, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the [Union] legal system.

23 The objective of the system of deposits is set out in the sixth recital of the preamble to Regulation No 102/64, according to which 'provision should be made to avoid licences being put into circulation which are not then followed by import or export', in view of the fact that 'such licences would give a mistaken view of the market situation', and to this end the issue of licences conditional on the lodging of a deposit which is to be forfeited if the obligation to import or export is not fulfilled. It follows from these considerations and from the general scheme of Regulations No 19 and 102/64 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.

24 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.

- 25 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 16 of Regulation No 19 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.
- 26 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.
- 27 A system of mere declaration of exports effected and of unused licences, as proposed by the respondent 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. Likewise, a system of fines imposed *a posteriori* would involve considerable administrative and legal complications at the stage of decision and of execution.
- 28 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.
- 29 The principle of the system of deposits cannot therefore be disputed.
- 30 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 question, especially in view of the allegation of the respondent in the main action that the burden of the deposit is excessive for trade, to the extent of violating fundamental rights.
- 31 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*. 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.
- 32 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 the Treaty, which aims at ensuring that supplies reach consumers at reasonable prices.

- 33 The respondent 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.
- 34 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.
- 35 Finally, the arguments relied upon by the respondent in the main action based 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, is irrelevant, as it cannot put in issue the actual principle of the system of deposits.
- 36 It follows from all these considerations that the fact that the system of licences involves 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, and in no way excessive, method, for the purposes of [Article 40(2) TFEU], for carrying out the common organization of the agricultural markets and also conform to the requirements of Article 43.

4 — The question relation to the concept of force majeure

- 37 The Court is asked to rule whether the provision of Regulation No 102/64 concerning forfeiture of the deposit (Article 7 (2)) is invalid by reason of the fact that, even without the legislature's attempting to establish whether or not the failure to carry out the obligation to export is independent of fault, the only case in which the deposit is not forfeited is, under Article 8, when exportation cannot be effected during the period of validity of the licence as a result of circumstances which may be considered to be a case of *force majeure*.
- 38 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.
- 39 The system established by Regulation No 102/64 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.

- 40 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 the Treaty. 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

- 41 The costs incurred by the Council and the Commission of the European [Union], which have submitted observations to the Court, are not recoverable. 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 Hessischer Verwaltungsgerichtshof, 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 respondent in the main action and the Council and the Commission of the European [Union];

Upon hearing the opinion of the Advocate-General;

Having regard to the [Treaty on European Union and the Treaty on the Functioning of the European Union], especially [Article 3 TEU, Articles 39, 40 and 43 TFEU, the first paragraph of Article 17 TEU, Articles 263, 267 and 288 TFEU];

Having regard to Regulation No 19 of the Council of 4 April 1962 and Regulation No 102/64/EEC of the Commission of 28 July 1964;

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 Hessischer Verwaltungsgerichtshof Kassel by order of that court of 21 April 1970, hereby rules:

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

(1) Regulation No 102/64/EEC of the Commission of 28 July 1964 on import and export licences for cereals and processed cereal products, rice, broken rice and processed rice products, adopted by virtue of Article 16 (3) of Regulation No 19 according to the Management Committee procedure set up by Article 26 of the same regulation;

(2) Articles 1 and 7 of Regulation No 102/64/EEC of the Commission in so far as they concern export licences and deposits lodged for the purpose of obtaining those licences.

Lecourt

Donner
Mertens de Wilmars

Pescatore

Trabucchi
Kutscher

Monaco

Delivered in open court in Luxembourg on 17 December 1970.

A. Van Houtte
Registrar

R. Lecourt
President