

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 12 JUNE 1968¹

Mr President,
Members of the Court,

Article 11 of Regulation No 13/64 of the Council on the progressive establishment of a common organization of the market in milk subjects the issue by a Member State of the licence necessary for any importation to a deposit guaranteeing the obligation to import during the term of validity of the licence. The purpose of this system, which is found generally in the common organization of the markets is to give as precise a picture as possible of the imports to be expected during a given period, as well as of the probable development of the market. It must enable the customary protective measures to be taken in time if serious disturbances occur. However, in order to be effective, the quantities stated in the licence must in fact be imported and the deposit is intended to ensure that this transaction is properly carried out. The deposit is forfeit if the importation is not effected within the time-limit, except in cases of *force majeure* which are to be laid down in a regulation of the Commission.

This is the subject of Article 6 of Regulation No 136/64, the outline of which is as follows:

- As an exception to the principle laid down in paragraph (1), paragraph (2) provides that if the importation cannot be effected as a result of a case of *force majeure* the Member State shall decide that the obligation to import is cancelled and the deposit is not forfeit; on application by the party concerned, this State may also extend the term of validity of the licence for such period as it considers necessary by reason of the circumstance invoked.
- Paragraph (3) adds that cases of *force majeure* within the meaning of paragraph (2) may result from the circumstances which are enumerated therein and which extend from war and civil

disturbances to strikes and include engine failure, damage to vessel or damage to cargo.

- Finally, paragraph (4) makes it possible for Member States to recognize as cases of *force majeure* within the meaning of paragraph (2) cases resulting from circumstances other than those set out in paragraph (3), provided that they notify the Commission immediately of any such cases.

These are the various provisions which the Verwaltungsgericht, Frankfurt, is asking you to interpret for the purposes of an action before it between an importer and the Einfuhr- und Vorratsstelle für Fette (Office for the importation and storage of fats and oils) which arose in the following circumstances: the deposit lodged by the Schwarzwaldmilch undertaking for the issue of an import licence for 100 000 kg of skimmed milk powder from France was declared forfeit on the ground that the importation had not been effected before the term of validity of the licence expired on 28 February 1967. This company maintained that it had ordered the goods in good time from the Laiterie Centrale de Strasbourg, which had only informed it on 20 February 1967 that it was unable to effect delivery by reason of a serious engine failure in a machine in its production plant; at that date it was no longer possible for the importer to obtain the goods in France on acceptable terms. Since the failure to fulfil its obligation was not the result of any fault on the part of the importing company, it contended that the said failure had to be considered as a case of *force majeure* within the meaning of Article 6(2). This argument was contested by the Einfuhr- und Vorratsstelle which refused to acknowledge the existence of a causal connexion between the facts alleged and the failure to import. The Verwaltungsgericht considered that in the circumstances it was unable to choose between these two points of view. It therefore submits five questions on the inter-

¹ — Translated from the French.

pretation of Article 6 of Regulation No 136/64, some of which may appear extremely difficult.

A — It appears that the first question may be resolved without difficulty.

I have already mentioned that according to the argument of the applicant in the main action, the importation could not be effected as a result of an engine failure at the Strasbourg undertaking. Article 6(3) includes engine failure among the circumstances which may amount to *force majeure*. The German court wonders whether this concept relates solely to failures in ships' engines or whether it also includes those which may occur in other engines, in particular in dairy machinery. The Verwaltungsgericht observes that the context points to the first interpretation whereas the wording of the provision permits the second.

The first interpretation is certainly to be preferred. The cases referred to in the paragraph in dispute may in fact be classified in two categories: one relates to general obstacles to trade such as war and civil disturbance, government bans on exports or imports and strikes (Article 6(3)(a), (b) and (f)); the other covers circumstances all of which concern transport and more precisely sea transport—restrictions on navigation as a result of acts of sovereignty—shipwreck—shipping delays in periods of icing-up or low water (Article 6(3)(c), (d) and (g)). Finally—and this is the provision to be interpreted—subparagraph (e) refers to 'engine failure, damage to vessel or damage to cargo'. The term 'engine failure' thus follows directly on restrictions on navigation and shipwreck; it is, moreover, coupled with circumstances which are peculiar to shipping; it must therefore be considered not to cover *any* mechanical difficulty whatsoever arising during the manufacturing process, but merely a failure occurring in the course of transport. It is well-known that Article 6 is largely inspired by Regulation No 87 concerning cereals which was in turn based on clauses in the standard contracts of international trade. It is on the basis of the usual methods of transport for cereals that this text refers to hypothetical incidents affecting sea navigation; these incidents may reasonably be adapted and extended to other modes of transport by river or rail,

but it is impossible to go any further. An engine failure in a producing undertaking is certainly not covered by the provisions of Article 6(3).

B — The Verwaltungsgericht then refers to paragraph (4) of the same Article and asks you whether it empowers the courts of the Member States to recognize as cases of *force majeure* circumstances other than those referred to in paragraph (3).

The provision in question is worded as follows:

'If Member States recognize as cases of *force majeure* within the meaning of paragraph (2) cases resulting from circumstances other than those set out in the foregoing paragraph, they shall immediately notify the Commission thereof.'

This provision, which is, moreover, elucidated by the preamble to the regulation, undoubtedly authorizes Member States to complete a list which cannot be drawn up exhaustively. Its wording and its connexion with the preceding paragraph would lead first to its interpretation as a power granted to the legislating State to adopt legislative measures defining the circumstances capable of constituting a case of *force majeure*, and it would then be for the competent national authority—in this case the Einfuhr- und Vorratsstelle—to apply these measures in each particular case. It is no more possible for the State than for the Commission to give an exhaustive list of these circumstances in advance and if the information given in the written procedure is to be believed, no Member State has yet attempted to do so.

The practice followed up to now—which appears to be the only realistic one—is as follows: the administrative authority competent to declare the deposit forfeit considers in each individual case whether the circumstances relied on may or may not be recognized as a case of *force majeure*. If it decides in the affirmative it informs the Commission which, as it is powerless to annul the decision of the national body, may thus be sure that the policy followed in the various Member States is sufficiently coherent; otherwise it would be for the Commission to act by means of regulations or directives.

It then remains for the courts of the Member

States to exercise the control provided for by the national legislature over the individual decisions taken by the competent administrative authority. This is what happened in the present case. The refusal of the Einfuhr- und Vorratsstelle to refund the deposit was referred to the Verwaltungsgericht by Schwarzwaldmilch. It is for that court, if necessary after the interpretation by you of Article 6 of the regulation, to decide whether or not the circumstances relied on constituted *force majeure* and whether they should therefore have induced the authority to refund the deposit.

C — As we shall see, the other three questions call for consideration together. First, the German court asks you how the concept of '*force majeure*' appearing in Article 6(2) to (4) of Regulation No 136/64 is to be interpreted, secondly, whether this Article requires a direct causal connexion to exist between the circumstances relied on as a case of *force majeure* and the failure to effect the importation and, finally, whether in view of these circumstances, the fact that the performance of the transaction involves the importer in considerable economic difficulties and can only take place at excessive loss is sufficient to make Article 6(2) applicable.

These three questions are therefore closely connected. The first is of general scope—it is designed to obtain a 'Community' definition of the concept of '*force majeure*', by reason of the differences which the German court believes that it sees between this concept as it exists in German law and in French law and also by reason of the argument put forward by the applicant in the main action that the forfeiture of the deposit is penal in character and according to German constitutional law could only be declared if the failure to fulfil the obligation to import was the importer's own fault. The other two questions only serve to obtain a definite ruling on certain points as to the conditions under which *force majeure* should be admitted, having regard to the facts of the case.

1. The Commission rightly points out that these questions only fall within your jurisdiction if the concept of *force majeure*, as provided for in the regulation, constitutes an independent concept of Community law

which must be interpreted and applied uniformly throughout the six Member States; it is really only in this event that Article 177 of the Treaty gives you jurisdiction to interpret this concept. To put it more precisely, if this were not so, your rôle would be limited to confirming, without going any further, that the concept belongs exclusively to national law, and to leaving the German court to resolve the questions referred according to its own legal system.

In support of this latter solution, it might be recalled that the organization of the milk markets, as laid down in Regulation No 13/64, does not abolish national markets but leaves the Member States with important powers. It is these States which issue the import licences, supervise the development of their markets and have the power to put into operation the application of safeguard clauses. Moreover, should not the power conferred on them by Article 6(4) to recognize cases of *force majeure* other than those listed in the regulation lead us to admit that they may be determined according to the criteria of their national legal systems? But this would be to ignore the fact that the regulation, directly applicable in all the Member States, establishes a uniform system of import licences, lays down the principle that the deposit is forfeit if the transaction does not take place and enumerates a number of circumstances which, throughout the Community, constitute cases of *force majeure*. The uniformity of application must therefore logically be extended to cases in which a decision is left to the Member States. Moreover, this is the reason for the existence of paragraph (4), which provides that the States shall immediately notify the Commission, as it is necessary for that body to be in a position to ensure a sufficiently coherent application of the system throughout the Community. It can only be in such a position if the concept of *force majeure* used in the regulation is recognized as an independent provision of Community law, the meaning and scope of which are for you to define.

2. On what criteria must this definition be based?

The Commission starts with the assumption that this concept, borrowed from the legal systems of the Member States, could not

have, in Community law, any significance other than that contained in those systems. Its definition must therefore be based on principles which can be borrowed 'as common principles' from these various legal systems, in view of the fact that it is only the scope of application of the concept of *force majeure* which is generally fixed by the national legislature, while the rules by which to interpret and give effect to the concept are worked out by practitioners.

On this basis the Commission believes it possible to contend that the national legal systems agree in generally recognizing as *force majeure* only cases in which the impossibility of performance arises from an extraordinary, unforeseen event, outside the control of the person who is under the obligation, an event, not brought about by his own default, which he could neither foresee nor avoid. While accepting that these principles have been the subject of precise interpretation according to the concepts peculiar to the various legal systems, the Commission considers it necessary to begin with these common points in order to trace out the scope of Article 6 having regard to the purpose of Regulation No 136/64. I must point out here that, in support of its theory concerning the identical nature of the concept of *force majeure* in the legal systems of the Member States, the Commission refers to both academic legal opinion and to case-law in the six States. However, in my opinion, this argument gives cause for serious reservations.

In the first place, this is not a case in which the provision obliges you—as in Article 215 of the Treaty—to refer to the 'general principles common to the laws of the Member States'. Secondly, while admitting that I have not undertaken an exhaustive study of the comparative law of *force majeure* in the six States of the Community, it seems to me at present impossible to find any really common accord on this concept; if there are no differences on fundamental principles there certainly are differences in the modes of its application from one State to another and even within the same country according to the branch of law to which it is applied.

To take only a few examples, the court which referred the questions to you has

already pointed out that the definitions are different in the French and the German legal systems. In the former the concept of *force majeure* is frequently given an objective interpretation and it does not exist unless the act or event which has caused the damage lies outside the sphere of activity of the undertaking. On the other hand, a subjective criterion is applied in other areas, which looks rather at the person concerned and the actual position in which he found himself, without going into the question whether the event did or did not lie within his sphere of activity (Coing, in Staudinger's *Kommentar zum Bürgerlichen Gesetzbuch*, Vol. I, pp. 1134 to 1137). As regards French law, to remain in the field of contract, although the same concept applies in both civil and administrative law and although *force majeure* always results from events of an uncontrollable and unforeseeable nature which are unconnected with the activities of the person under the obligation, the administrative courts in applying it are generally more reluctant to admit that these conditions have been fulfilled (*Répertoire de droit administratif*, V. *Force majeure*—de Laubadère—*Traité des contrats administratifs*).

Finally, whilst I do not wish to go into the details of the arguments by which the Commission replies to the various points raised by the German court, its observations appear at times to consider the concept of *force majeure* with a certain flexibility within the framework of the facts of the case. This is undoubtedly because, as the Commission itself states, the general principles which it quotes as authority must be applied 'in accordance with the aim pursued by import licences in general and by the deposit in particular'. But is not this to deprive a concept which would logically be valid throughout Community law of a large part of its significance?

3. Indeed, in my opinion, in order to interpret the concept of *force majeure* used in Article 6(2) of Regulation No 136/64 we must resort less to general principles than to the spirit of this regulation, to the reasons justifying the requirement of import licenses and deposits and to the balance which must be maintained between the public interest and the interests of the importers. Perhaps

in this way we shall arrive at solutions which are very close to those put forward by the Commission but which will be pragmatic in character and limited to the regulation in question.

As I have said, the system of licences is intended to provide as accurate a view as possible of the volume of imports which will be made in the course of a given period and to enable the probable development of the market to be forecast from the point of view of quantities or prices; as was pointed out at the hearing, customs statistics concerning imports already made cannot do this. In order to attain the desired objective the quantities shown in the licences must in fact be imported during their period of validity. The lodging of a deposit, to be forfeit in case of a default by the importer which is not justified on the grounds of *force majeure*, ensures that applications for licences are genuine and prevents possible speculative manoeuvres. However, it is essentially a deterrent; as soon as you have a properly operating system making all applications for a licence subject to the lodging of a deposit, there is little chance that importers will undertake obligations lightly and expose themselves to the risk of losing by their own default the deposit which they have had to lodge. The mere existence of the machinery no doubt suffices to prevent any attempt at abuse, the practical importance of which must not be exaggerated. This leads one to think that the purpose of the provision in dispute does not demand a strict interpretation, but allows a reasonable assessment to be made of the cases in which the deposit may be refunded in spite of a failure to effect the importation. It remains for me to consider the conditions under which this may be done.

4. First, the circumstances which have prevented the import's being made must not of course be attributable to the importer himself. As we know, the applicant in the main action has contended that the refund of the security could only be conditional on there being no default on the part of the importer and it has based this argument on the German constitutional provisions relating to the imposition of penalties, but its argument is invalid as the rules invoked only relate in German law to penalties and sanctions im-

posed for breaches of the criminal law.

There is, nevertheless, a reason for requiring of the importer something more than the absence of any default. The licence constitutes not only an authorization, but also an obligation to import; one is therefore entitled to demand that the holder should take care that it is effected, even when this involves persons other than himself, in other words, he must remove the obstacle to importation so far as it lies within his power to do so. What is the limit of his obligation in this respect?

He must not have been able to foresee the obstacle and on this point one may be more or less liberal in recognizing or in refusing to recognize the foreseeability, according to the particular circumstances of the case. The Commission considers that it is only in the case of exceptional circumstances that a presumption of unforeseeability may be accepted and that delays in the manufacture or transport of goods must always be reckoned with. This formula of course needs to be qualified, since the possibilities of such delays may always be envisaged, although not necessarily their precise duration and it is this which may render the importation impossible within the term of validity of the licence.

It is also necessary for him to have been unable to avoid the consequences of the circumstance which prevented the importation from being effected. This is the point of the final question submitted by the German court, which asks whether the fact that performance of the obligation to import involves the importer in considerable economic difficulties and could only be effected at excessive economic sacrifice is sufficient to make Article 6(2) of the regulation applicable. It seems to me that the answer must be in the affirmative. The public interest represented by the system of security is not such that the importer may be required to incur considerable additional expense in order to fulfil the obligation imposed on him. However, to decide as from what moment the importer, having knowledge of the obstacle, can attempt to avoid it, will be a question of fact of considerable significance.

Finally, the Verwaltungsgericht asks you whether a direct causal connexion must

exist between the circumstances relied on as a case of *force majeure* and the failure to effect the importation.

It is certainly possible for certain causes to exist simultaneously or to be interconnected; it is therefore necessary to consider what was in fact the fundamental cause of the failure to import and in order to establish *force majeure* there must be a *necessary* connexion between the circumstances alleged and the failure to carry out the trans-

action. However, this does not imply that only the most recent circumstances should be taken into account and earlier events, which also may be material, set aside.

My conclusions are therefore very similar to those suggested to you by the Commission. They differ from these in particular to the extent that they are limited to the regulation in question and thus in no way purport to prejudge, or even to outline, a concept of *force majeure* in Community law.

In conclusion, a reply to the German court might be given on the basis of the following propositions:

1. The concept of 'engine failure' does not cover breakdowns occurring in dairy machinery.
2. The courts of Member States have power to recognize as cases of *force majeure* circumstances other than those set out in Article 6(3) of the regulation.
3. Within the meaning of this regulation *force majeure* exists when, owing to circumstances which are outside the control of the importer and which he could not foresee, the importation is rendered materially impossible or becomes subject to such difficulties that performance of the obligation would require the holder of the licence to incur expenses which he could not reasonably be expected to bear.

Finally I consider that the decision as to costs incurred before this Court is a matter for the Verwaltungsgericht, Frankfurt-am-Main.