procedure different from that in Article 43, either by the Council itself or by the Commission by virtue of an authorization complying with Article 155.

2. Without distorting the Community 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. The legality of the 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 Community.

3. In the light of the scheme and objectives of Article 16 (3) of Regulation No 19, the Commission was 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, all being provisions intended to supplement the partial measures laid down in the said Article 16.

4. Respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice.

5. The requirement by the agricultural regulations of the Community of import and export licences involving for the licencees an undertaking to effect the proposed transactions under the guarantee of a deposit constitutes a method which is both necessary and appropriate, for the purposes of Articles 40 (3) and 43 of the EEC Treaty, to enable the competent authorities to determine in the most effective manner their interventions on the market in cereals. The system of deposits violates no fundamental right.

6. The concept of *force majeure* adopted by the agricultural regulations 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. (Judgment of 11 July 1968, Case 4/68, Rec. 1968, p. 563.)

7. By limiting the cancellation of the undertaking to export and the release of the deposit to cases of *force majeure* the Community 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.

In Case 25/70

Reference to the Court under Article 177 of the EEC Treaty 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 Lamothe
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

On 2 June 1964 Köster, Berodt & Co. obtained an export licence in respect of 1 200 metric tons of maize meal.
In accordance with Article 7 (1) of Regulation No 102/65/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) the issue of the licence was conditional on the lodging of a deposit, amounting to 0.5 units of account per metric ton, guaranteeing that exportation would be effected during the period of validity of the licence.
An exportation was not effected during the period of validity of the said licence, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel, by decision of 25 November 1965, declared the deposit of 2 400 DM to be forfeited.
On the Einfuhr- und Vorratsstelle's refusing to entertain the objections of Köster, Berodt & Co., that undertaking on 8 October 1966 brought an action in the Verwaltungsgericht (Administrative Court) Frankfurt-am-Main.
By judgment of 12 December 1966, the Verwaltungsgericht Frankfurt-am-Main, found in favour of the undertaking.
The court gave reasons for its decision, holding in particular that Regulation No 102/64 was invalid in that it institutes an obligation to export, makes the issue of the export licence conditional upon the lodging of a deposit and provides in principle for forfeiture of the deposit should the obligation to export not be carried out; moreover, the Commission did not have the power to adopt such a regulation as it violated the principle whereby the administration is obliged to implement only measures proportionate to the objective to be attained (principle of proportionality).
On appeal against that judgment by the Einfuhr- und Vorratsstelle, the Hessischer Verwaltungsgerichtshof, by order of 21 April 1970 received at the Court Registry on 28 May 1970, has asked the Court under Article 177 of the EEC Treaty for a preliminary ruling on the validity of Regulation No 102/64/EEC of the Commission and, in particular, on the question whether Articles 1 and 7 of that regulation are valid in so far as they relate to the system of export licences and deposits.
In its order the *Hessischer Verwaltungs-*

gerichtshof puts the following questions, the scope of which is decisive for the solution of the dispute:

(1) Must 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 was adopted, be considered to be contrary to the EEC Treaty? In particular, is that procedure compatible with Articles 43 (2), 155, 173 and 177 and the first paragraph of Article 189 of the EEC Treaty?

(2) Is Regulation No 102/64 deprived of any 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 are the Commission's powers in this connexion to be found in either the EEC Treaty in general or the combined provisions of Article 16 (2) and (3) or Articles 19 and 20 of Regulation No 19?

(3) Do the provisions of Regulation No 102/64 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 implement only measures proportionate to the objective to be attained or prohibiting it from recourse to excessive measures? In particular, is this so 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?

(4) May it be said that 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?*

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted on 5 August by the respondent in the main action, on 6 August by the Council of the European Communities and on the same date by the Commission of the European Communities.

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory inquiry. The respondent in the main action, the Council and the Commission presented their oral observations at the hearing on 11 November 1970.

The Advocate-General delivered his opinion at the hearing on 2 December 1970.

For the procedure before the Court Fritz Modest, Advocate, of Hamburg, appeared for the respondent in the main action, Jean-Pierre Puissochet, Director of the Secretariat-General, for the Council and Claus-Dieter Ehlermann, the Commission's Legal Adviser, for the Commission.

II — Observations submitted to the Court

Köster, Berodt & Co., the respondent in the main action, advances the following arguments in particular against the validity of the system of deposits:

(a) *On the formal level*

Forfeiture of the deposit constitutes a quasi-penal sanction or a fine imposed on the importer or exporter on failure to carry out the obligation of public law imposed

upon him. The institutions of the Community do not have the power to impose fines or sanctions of a penal nature except in cases where they are expressly authorized by the Treaty to do so. However, Article 39 et seq. relating to the organization of the agricultural markets contain no enabling provision of this nature.

The system of deposits is based on the so-called Management Committee voting procedure. That procedure is contrary to the Treaty: it enables the Management Committee to participate in the legislative work of the Commission, makes the obligation to consult the Assembly illusory and gives the Member States the opportunity of obtaining from the Council an 'annulment' of the regulations of the Commission. The regulations of the Commission adopted in implementation of this illegal procedure are therefore invalid.

Regulation No 19 only provided for the lodging of a deposit for the issue of import licences for cereals alone. The Commission was therefore not entitled on its own authority to extend the system of deposits either to export licences for cereals or to import and export licences for cereal products.

(b) *The substance of the system in dispute*

The respondent in the main action maintains that the system of deposits must respect the principle of proportionality, enshrined both in the German Basic Law and in Community law. In this respect the following observations in particular should be made:

The regulations establishing the common organization of the agricultural markets are limited in principle to the formation of market policy by means of prices. The regulation of prices has an automatic sluice-gate effect on quantitative movements in the Community market and avoids any disturbance to it. Consequently, the point of prime importance in the assessment of the market and market trends is the observance and checking, first, of the prices on the internal market and, secondly, of the situation on the world market. On the other hand, a quantiative check, such as arises from the system of import and export licences, the utilization of which must be guaranteed by means of a deposit, is only of secondary importance.

It appears therefore that the system of deposits is ineffectual in attaining the objective sought by the agricultural regulations and is even contrary to the scheme of those regulations. Moreover, it is also ineffectual in view of the fact that it can neither guarantee that the obligation to import or export is actually carried out, nor enable the competent authorities in good time to have a sure view of the state of the market, much less future market trends.

Moreover, the intervention agencies and the Commission are not technically in a position to exploit the information provided by the system criticized.

Finally, the obligation to lodge a deposit places a heavy burden on the liquidity of undertakings, in particular small and medium-sized undertakings, and the amount of the deposit, especially in the case of advance fixing of the levy or refund, is excessive in relation to normal trade profit margins.

It follows from the foregoing that a substantial charge is imposed without any necessity on importers and exporters. However, any measure constituting a charge, whether or not it is in itself tolerable, violates the principle of proportionality when it is superfluous, when there is disproportion between the charge and the result which it may or must endeavour to achieve, when that objective cannot be attained by the method employed or when, in order to attain it, there are other methods which may be more conveniently applied.

The system of deposits also violates the principle of proportionality in that in respect of exemption from forfeiture of the deposit it refuses, otherwise than in cases of *force majeure*, to take into consideration situations in which the licence to import or export has not been utilized for wholly justifiable commercial reasons, in particular when utilization would have been contrary to the objectives of the common organization of the markets or to commercial logic (for example, in the event of amendment of the applicable legislation between the date of the application for the licence and that of its issue).

The system criticized does not take into

account the peculiarities of the inward processing trade, to which the goods concerned in the main action are subject.

The Council of the European Communities restricts its observations to the problem of the compatibility with the EEC Treaty of the so-called Management Committee procedure and, in asserting such compatibility, advances essentially the following arguments:

(a) The Commission and the Council are empowered to adopt measures implementing a Council measure based directly on the Treaty.

The last indent of Article 155 of the EEC Treaty expressly attributes powers of implementation according to a machinery very closely approaching the so-called technique of the delegation of powers or competences. The Commission does not therefore have a direct, immediate and general power to adopt provisions implementing the rules drawn up by the Council, which must, case by case, expressly delegate such power to it. On the other hand, once such power is delegated to the Commission, it is free to exercise it under the conditions laid down by the measure attributing the power to it and the Council may amend decisions adopted in this way only in so far as it itself provided for that possibility in the measure delegating powers.

By expressly providing for the possibility of conferring powers of implementation on the Commission, Article 155 implicitly, but necessarily, confirms that the Council holds and may retain the same powers.

These principles involve a twofold limitation: on the one hand, the powers which the Council is entitled to confer on the Commission can only be powers of implementation and, on the other hand, it is only to the Commission that powers in connexion with the implementation of rules of the Council may be attributed.

(b) With regard to the procedure for the adoption of rules of implementation, a distinction must be made according to whether they are adopted by the Commission or by the Council.

In the first case, as Article 155 contains no provision on this point, the Council is free, subject to the observance of the institutional balance of powers created by the Treaty, to subject the exercise of the powers conferred on the Commission to specific, detailed rules, such as consultation of a subsidiary body composed of experts or representatives of the Member States.

The detailed rules of the Management Committee procedure do not have the effect of putting the powers conferred on the Commission in issue: they introduce, it is true, the deliberations of a committee but in the exercise of the powers conferred on it the Commission remains the master of its own decision; it is never obliged to follow the opinion of the Committee, the only consequences of a difference between the Committee's opinion and the decision of the Commission being the obligation for it to communicate the wording of the measure to the Council, the option to defer application of the measure for a limited period and the possibility for the Council to adopt different measures. The complaint that the Council has illegally had conferred on itself a 'right of annulment' is irrelevant in the present case, as Regulation No 102/64, the validity of which is contested, was adopted by the Commission and complies with the opinion of the Management Committee. Moreover, any measures adopted by the Council, when it substitutes fresh provisions for those previously adopted by the Commission, cannot in any way be compared with the intervention of a decision of annulment or even of appeal.

In reality, the machinery in dispute must be seen as a conditional delegation of powers; the Council, which might have conferred no power on the Commission, may also confer powers on it subject to certain detailed rules or under certain conditions permitting it in certain specific and well-defined cases to take up and exercise its power to determine itself the measures implementing its own rules.

In a case where the Council itself adopts measures adopting its own rules—a case not relevant in this instance—it is justified and compatible with the Treaty that it may do so according to detailed rules different from those required for basic measures by Article 43 (2) of the Treaty.

(c) The fact that the provisions relaing to the Management Committee procedure do not expressly mention the forms of measures provided for by Article 189 of the Treaty in no way signifies that that article is infringed. It follows from this solely that the institutions have the opportunity of adopting, from among all the legal forms provided for by Article 189, that which appears to them the most appropriate.

(d) The fact that, on the one hand, only the Council and the Commission have a power of decision in the application of the Management Committee procedure, and that, on the other hand, measures adopted by these two institutions are obliged to take one of the forms of executory measure provided for by Article 189 of the Treaty enables it to be stated that the legal guarantees offered by the Treaty, in particular by Article 173 and 177, to those concerned by acts of the administration are safeguarded when this procedure is applied.

The Commission of the European Communities submits substantially the following observations:

(a) *The legality of the intervention by the Management Committee*

The power to make laws for the Community obviously cannot be conferred on bodies other than the Council and the Commission; the collaboration of a committee in the legislative work of the Commission is, however, perfectly legal.

The last indent of Article 155 of the EEC Treaty enables the Council to entrust the Commission with the implementation of the rules laid down by it and to evaluate to what extent and under what conditions it intends to confer powers of implementation on the Commission. The Council does not exceed the limits of that power of evaluation to obtain the opinion of a committee composed of representatives of the Member States before adopting measures of implementation.

The negative opinion of the Management Committee does not deprive the Commission of its powers; it merely obliges it to communicate the measure adopted to the Council and enables the Council to take a different decision. There is nothing against the Council's reserving such a right and, when it does so, this in no way has an adverse effect on review by the Court of Justice.

The powers conferred on the Commission within the framework of the Management Committee procedure are powers of implementation; they may thus be exercised according to rules other than those laid down by the third subparagraph of Article 43 (2) of the Treaty solely for measures intended to lay down the principles of the common agricultural policy and, in particular, the guidelines of a common organization of the market. The principles governing the institutional balance between Council and Commission are respected in this case. As to the Council's option, on a qualified majority, to take a decision different from that of the Commission, it must be remarked that the Council's powers of amendment in the framework of the Management Committee procedure and those provided for by the first paragraph of Article 149 of the EEC Treaty are not comparable.

(b) *The principle of proportionality*

The Community institutions are bound by Community law alone and in their regard the protection conferred by the fundamental rights of national constitutions flows only from Community law, written or unwritten. Further, even according to German constitutional law, the system of deposits is only capable of infringing the provisions concerning free development of the person, freedom of action and economic freedom if, at the same time, it runs counter to the principle of proportionality.

This principle is, however, in no way put in issue by the system in dispute, as that system is indispensable to the proper functioning of the common organization of the market in cereals.

The common organization of the market in cereals involves essentially the regulation of prices, the object of which is to stabilize the price of cereals in the Community at a level higher than that on the world markets. Such regulation protects the Community market from falls in prices provoked either by internal over-production or by imports.

It can only function if the regulatory mechanism is used in a rational manner; it is therefore essential that data be available indicating not only the imports and exports already effected but also enabling a valid assessment of *future* market trends to be made. This *prospective* comprehensive view of the market is essential not only for the possible application of protective measures in the face of a threat of serious disturbances of the market but also for the fixing of export refunds and denaturing premiums, for the exercise by intervention agencies of their right to intervene on the market at any time, particularly by way of purchases, for fixing the flat-rate amount comprised in the intra-Community levy, for the choice of measures intended to avoid deflections of trade and, generally, for checking the functioning of the systems set up by Regulation No 19 and its implementing regulations and for their possible amendment.

The system of deposits is a necessary instrument for such a prospective comprehensive view. In the absence of a deposit, which in the event of non-utilization of the licence is forfeited, the licence is not capable of providing sure data as to the future imports or exports. In fact, there are several reasons for a trader to apply for more licences than he needs. The obligation to import or export involves no disadvantage for the licensee other than forfeiture of the deposit; thus it in no way has a particularly adverse effect on the rights of the individual. It is not possible to obtain a valid comprehensive view of the market by obliging the licensee to report non-utilization of his licence and by penalizing any failure to fulfil that obligation by the imposition of a fine; in fact, in order to acquire a prospective comprehensive view of the market it is necessary that at the time when the licence is issued there should be sufficient certainty that the quantity mentioned in the licence will be imported or exported during the period of its validity. Notice of non-utilization would merely lead to piecemeal correction of the initially false image of the future state of the market.

A reduction in the duration of the validity of licences is not an adequate solution: it runs counter to the objectives of the common organization of the market in cereals and is incompatible with the principle whereby trade must be taxed as lightly as possible.

The cases in which the licences remain unused are the exception and do not prevent the system of deposits from attaining its objective.

The opinion that the Member States and the Commission have not really attempted, on the basis of the licences, to obtain an exact idea of future imports and exports is incorrect. In any event, the argument based on the practice of administrative authorities is only valid in law when that practice shows that it is objectively impossible to use the instrument created by the system of deposits; this has not even been maintained.

The complaint that the system of deposits transforms the economy of the market into a planned or directed economy is not justified. The common organization of the market into a planned or directed economy is not justified. The common organization of the market in cereals cannot dispense with all intervention on the market; it is characterized, however, by the concern to make such interventions conform as much as possible to the rules of the market and to allow the widest scope for competition.

The amount of the deposit is in no way excessive, having regard to the objective of the system of deposits, by reason of the fact that forfeiture of the deposit is not the rule, that it involves only a small percentage of the target price of the least expensive cereals and that it is very much less than the normal margin of profit for this type of transaction.

Limitation solely to *force majeure* of the cases in which the deposit is not forfeited does not offend either the principle of proportionality or that of legality.

In fact, it follows from the case-law of the Court that the existence of a case of *force majeure* must be recognized when the application of strictly objective criteria indicates that the failure to effect importation or exportation is not due to negligence and that, in such examination, the principle of proportionality must be respected; furthermore, the fact that a trader has to bear an excessive loss may constitute a case of *force majeure* capable of releasing him from the obligation to effect the intended transaction.

Thus the Commission considers that, with

regard to the principle of proportionality, it should be held that:

— first, the functioning of the common organization of the market in cereals requires a prospective comprehensive view of the market and therefore demands sufficiently certain knowledge of future imports and exports; only a licence subject to the risk of forfeiture of the deposit is capable of giving such knowledge. The system complained of not only conforms to the objective sought but is necessary to its attainment, thus it does not run counter to the principle of proportionality of the method to the objective sought;

— secondly, that, in order to attain its objective, the system of deposits must include a strict definition of the conditions which, if satisfied, justify the release of the deposit. Limitation to cases of *force majeure*, in the interpretation given to this concept by the Court runs counter neither to the principle of proportionality nor to any other legal principle.

(c) *The legal basis of the system of deposits on exportation*

The powers necessary to adopt the system of deposits, which forms part of the implementing provisions, were conferred on the Commission by the Council in accordance with the fourth indent of Article 155 of the EEC Treaty, which appears from Article 16 of Regulation No 19. The fact that this provision only expressly provides for deposits in the case of an import licence; the proper functioning of the market in cereals requires that sure data be available in respect of both exports and imports.

(d) *The power of the Commission to adopt the system of deposits*

The deposit is neither an administrative penalty or fine nor a periodic penalty payment; it is a particular type of guarantee the system for which the Commission is empowered to determine.

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 177 of the EEC Treaty, 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 Frankfurt-am-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 EEC Treaty and whether in particular that procedure is compatible with Articles 43 (2), 155, 173 and 177 and the first paragraph of Article 189 of the EEC Treaty.

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 Community 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 third subparagraph of Article 43 (2) of the Treaty, 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 the last indent of Article 155, and the consistent practice of the Community 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 Article 155.

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) 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 Article 155 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 Community 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 Community.

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 173 or to a reference for a preliminary ruling under Article 177 of the Treaty. 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.

2 — The question relating to the delegation of powers to the Commission

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 EEC 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 Community 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 Community 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 Community 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 Community 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 State ares 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 Community 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 (3) of the Treaty, 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 con-

cerning 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 Community 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 Communities, 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 Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 2, 39, 40, 43, 149, 155, 173, 177 and 189;
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 Economic Community, 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 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 Trabucchi

Monaco Mertens de Wilmars Pescatore Kutscher

Delivered in open court in Luxembourg on 17 December 1970.

A. Van Houtte R. Lecourt

Registrar President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE

(See Case 11/70, p. 1140)