OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 2 DECEMBER 1970[1]

Mr President,
Members of the Court,

The four cases (11/70, 25/70, 26/70 and 30/70) which the Court has to examine today present on many points the same or closely related questions.
What in essence are the issues?

1. The validity of the provisions in three Community regulations, Regulations Nos 102/64, 120/67 and 473/67, which provide that the issue of an import or export licence for the products covered by the basic Regulation No 19 is subject to the lodging of a deposit and that, except in the case of *force majeure*, the deposit is forfeited if the transaction is not carried out by the holder of the licence;

2. In one of the cases, 30/70, the validity in Community law of Regulation No 87/62 and the organization by a Member State of this system of deposits as from 30 July 1962, that is to say, before the intervention in 1964 of the first Community regulation laying down the system of deposits for the whole of the Community.

These questions have been put to the Court by two German courts: a court of appeal, the Verwaltungsgerichtshof of the Land of Hesse in Cases 25/70 and 30/70, and a court of first instance, the Verwaltungsgericht, Frankfurt-am-Main, in Case 11/70.
But these questions have not been put to the Court in the same form in the various cases.
In Cases 11/70, 25/70 and 26/70 they take the form of a query as to validity and in Case 30/70 of a request for interpretation of Article 16 of Regulation No 19 of the Council of 4 April 1962, together with a question relating to the validity of the second paragraph of Article 7 of Regulation No 87 of the Commission.

But this is basically irrelevant, as these differences can be of consequence only on the form of the judgments to be delivered by the Court in the various cases and I shall return to this at the end of my opinion.
These four cases present a large number of questions which may, I think, be gathered into three groups:

— those which relate to what I shall call the *external legality* of the provisions in dispute, that is to say, the power of the Community authorities to issue them and the correctness of the procedure by which they were adopted;

— those which relate to the *internal legality* of those provisions in respect of which the essence of the complaint is the violation of a so-called principle of proportionality which is alleged to bind the Community authorities;

— finally, those which relate to the validity of Regulation No 87/62, to the compatibility with Community law of the system instituted in Federal Germany before the appearance of Regulation No 120/64.

I

Let us look first at the questions relating to the *external legality* of the disputed provisions.
The criticisms aimed at these provisions are numerous, but in reality they may all be reduced to three:

(1) The lack of competence of any Community institution whatever to issue them;

(2) The incorrectness of the procedure of drawing up the regulations and in particular of the intervention of the Management Committees;

1 — Translated from the French.

(3) Finally and subsidiarily, the particular defects which are alleged in any case to vitiate the external legality of only some of the disputed provisions.

A — On the first point, complete lack of competence of any Community institution to issue the provisions in dispute, two arguments have been advanced, which to some extent seem to have persuaded the Frankfurt court.

1. The first of these arguments is that the provisions create an obligation to import or export, that is to say, an obligation to act, whereas no provision of the Treaty permits the Community authorities to impose such an obligation on individuals.
This argument need not detain us.
First, the question whether or not certain provisions of the Treaty, in particular those relating to agriculture, authorize the Community institutions to impose obligations to act on traders in certain circumstances is full of uncertainty and if it were necessary to give an answer I should be inclined at first sight to rely in the affirmative.
But in reality the question, in my opinion, does not arise in this case. In fact, the disputed provisions do not really create any obligation to import or export.
The sole purpose of these provisions is to provide that the licence may be requested only in order actually to carry out an import or export transaction and not merely frivolously. In doing so they are not creating an obligation, but are merely imposing a condition on the issue of a document necessary for the transaction upon which the trader has already decided.
Obviously, an importer or exporter is free not only not to request an import or export licence, but even not to carry out the import or export which he has stated his desire to effect. In such a case, certainly, he forfeits his deposit, but his freedom of action, although it may clearly be influenced by this factor, remains no less complete in law. Thus the system does not create an *obligation to act* but merely imposes a condition on the grant of a *permission to act.*

2. The second argument advanced in support of the claim of complete lack of competence of the Community institutions to issue the disputed provisions deserves deeper examination.
It is submitted that this system, which obliges those who apply for an import or export licence to lodge a deposit and which provides that such deposit is, save in the case of *force majeure*, forfeited where the transaction is not carried out within the period prescribed in the licence, constitutes in practice the institution of a *system of penalties.*
The Court is assured that the Member States have not as a general rule entrusted penal powers to the Community institutions, except in the cases expressly provided for in the Treaty, as for example for cartels or the abuse of a dominant position in Article 87 (2) (a), which provides expressly for fines and periodic penalty payments. It is first of all extremely disputable to state that the Treaty does not give the Community institutions the power to decree penalties except in those cases expressly provided for by it.
In agricultural matters in particular, Article 40 (3) lays down that the common organization of the markets may include all measures *required* to attain the objectives set out in Article 39. It may legitimately be asked whether or not such a wide formula includes the possibility of instituting pecuniary sanctions to ensure compliance with the Community regulations.
But I do not consider that the Court has to settle the question in this case, as in my opinion it will be sufficient to examine and determine the legal nature of the deposit provided for by the provisions in order to find that its forfeiture has in no way the character of a penalty.
It should first be noted that the word deposit *(caution, cautionnement)* in contemporary French has an ambiguity which commentators have long emphasized, sometimes suggesting that it be removed.
Up to the middle of the nineteenth century, the word *cautionnement* had only one meaning: that given to it by Article 2011 of the French Civil Code, the old *fidejussio* of Roman law, that is to say, the undertaking whereby a third party intervenes in the relationship between creditor and debtor to guarantee to the creditor that he

will carry out the obligations of the debtor if the debtor fails to do so.

But another meaning of the word *caution* very quickly appeared, which has sometimes been called 'administrative' *caution* and which means the compulsory lodging of a sum of money before being able to carry out certain acts or exercise certain functions in order to guarantee any liabilities which may follow, in particular with regard to public authorities.

This latter type of *cautionnement*, which from the point of view of civil law is related rather to a pledge *(nantissement)* is very different from the *fidejussio* which the *cautionnement* had as its first meaning.

But these two forms of *cautionnement* may be combined, for example, as is often the case in practice, when the *caution nantissement*, to coin a phrase, is itself guaranteed by a *fidejussio*, usually a bank.

But what really is a *caution nantissement?* In my opinion, it is nothing other than a form of security intended to guarantee compliance with undertakings entered into previously or at the same time.

The institution of a security is clearly only with difficulty capable of being assimilated to the institution of a penalty. A penalty is intended to punish. A security is intended to prevent and possibly to recompense.

The submission made against the disputed provisions and based on the allegation that the Community authorities are not competent to institute penalties thus in my opinion fails 'on the facts', since those provisions did not institute a system of penalties but a system of securities.

B — Let us therefore examine the second series of questions relating to the external legality of the provisions in dispute, which are based on the alleged irregularity of the procedure for drawing up the regulations in which those provisions are to be found. These regulations were all drafted according to the Management Committee procedure, the principle of which is well known to the Court.

On a proposal from the Commission and after consulting the Parliament, the Council adopts basic regulations but entrusts to the Commission, subject to certain conditions, the task of drawing up the measures necessary for their application.

The exercise of the powers thus conferred by the Council on the Commission is organized as follows: the Commission draws up a draft of the measures to be adopted. It submits this to a Management Committee comprising representatives of the Member States, but chaired by a representative of the Commission. The opinion of the Management Committee is communicated to the Commission. The latter, in the light of the opinion, adopts measures which are immediately applicable. However, when these measures do not conform to the opinion of the Management Committee, the Commission may delay putting them into effect for one month and the Council, to which they are immediately communicated, may abrogate them or amend them within the same period of one month.

The legality of this system, which has been very widely used since it has helped in the drafting of more than two thousand Community regulations, is disputed and at least one of the German courts which has referred questions to you appears to have had doubts as to its legality.

It has been argued before the Court that this procedure is doubly contrary to the Treaty:

— because it confers on the Management Committee a right to take part in the legislative work of the Commission;

— because it gives to the Member States the possibility of obtaining from the Council a 'quashing' *(cassation)* of the regulations of the Commission.

Finally, it was argued, particularly in the oral proceedings, that this procedure infringes the prerogatives of the Parliament.

And so the whole institutional balance of the Community is said to be put in question by this procedure.

These arguments had already been developed at great length before the European Parliament and were refuted in masterly fashion by the legal committee of the Parliament on the report of Monsieur Jozeau-

Marigné who is, by a happy combination, both a parliamentarian and an excellent lawyer. I shall adopt many of the conclusions set out in that report.
These arguments do not, in my opinion, stand up to a serious comparison of the detailed working of the so-called Management Committee system with the wording of the Treaty.
The key provision is that of Article 155, the last sentence of which 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'. Three points clearly follow from this:

(1) The Council has institutionally not only a general and basic legislative power, but also the power itself to issue the implementing provisions which are necessary for the application of the general rules which it lays down.

(2) This power of implementation may be exercised by the Council itself or conferred by it upon the Commission.

(3) No provision limits the right of the Council to use or not to use the power which is available to it by virtue of this provision or prohibits it from fixing the circumstances in which the Commission will exercise the powers delegated to it.

So, how should the Management Committee system be analysed?

(1) The Council entrusts to the Commission, and to it alone, the task of taking measures to implement a basic regulation.

(2) However, it provides a limit to this delegation.

In case of disagreement between the Management Committee and the Commission the Council may, in a certain sense, re-assume its power, itself legislating on the matter within one month by repealing or amending the text adopted by the Commission.
The whole of this system seems to comply perfectly with the text of Article 155 of the Treaty.

Let us pass to the argument that the Management Committee procedure, even if it is not contrary to the letter of the Treaty, disturbs the institutional balance laid down by the Treaty.
On this point I cannot do better than adopt the words of Monsieur Jozeau-Marigné in the aforementioned report where, before expressing reservations on the political level, he examined on the legal plane the compatibility with the Treaty of the Management Committee procedure.

1. The Council, when it confers executive powers on the Commission under Article 155 for the implementation of the rules which it lays down, is entitled to make the grant of these powers subject to certain conditions as to the way in which they shall be exercised.

2. There is no subordination of the Commission to the Management Committee since the Commission remains in sole control of its proposal.

3. There is no transfer of powers from the Commission to the Council since under the Treaty it is the latter which may grant their exercise to the Commission.

4. Finally, the Council would transgress the limits laid down for it in the Treaty only if it conferred on the Management Committees some power of decision, which is not the case here.
A procedure which reserves to the Council itself the right to decide in the final resort should on the other hand be regarded as compatible with the Treaty.
Finally, as regards the rights of Parliament, it is certain that the Management Committee procedure instituted by Regulation No 19 does not of itself interfere with the powers of Parliament.
To be sure of this it is only necessary to reread the resolution adopted on 3 October 1968 in which Parliament recognized the existence and legality of this procedure whilst fixing the political and legal limits for its use.
I consequently think that the Management Committee system instituted by Article 26 of the basic Regulation No 19 is contrary

neither to Article 155 of the Treaty nor to the institutional balance set up by it.

One final point remains. It was argued before the Verwaltungsgerichtshof of the Land of Hesse, which questions you on this point, that this procedure is contrary to Article 189 of the Treaty, which sets out the different categories of measure which may be issued by the Commission or the Council: regulations, directives, etc.

I find it difficult to understand the drift of this submission, which was not pursued before the Court in the oral proceedings by those who had originally raised it.

As soon as Article 155 of the Treaty gives the Council the power to confer on the Commission the power to take measures to implement the rules which it has decreed, it follows impliedly and necessarily that the Commission must give to those rules the form which corresponds to their legal nature—regulation or directive—and that the Council will adopt the same form if it is led to repeal or amend a provision drawn up by the Commission.

To sum up, I thus propose that you say that the Management Committee procedure laid down by Article 26 of Regulation No 19 whereby the disputed regulations were issued complies with the Treaty inasmuch as the Council only conferred on the Commission the power to issue regulations to implement basic regulations issued by itself.

C — And this leads me directly to the third series of criticisms, formulated as subsidiary to those we have discussed already, of the disputed regulations as regards their external legality.

They may be summarized thus:

Even if one admits the legality of the Management Committee procedure, the disputed provisions relating to the deposit could not be issued by the Commission using that procedure because the institution of such a condition for the issue of the licences far exceeds the scope of measures of implementation and more particularly because the Council, in Regulation No 19, had expressly laid down that that condition could be imposed only for the import of cereals and not, as the criticized provisions provide, for exports *and imports* of grain as well as for the export and import of cereal products.

The first limb of this argument calls for only a brief remark.

It rests in essence on the fact that the institution of the system of deposits results partly from provisions issued by the Council itself and partly from provisions issued by the Commission following the Management Committee procedure; but that fact, although evidencing a certain incoherence, is not in itself capable of establishing the illegality of the provisions issued following the Management Committee procedure.

Indeed, as I said a moment ago and as I shall have cause to repeat shortly, the Council is perfectly free to reserve to itself the issue of a measure of implementation or to confer on the Commission the task of doing so.

The only question which arises and which I am going to examine with regard to Regulation No 19 is whether or not the institution of a system of deposits constitutes a measure implementing a basic regulation.

Article 16 of Regulation No 19 raises in this respect a delicate question and I shall not hide from the Court that I have hesitated long on the reply which I would propose that the Court should give to it.

Article 16 takes the following form:

— The first paragraph imposes the requirement for every import and export of any product covered by Article 1 of Regulation No 19 that a licence be issued to the trader.

— The second paragraph is solely devoted to the *import* licence for *grain*. It lays down the period of validity of the licences and the procedure for changing that period.

Lastly, and above all, it lays down that the issue of the licence is subject to the lodging of a deposit which guarantees the undertaking to import during the period of validity of the licence and that the deposit is forfeited should the importation not be carried out within that period.

— The third paragraph refers finally to the procedure laid down in Article 26, that is to say, that of the Management Committee, for determining the methods of implementation of the whole of the article, especially,

it states, for determining the duration of the import licences for all the products falling within the field of application of Regulation No 19.

Faced with this wording, it may legitimately be wondered whether the Council did not intend to limit the obligation to lodge a deposit solely to the import of grain to which it expressly refers and whether, therefore, the extension of that obligation to the export of grain and to the import and export of cereal products other than grain is not illegal.

This doubt is all the stronger since, according to the explanations given to us in the oral proceedings the other day on this question, it seems that two tendencies emerged within the Council, that of the 'hawks', as it were, who wanted a very wide and very rigid system of deposits, and that of the 'doves' who on the contrary advocated less restrictive solutions.

Would not the version finally adopted seem to be a compromise between these two tendencies, the hawks having succeeded in having the system of deposits applied to grain, the doves in having it accepted that it would not be applied either to the export of grain or to imports and exports of cereal products?

After much hesitation, as I have said, I propose that the Court should reply to this question in the negative for the following three reasons:

(1) It is the provision alone which should be taken into account in settling the question, for there are no preparatory studies for this basic regulation which are capable of binding the Court in its interpretation.

(2) Article 16 (1) unequivocally sets out the principle of the obligation on the trades to obtain for every import or export of every product listed in Article 1 of that regulation, that is, both grain, cereal products and processed products, an import licence or an export licence.

(3) The third paragraph of that article expressly confers on the Commission the task of laying down, in accordance with the procedure prescribed in Article 16, the procedure for implementing the general rules imposed in paragraph (1). I think that the institution of the deposit is really only the definition of one of the conditions necessary for the issue of the import and export licences referred to in Article 16 (1), that is to say, a means of implementation of that article.

To be sure, the system of deposits and the forfeiture of the deposit in cases of failure to carry out the transaction were in certain cases laid down in a basic regulation and in others in a regulation issued by the Commission under the Management Committee procedure.

But that is not in itself a determining factor since, as I have just said, the Council is always free to retain or to confer on the Commission the adoption of measures to implement basic regulations.

The only problem is whether the institution of a system of deposits really constitutes a measure of 'implementation' of a regulation which lays down the obligation to obtain an import or export licence.

I think so, for once the Council imposed the requirement of an import or export licence, the conditions for the issue of such license were, as regards external legality, nothing more than means of implementing that obligation so long as these means—and that is a question of internal legality which I shall examine in a moment—do not impose on importers and exporters burdens which are excessive as regards the aims for which the import licence was instituted.

If the Court also accepts this, which again I clearly realize requires a certain effort of interpretation, it will be led to recognize the validity of the disputed provisions which have extended the system of deposits both to exporters of grain and to the export and import of products other than grain which fall under Regulation No 19.

One last submission relating to the external legality of the disputed provisions was raised in the written procedure: the absence or inadequacy of the statement of the reasons for the regulations in which they appear.

If the Court thinks that it should give a reply to that submission, even though

neither of the German courts has expressly asked it of the Court, it would be sufficient to hold that in fact all the disputed regulations contain a statement of reasons and that that statement is sufficient.

We have now finished with the questions relating to the external legality of the disputed provisions. Let us now start on those relating to the internal legality of those provisions.

II

The questions which are submitted to the Court concerning the internal legality of the disputed measures are all linked to one and the same problem, namely whether or not these measures comply with a principle described as the principle of 'proportionality', under which citizens may only have imposed on them, for the purposes of the public interest, obligations which are strictly necessary for those purposes to be attained.

But a prior question is immediately raised, as to what *legal source* this principle must be taken from in order to be applied against a measure issued by the Community authorities.

Three arguments on this have been put forward:

(1) that of the Frankfurt court, which states that since the principle of proportionality results from the combined effect of Articles 2 and 12 of the Basic Law of the Federal Republic of Germany, Community measures may not infringe those constitutional provisions, an argument from which that court has drawn all the consequences since, before referring this question to the Court of Justice, it has held invalid, as contrary to the Basic Law, the provisions disputed today before the Court;

(2) that outlined by the Verwaltungsgerichtshof of the Land of Hesse, which finds the legal source of this principle of proportionality in the unwritten law of the Community, in the general principles of Community law;

(3) finally that which I suggest to the Court which would in this case find the source of this principle in an express and very clear provision of the Treaty.

Even if the final solution were to be the same, whatever the argument adopted, it would still be necessary for the Court to give a ruling, for otherwise there would be the danger of divergent if not contradictory case-law developing in the Member States.

One first point seems certain: the argument which seduced the Frankfurt court must be rejected categorically.

The legality of a Community measure can be judged only in the light of the ordinary law, whether written or unwritten, but never in the light of the national law, even if that is a constitutional law. As the Court held in *Costa* v *Enel*, a Community measure 'because of its special and original nature' cannot 'be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question'.

This principle applies, according to the case-law of the Court, whatever the national legal rule invoked and the Court has in particular held that the validity of a Community decision could not be judged in the light of the Basic German Law (*Comptoirs de Vente des Charbons de la Ruhr* v *High Authority* Rec. 1960, p. 861 et seq.) and more especially in the light of Articles 2 and 12 of that Law, namely those very articles which are invoked in this case (Case 1/58, *Stock et Cie.* v *High Authority*, Rec. 1959, p. 62).

Does that mean that the fundamental principles of national legal systems have no function in Community law?

No. They contribute to forming that philosophical, political and legal substratum common to the Member States from which through the case-law an unwritten Community law emerges, one of the essential aims of which is precisely to ensure the respect for the fundamental rights of the individual.

In that sense, the fundamental principles of the national legal systems contribute to enabling Community law to find in itself the resources necessary for ensuring, where

needed, respect for the fundamental rights which form the common heritage of the Member States.
This possibility of Community law ensuring by itself and in all circumstances the protection of the human rights recognized as fundamental has already been affirmed in the Court's judgment of 12 November 1969 in *Erich Stauder* v *City of Ulm Sozialamt* ([1969] E.C.R.). The Court should reaffirm that here even more strongly, in my opinion, for the present case is particularly apt for the purpose.
In fact, the fundamental right invoked here—that the individual should not have his freedom of action limited beyond the degree necessary for the general interest—is already guaranteed both by the general principles of Community law, the compliance with which is ensured by the Court and by an express provision of the Treaty!

— By the general principles of Community law: that has been expressly affirmed by at least two of the Court's judgments: of 29 November 1956 in *Fédération Charbonnière de Belgique* v *High Authority* (Rec. 1955–1956, p. 304) and of 13 June 1958 in *Compagnie des Hauts Fourneaux de Chasse* v *High Authority* (Rec. 1958, p. 190).

— By an express provision of the Treaty: that appears in Article 40 of Title II on agriculture from which it follows that the Common organization of the markets set up to attain the objectives set out in Article 39 may include only those measures *required* to attain the objectives set out in Article 39.
So, as the Court can see, not only will it have no trouble in finding in the law invoked before it a number of foundations which are embedded solely in Community law, but it can even ponder over which of those foundations it should use.
I shall propose the one derived from the written law, for I think that it is good judical technique to apply unwritten law only in cases of obscurity, insufficiency or gaps in the written law and also that since Article 40 of the Treaty refers not to more or less defined aims of general interest but more precisely to the objectives listed in Article 39 it thereby ensures a more precise guarantee of the rights of individuals than the general principles of Community law.
In sum, I think therefore that the problem which has been put to the Court in very wide and sometimes even in politico-philosophical terms may be reduced to a simpler question: 'Have the Community authorities, in instituting the disputed system of deposits, infringed Article 40 of the Treaty under which only measures which are required to attain the objectives of the common agricultural market set out in Article 39 may be issued?'
To reply to that question we should examine in turn:

(1) the principle of the system of deposits;

(2) the system in practice.

A — In its principle I think that not only is this system strictly necessary for the normal functioning of the Community market in cereals and cereal products but that, although capable of improvement, it is probably the least restraining measure that could be imagined to guarantee a correct functioning of that market.
I shall try to demonstrate this by placing the system in the context in which it must be placed for it to be judged.
The organization of the market in cereals has in essence the aim of ensuring a fair standard of living for the European producers while respecting the other objectives set out in the Treaty for the common policy.
It provides powerful support and intervention procedures regarding internal prices.
Each year first of all a target price is fixed, that is to say, the price at which it is hoped that the transactions will take place on the internal Community market.
On the basis of this target price an *intervention price* is determined, slighty below it so as not to block intra-Community trade.
This intervention price is in a certain sense the guaranteed price to the producer.
Its fluctuations constitute one of the elements which set in motion the action of the intervention agencies, either in the form of compulsory purchases without limits as to

quantity or by aids to private storage or by indirect means such as denaturing.

It is quite clear that such a system can work only when accompanied and supported by action at the Community frontiers, by action on the external trade in the products.

The internal prices of the Community, fixed in relation to social as well as economic objectives, are in fact higher than the world prices which are known, moreover, to be generally artificial and to correspond little to the ideal prices of a perfect market as imagined by the liberal economists of the nineteenth century.

If there were no action at the frontiers of the Community two phenomena would certainly occur:

(1) No exports would be possible, even when the excess of Community production over needs made them desirable.

(2) The Community market would risk being inundated by imports from third countries, which would lead to a sagging of price levels, the intervention agencies would be set in motion and so the burdens accepted by the citizens of the Member States in order to support their farmers would be directly or indirectly diverted to the advantage of either the producers of third countries or of the importers of grain or cereal products.

Whilst the necessity for intervention at the Community frontiers is thus beyond dispute, the choice of means for such intervention has posed a delicate problem for those who had to decide on it.

The simplest solution would have been obviously to reserve to a Community agency or agencies acting on behalf of the Community a monopoly in external trade. Such agencies, knowing the supply situation perfectly, would have imported when there was a shortage, exported at a loss when there was a surplus and sought to recompense on the financial level the opposing results of these two operations.

Another, equally possible, solution would have been, whilst maintaining in principle the freedom of external trade, to fix periodically and on the basis of the internal market situation export and import quotas. These solutions were defended by many specialists and would certainly have ensured with the greatest degree of certainty the necessary control of external trade.

But they were not adopted because perhaps they appeared to the authorities responsible to impose too great restrictions on traders, restrictions which in the eyes of many did not appear absolutely necessary for the attaintment of the aims in view.

So a much more flexible system, the least coercive that could really be imagined, was adopted.

Neither monopoly over imports and exports nor quantity control. A whole system based entirely on the principle of *persuasion and not of compulsion.*

For exports, not only freedom to export but, so that that freedom should not remain theoretical, an export subsidy, the 'refund' the general effect of which is to cover the difference between the rates or prices of the products in the Community and on the world market.

For imports:

(1) a threshold price, fixed by the Community authorities and corresponding roughly with geographical corrections to the intervention price, constitutes the minimum price below which products cannot be marketed on the Community markets;

(2) a Community import duty, the 'levy' which, as opposed to a traditional customs duty, is variable, roughly corresponds in most cases to the difference between the threshold price and the offer price at the frontier;

(3) finally, for both imports and exports, the possibility of a certain number of protective measures coming into play which enable, should the machinery go wrong, appropriate measures to be taken rapidly on the Community market.

So except in cases of severe crisis the only means to ensure the equilibrium of the market, which Article 39 expressly mentions among the objectives of the common agricultural market, are:

— manipulationof the levy,

— manipulation of the refund.

If the supply on the Community market tends to exceed demand the refund is increased to ease disposal of the surpluses. If the demand exceeds supply the levy is lowered to allow the deficit in Community supplies to be made up.
But in order to manipulate the levy or the refund 'in the right direction', so to speak, certain data are necessary:

— firstly, the data relating to the internal market situation, which poses no problems in view of the tight links which bind the Community authorities responsible to the relevant agencies of the Member States;

— but equally knowledge of the volume and conditions of the imports and exports which the traders, who are entirely free to make them, are to carry out over a given period.

Without the latter information the Community action in external trade would develop *in the dark*. The Community authority would have good knowledge of the internal imbalances but it would have no knowledge of the decisions of the traders liable to increase or to reduce these imbalances; it would thus not be able to act in the way required by the equilibrium of the market.
That is why it is not only necessary but indispensable, if it is desired to maintain the economic freedom of the importers and exporters, both to subject their transactions to the issue of an import or export licence and to lay down that that document is not just a vague declaration of intent and that the condition for its issue is an undertaking to carry out the transaction decided upon, an undertaking which is guaranteed by a deposit.
Thus, put in its true context, the import and export licence system, the undertaking to carry out the transaction decided upon and the system of deposits which guarantees that undertaking appear in a very different light from that in which it has been sought by some to present them.
It is in no way a system intended to guarantee a sort of purely statistical obligation as the Frankfurt court seemed to think.
It is in no way, as was suggested to the Court the other day, a sort of victimization of traders by bureaucrats desirous of seeing at last the forecasts which they have drawn up match reality.
It is a fundamental datum of the organization of the market in cereals without which the freedom of the traders which it has been the intention to maintain would risk resulting in anarchy and chaos or in requiring the responsible authorities to resort to measures of coercion.
It is also, and this is an aspect of the question which should not be forgotten, a necessary means whereby the increase in outgoings, in the shape of an increase in the refunds, or reduction of income, in the shape of a reduction of the levy, should serve solely the interest of the market, so that the burdens which the States of the Community impose on their citizens to support the common agricultural market do indeed serve that end.
The obligations imposed by this system on importers and exporters are, in my opinion, the minimum ransom, the indispensable ransom for the freedom of action which has been conceded to them.
To be sure, attempts have been made to show to the Court that import and export licences on the one hand and deposits on the other were not indissolubly linked and that one could imagine less coercive measures which would lead to the same results from the point of view of market equilibrium.
One of these procedures is described in the judgment of the Frankfurt court and was defended the other day by counsel for the cereal companies. It is that while retaining the obligation to obtain an import or export licence the obligations of the importer or exporter, if he finally decided not to carry out the import or export originally determined upon, would be restricted to a *declaration*, under penalty of a fine, of *non-importation or non-exportation*.
But when the trader sends this declaration to the competent authority the harm would

already have been done: the importation previously decided upon and now cancelled would already have been taken into account in judging the market situation.

It would be, if you will allow a popular French saying, 'to lock the stable door after the horse has bolted'.

It is true that the other day, in the oral proceedings, it was attempted at length to demonstrate that the disputed system was not perfect and did not permit in all cases the complete realization of the objective sought; in other words, that some horses managed to get through the half-open shutters of the stable door.

I can well believe it, but the very imperfections brought out show that only a more coercive system would have been fully effective and that consequently the system being disputed really does constitute the 'irreducible minimum', so to speak, of constraints which must be borne by the trader if he wants to retain his freedom to take part in the transactions in question.

I think, therefore, that in principle the system instituted by the disputed regulations, which consists in the attachment to the issue of import and export licences of an undertaking to carry out the transaction decided upon and of a deposit to guarantee the fulfilment of that undertaking, is strictly necessary to the functioning of the common market in cereals as it has been organized and that, consequently, in instituting it the Community authorities did not infringe the provisions of Article 40 of the Treaty.

The Court has already judged in that sense on 11 July 1968 as regards the Community market in milk products in Case 4/68, *Firma Schwarzwaldmilch GmbH* v *Einfuhr- und Vorratsstelle für Fette*. It should, in my opinion, give judgment to the same effect for the Community market in cereals.

B — It remains to examine whether certain of the methods of application of this system are excessive and constitute measures which Article 40 of the Treaty did not authorize the Community authorities to impose on traders.

In this respect, two questions are put to the Court:

1. The first relates to the difference in the system which, in the view of some, should exist between the two categories of licence laid down by the regulations:

— the import and export licences for which the levy or refund rate is that in force on the day on which the transaction is carried out;

— the import and export licences for which the levy or refund rate is that in force on the day on which the licence is applied for subject to certain adjustments related to the threshold price in force at the time when the transaction is carried out.

The argument put forward is as follows: Even if the Court accepts that, in its principle, the system of licences and deposits imposes on traders only the constraints strictly necessary for the organization of the market, it should recognize that it is useless as regards the licences for which the levy or refund rates are those in force when the transaction is carried out.

For such cases there would be no risk of speculation or abuse, no valid reason to subject their issue to the lodging of a deposit.

This reasoning would be at least partly acceptable if the only aim of the system being disputed was to protect the finances of the Community. The licences in question here do from this point of view present less danger of abuse or 'misuse' *(détournement)* than the licences for which the levy or refund is fixed in advance, and that is the justification, let me say in passing, for the difference as regards these two transactions in the rate of the deposit which risks being forfeited.

But the protection of the Community finances is, as I have sought to show, only one of the considerations which necessitated the system adopted.

The other is, in my opinion, the more important. It is the necessity for as precise, as exact, a knowledge as possible of trends in the Community supply so that the threshold price, levy rate and refund rate may be consequentially fixed.

However, from that point of view, whatever the clause attached to each licence, all the

import or export licences form a whole. To subtract a fraction of these, to allow certain licences to be requested without a real intention to carry out the transaction would be to distort the whole forecasting system which, as I have tried to show, is indispensable to the regularization of the market as it has been, very liberally, organized.
I think therefore that the provisions of the Community regulations subjecting to the deposit the two types of licence are necessary to the organization of the market in cereals and therefore are not contrary to the provisions of Article 40 (3) of the Treaty.

2. The second question put to the Court relating to the somewhat 'abusive' character of certain details of the system of deposits refers to the provision that it is only in cases of *force majeure* that the deposit is not forfeited where the transaction for which the licence is issued is not carried out.
The Court is asked on this point:

(a) whether it affirms its case-law on *'force majeure'*;

(b) to judge whether, by providing this exception *alone* to the rule of forfeiture of the deposit in cases of noncompletion of the transaction, the Community authorities exceeded their powers and imposed on traders a more severe system than was necessary.

In reply to the first query the Court need only, in my opinion, repeat the considerations set out in its judgment in *Firma Schwarzenwaldmilch GmbH* v *Einfuhr- und Vorratsstelle für Fette* (Case 4/68) to which I referred just now and which can be summarized thus:

1. The importer or exporter is freed from the obligation to carry out the transaction for which he requested the licence when outside circumstances make it impossible for him to complete the importation or exportation within the prescribed period.

2. But for this it is necessary:

(a) that the event which made the transaction impossible was of an abnormal character;

(b) that the consequences of that abnormal event were unavoidable or at least such that they could have been avoided only at the cost of an excessive loss to the holder of the import or export licence.

On the second question, the validity of the provisions laying down the repayment of the deposit only in case of *force majeure*, it was argued before the Court that its rigidity is excessive in view of the aims pursued, that it should be replaced by a more flexible system which took account in particular, of the conduct of the licence holder and the difficulties which he may have experienced in completing the transaction for which he requested the licence.
I suggest that the Court reject this argument for two reasons:
Firstly, the Court's definition of *force majeure* gives great play, *greater play* than many national legal systems, to the conduct of the importer since it brings into consideration judgment of the character of the forecasts which he has made, his diligence and the sacrifices which he would have had to make in order to complete the transaction at any price.
All these factors thus give the national court a wide margin of discretion and the system is thus not as rigid as some have said.
Secondly and above all, in the reasoning put to the Court on the occurrence of *force majeure* I find the same basic principle as in the equation of forfeiture of a deposit to a sanction, which I have already proposed that the Court reject.
It is because the forfeiture of the deposit is seen as a sanction that the Court is asked to lay down that it can only be imposed after taking into account all the mental factors, subjective or circumstantial, which explain the non-completion of the transaction for which the licence was issued.
But, as I have said, the system of deposits does not seem to be in any way a system of sanctions. To me it is a system aimed at guaranteeing the execution of an undertaking accepted when the licence is issued and it is therefore with right on their side

that the Community authorities decided that only *force majeure* could excuse one who had accepted the undertaking from complying with it.

To conclude on these questions on the internal legality of the disputed provisions, I think that the system of deposits which they institute is both in its principle and in its detailed application necessary and even indispensable to the proper functioning of the common market in cereals as it has been organized and that the Community authorities, in adopting those provisions, have perfectly respected the obligations resting upon them under Article 40 (3) of the Treaty.

III

Finally, let us broach the third series of questions raised by this case: those relating to the validity, under Community law, of the system of deposits organized in a Member State before the entry into force of the implementing regulations issued by the Commission under Article 16 (3) of Regulation No 19, and to the validity of Regulation No 87/62.

The reasons for which the Court is faced with this problem are as follows:

Regulation No 19 was adopted on 4 April 1962 and entered into force on 21 April 1962.

Regulation No 87, adopted on 25 July 1962 by the Commission, entered into force on 30 July 1962 and provided in Article 7 thereof:

> 'The issue of import and export licences for the products referred to in Article 1 of Regulation No 19 of the Council shall be subject to the lodging of a deposit. Subject to the provisions of Article 8 this deposit shall be forfeit in whole or in part where the obligation to import or to export has not been carried out; *until such time as they are harmonized, in accordance with the provisions of Article 26 of Regulation No 19 of the Council, measures as to the lodging and forfeiting of the deposit and as to its amount shall be decided by Member States and at once notified to the Commission and the other Member States.*'

The Federal Republic showed extraordinary zeal since as early as 26 July 1962 there was passed in Germany a law for the purpose of implementing Regulation No 19, which provided as from 30 July 1962 for a system of deposits for the issue of import and export licences for grain and cereal products in accordance with the procedures which correspond roughly to the provisions which were later to be included in the Community regulation.

This haste appeared questionable to some and thus, in Case 30/70, the Verwaltungsgerichtshof of the Land of Hesse put to the Court a question relating to this, in the form both of a reference for interpretation of Article 16 of Regulation No 19 and of Article 7 of Regulation No 87 as well as of a reference for a ruling on the validity of the latter regulation.

This question, set out at great length would appear to be asking the Court to judge the compatibility with Community law of the German law of 26 July 1962, a judgment which, according to the established case-law of the Court, it cannot give.

But the Court should, I think, interpret it and, as the Commission proposes, it can be understood in the following way:

> 'Did Member States have the right, in the light of Article 16 of Regulation No 87, to regulate the details of the lodging, the forfeiture and the amount of the deposit required for the issue of import licences, before the issue of Community rules on the point?'

Before examining the reply which the Court has to give to this question a preliminary remark seems necessary.

As from the entry into force of Regulation No 87, which institutes the system of deposits and provides for forfeiture of the deposit in case of non-completion of the transaction for which the licence was granted, the competence of the Member States to take the measures necessary for implementation of the provision rests on an express and perfectly clear basis, the provisions of Article 7 (2) of Regulation No 87 which has precisely the object of *recognizing* their competence to do so.

Consequently the problem raised and discussed at length by the plaintiffs in the main action in connexion with whether,

without or independently of this express provision, the Member States had an original legislative power in this matter is, in my opinion, only of theoretical interest; it will not be necessary to resolve it if the Court replies in the affirmative to the question put to it on the validity of Regulation No 87.
As for the legality of the provisions of Article 7 (2) of Regulation No 87, it has been argued that these provisions are illegal because:

— they were adopted under the so-called Management Committee procedure;

— they are contrary both to certain general principles laid down by the Treaty of Rome and to the provisions of Article 16 of Regulation No 19 of the Council.

But I do not think that the argument on these two points can be accepted for the following reasons:

1. As regards that part of the argument relating to the illegality of Regulation No 87 deriving from the fact that it was adopted under the so-called Management Committee procedure, I can but refer to what I have already said.

2. As regards the incompatibility of the provisions of paragraph (2) of Article 7 of Regulation No 87 with the general principles of the Treaty and of Community law:

(a) Reliance has been placed on a general principle which would to some extent oblige the Community authorities not to bring about a Community market unless it could be regulated down to the last detail and throughout the whole Community by Community regulations.
But, as I shall emphasize in a moment, the principle is on the contrary the progressive realization of the measures appropriate for ensuring the equilibrium and functioning of the Community market.

(b) Reliance has secondly been placed on the principle of non-discrimination, which would prevent the Member States being able to take implementing measures because of the risk that the measures might differ.
But we must not confuse discrimination and diversity of the national situations; non-discrimination must not be equated with prior and complete harmonization of the national laws.
The principle of non-discrimination only applies when one and the same authority takes different measures with regard to persons placed in identical or analogous situations.
It cannot therefore usefully be invoked when there is not one sole authority but distinct authorities.

(c) Finally, reliance has been placed on the excessive burdens which these provisions impose on traders, but on this point too I think that it is useless to repeat the explanations which I gave a while ago.

3. As regards the incompatibility of the disputed provisions of Regulation No 87 adopted by the Commission with those of Article 26 of Regulation No 19 adopted by the Council, the arguments raise a more delicate problem.
The third paragraph of Article 16 provides, as the Court will remember, that 'the detailed rules for the application of this article and the period of validity of the import licence... shall be established according to the procedure laid down in Article 26', that is, by the Commission after obtaining the opinion of the Management Committee.
It is clearly legitimate to wonder whether the *letter* itself of this provision does not reserve to the Commission and in some cases the Council the task of laying down all the conditions to which the issue of the import or export licences shall be subject.
But I do not think that a literal interpretation of the provision imposes such a solution and that such a solution should even be rejected in favour of a *teleological* interpretation of the same provision.
As regards the literal interpretation, three remarks should be made:
Firstly, as the Commission emphasizes, the provision in no wise lays down that *all* measures to implement Article 16 of Regulation No 19 may only be taken

according to the Management Committee procedure; it can be understood as meaning merely that certain of them, the most important ones, should be taken according to that procedure.

And that is in fact what has happened since the Commission, in Regulation No 87, instituted the deposit requirement and provided for the forfeiture of that deposit when the exportation or importation did not take place, and merely left it to the Member States to fix supplementary measures.

Secondly, it should again and above all be emphasized that the use of the present indicative shows that the authors of the regulation intended to cover in essence the general measures taken in the framework of the complete organization of the market and not necessarily *all the* transitional measures necessary for its progressive establishment.

Thus the very wording of the provision is not sufficient to give it the meaning which the plaintiff company in the main action gives it.

On the contrary, the spirit which must clarify it leads to its rejection.

Once again the disputed provision should be placed in its context.

What is that context?

— on the one hand, a general provision, that laid down in Article 40 (1) of the Treaty, which provides that the Member States shall develop the common agricultural policy by degrees during the transitional period (and it was during that period that the disputed provision appeared);

— on the other hand, a yet more general provision, that appearing in Article 5 (1) of the Treaty, which provides that 'Member States shall... facilitate the achievement of the Community's tasks';

— thirdly and lastly, Community Regulation No 19 which applies these principles fully by providing for a progressive establishment of the machinery which it prescribes *with* the assistance of the Member States, whose powers during this transitional period are progressively transferred.

In this context, and without even considering the fact that any other solution would have led to a considerable delay in the putting into effect of what were essential provisions of the Community market in cereals, it seems clear to me that when the authors of Regulation No 87, after laying down the principle of the deposit and its forfeiture in case of non-completion of the transaction, provided that the '*remainder*', as it were, of the implementation measures would be fixed by the Member States, they in no way infringed the provisions of the Treaty or misconstrued those of Regulation No 19, but on the contrary applied them exactly in the spirit in which they had been conceived.

To conclude these unduly long observations, I should like now, in a few words, to gather together the points which I have made according to the questions put to the Court by the German courts.

I propose therefore that the following replies should be given to those questions:

(1) The procedure laid down in Article 26 of Regulation No 19 of the Council of 4 April 1962 complies with the Treaty.

(2) An examination of the questions put to this Court by the Verwaltungsgerichtshof of the Land of Hesse and the Verwaltungsgericht of Frankfurt reveals no factors capable of affecting the validity of Article 7 (2) of Regulation No 87 of the Commission of 25 July 1962 or of Article 1 and 7 (1) and (2) of Regulation No 102/64 of the Council of 13 June 1967 or of Article 9 of Regulation No 473/67 of the Commission of 21 August 1967.

(3) Article 16 (2) and (3) of Regulation No 19 of the Council of 4 April 1962 does not prevent a Member State, in accordance with Article 7 (2) of Regulation No 87, from fixing the detailed rules for implementing the provisions relating to the lodging of a deposit laid down in Regulation No 19 and Regulation No 87 itself.