On those grounds,

THE COURT

hereby:

1. **Dismisses the applications as unfounded;**

2. **Orders the applicants to pay the costs.**

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 26 January 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 15 DECEMBER 1977 [1]

Mr President,
Members of the Court,

I — Allow me to begin by recalling the detailed rules of the system whose 'inopportune' modification gives the Groupement d'Intérêt Économique 'Union Malt' and the nine other applicants cause for complaint and forms the basis of the claims for compensation which you have joined for the purposes of the procedure.

The first subparagraph of Article 12 (1) of Regulation No 120/67 of the Council on the common organization of the market in cereals, replaced since 1 November 1975 by the corresponding provisions of Regulation No 2727/75 of the Council, provides that exports from the Community of any of the products listed in Article 1 (including barley and malt) shall be subject to the submission of an export licence which may be issued by Member States to any applicant. The refund which may apply

1 — Translated from the French.

to the transaction may be fixed in advance or 'pre-fixed'; in such a case it shall be noted on the licence 'which serves as supporting document for such advance fixing'.

On the other hand, the third [fourth in the English version] subparagraph of Article 12 (1) provides that the issue of the export licence for third countries fixing the refund in advance shall be 'conditional on the lodging of a *deposit* guaranteeing that ... exportation will be effected during the period of validity of the licence; the deposit shall be forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period'.

The refund is fixed at regular intervals in accordance with the relevant Management Committee procedure, which is well known to you (Article 16). 'Where necessary the Commission may, at the request of a Member State or on its own initiative, alter the refunds in the intervening period' (final subparagraph of Article 16 (2)). The detailed rules for the *adjustment* of the refund are laid down by the final subparagraph of paragraph 4. The application of the provision concerning the advance-fixing of the refund may be suspended, still in accordance with the Management Committee procedure, in the circumstances provided for in paragraph 7.

The detailed rules pertaining to that system were laid down by Regulations Nos 2637/70, 193/75 and 2042/75 of the Commission of 23 December 1970, 17 January 1975 and 25 July 1975 respectively: the export licences for malt remained valid until the end of the eleventh month following the month of issue, which is exceptional as compared to the average period of validity of the licences for other processed cereals, namely an average of four months.

The export refund is intended to cover the difference between the prices of the products within the Community and the prices ruling in the world market: the amount is fixed essentially on the basis of the prices of the basic products inside and outside the Community. The export refund for malt has therefore been fixed each month on the basis of the average levy on the import of barley applicable during the first 25 days of the preceding month. In accordance with Article 7 of Regulation No 1052/68 of the Council of 23 July 1968 the amount thereof, which shall be that applicable on the day the licence was applied for, was *adjusted* on the basis of the threshold price valid for the basic product or products in question during the month of exportation.

In addition, Regulation No 980/75 of the Council of 14 April 1975 provides for a *corrective amount* to be applied to the refund on malt where this is fixed in advance. The corrective amount shall be fixed at the same time as the refund and according to the same procedure. In accordance with Article 2 (3) of Regulation No 1281/75 of the Commission of 21 May 1975 the existing situation and foreseeable forward developments on the world market with regard to the possibilities and conditions for the sale of malt, the quantity of cereals required for its production, the need to avoid disturbances on the Community market and the economic aspect of exports shall be taken into account when fixing correctives.

At the time of the events which gave rise to the present actions the aggregate rates of refund for the processed product 'malt' was 64 units of account per tonne (metric ton) for June and 71.10 units of account for the first 14 days of July 1975.

II — Article 9 (3) of Regulation No 193/75 provides that Copy No 1 of the export licence which fixes the refund in advance — that is, the Titular Holder's copy — shall be submitted to the office responsible for attributions and for completing the customs formalities relating to exportation from the

Community or to the placing of products under one of the procedures provided for in Articles 2 and 3 of Regulation (EEC) No 441/69 of the Council. They are bonded warehouse procedures for the purposes of exportation organized by the regulation of 4 March 1969 — which is still in force — laying down additional general rules for granting export refunds on products subject to a single price system, exported unprocessed or in the form of certain goods not covered by Annex II to the Treaty, and I must now say a few words about them.

The bonded warehouse procedure for the export of unprocessed goods (also known as the bonded storage or export warehouse procedure) is only applied to the products listed in Annex II to Regulation No 1957/69, which include malt. That procedure consists in placing under customs control, in a store specially approved by the customs authorities, a certain quantity of malt for which the export licence is progressively discharged. The warehousing declarations may be made by the trader concerned, even on the last day of validity of the licence. The refund is paid as soon as the products are placed under customs control, subject to their actual export from the geographical territory of the Community unprocessed and within a certain time-limit. If the products in question have not in fact left the territory of the Community within the set time-limit the security which guarantees payment of the refund previously paid and amounts to 120 % thereof is forfeited except in case of *force majeure.*

The bonded warehouse procedure for processing products under customs control (industrial bonded warehouse procedure) is only applied to the basic products (barley) which are exported as processed products, listed in Annex I to Regulation No 1957/69 (including malt). It consists in placing under customs control a certain quantity of barley which must be shown to be in the factory. On receipt of the declaration that the product has been placed in the warehouse the customs authorities discharge the export certificate for a quantity of malt equal to the quantity of barley present in the factory, as divided by a processing coefficient equal to 1.33. Here again, the refund applicable to the products to be exported is paid as soon as the basic product is placed under customs control. The amount of the refund is that applicable to the processed products. The rules applying to the release of the security are the same as those applying to the warehouse procedure for unprocessed goods. In that case, advance payment of the refund serves to 'pre-finance' the processing of the barley into malt which takes place, so to speak, under customs control.

I shall digress briefly here to recall the main technical points of the process in question.

Two-rowed barley, which is normally used for brewing (unlike barley used for fodder) is sown after the winter, which explains the name 'spring or summer barley'. Unlike barley for fodder, barley for brewing is required to satisfy certain criteria of selection which enable the brewer to brew the beer with a greater degree of security and furthermore, enable that type of barley to be sold for a better price. The selection is aimed in particular at obtaining a type of barley capable of germinating rapidly and fully. Barley which does not germinate fully or regularly just after the harvest (a phenomenon known as the 'dormancy of the barley') must go through an additional process of maturing during storage in conditions which ensure the aeration and drying of the grain, correctly graded and cleaned. The barley must subsequently be steeped for the purposes of its germination in the true sense and of the process of 'disintegration' which accompanies the germination.

When it has reached the desired stage the process of germination must be stopped, the barley degermed and the malted barley or malt resulting from all those operations (which are known as malting) preserved until it is required for use at the brewery, which is in general not for two or three weeks. The malt is 'assessed' so as to ensure that it satisfies the special requirements of the brewer and of the make of beer which he is producing. Thus, where the malt is produced from newly-harvested barley and the qualities which it must have differ from the usual specifications required by the brewer, its 'definition' requires a certain period of time.

The aim of the industrial bonded warehouse procedure is to ensure a balance between the use of Community basic products with a view to exporting processed products to third countries for which marketing is difficult and the use of basic products from third countries admitted under inward processing arrangements. It is an additional facility made available to traders known as 'pre-financing of the refund', which is intended to put European malt producers on an equal footing with their competitors in third countries who qualify for the suspension of the levy in the case of recourse to the inward processing arrangements, without, however, receiving the refunds. The bonded warehouse procedure for the export of unprocessed goods confers on Community exporters an equivalent advantage to that deriving for traders in third countries from recourse to the simple bonded warehouse or free zone procedures.

Where the refund is fixed in advance the day on which the basic products for processing are brought under customs control shall be taken into consideration for the determination of any *adjustments* to be made to the rate applicable (Article 2 (4) of Regulation No 441/69).

The customs control procedure shall include the lodging of a *deposit* guaranteeing that an amount not less than the refund paid will be reimbursed if the processed products or goods are not exported from Community territory within the set time-limit (Article 2 (5) of Regulation No 441/69).

The list of products or goods eligible to benefit from those procedures shall be reviewed and amended as necessary each year in the light of the criteria referred to above and in accordance with the third subparagraph of Article 2 (3) 'In fixing the date from which any such amendments are to take effect, the need to give processors of basic products some security as regards the terms of supply shall be taken into account'.

III — In the case of transactions carried out under one of the procedures introduced by Regulation No 441/69, the export refund is paid once the products or goods have been placed under one of the procedures.

Exportation is considered to have taken place during the period of validity of the licence — this is a condition for the release of the security — on the day on which the products or goods concerned are placed under one of the abovementioned procedures. Where an export licence is not presented before its validity expires to, as the case may be, the customs export office or to the 'attributing authorities' in the case of recourse to the bonded warehouse procedure and, therefore, where the customs export formalities or the formalities relating to the placing of the goods in the warehouse have not been completed before that date the obligation to export shall be regarded — except in the case of *force majeure* — as not having been discharged: the security shall be forfeit (Article 17 of Regulation No 193/75). At the period in question the security was 8 units of account per tonne (Regulation No 1454/74 of the Commission of 11 June 1974).

On application by the titular holder of the document, Member States may release the security by instalments in proportion to the quantities of products for which the proof of the completion of the warehousing formalities has been furnished (Article 18 (3) of Regulation No 193/75). There may therefore be a partial fulfilment of the undertakings entered into where the bond-note is discharged in several transactions which take place over a period of time. That is known as 'attribution of the accounts'. The undertakings entered into are cleared upon sight of a certificate of discharge given by the customs authorities after allocation of the goods to one of the destinations accepted for discharge of the customs procedure used and after verification that the transactions have been properly carried out from the point of view of the obligations relating to that procedure. Any export transaction carried out under the warehouse procedure must be discharged at the latest by the date of expiry of the period fixed for use of that procedure.

IV — By Regulation No 1957/69 of 30 December 1969 the Commission drew up, in accordance with the Management Committees procedure, additional detailed rules for granting export refunds on products subject to a single price system.

The day on which the basic products are brought under customs control shall be that on which the customs authorities accept the document in which the declarant states his intention to bring the basic products under customs control (Article 3 (1)).

The time-limit during which products may remain under the bonded warehouse processing procedure shall be equal to the remainder of the period of validity of the document at the date on which those products came under customs control or, if that period is less than three months, to three months (Article 3 (3)). The products or goods may remain under a bonded warehouse procedure for not more than six months, beginning on the day on which the customs export formalities are completed (Article 4). As a result, there may be a time lag of three to six months between the date on which the export actually takes place and the date for which the refund had originally been fixed, which may take place 12 months before.

However, and thus we approach the facts which have given rise to the present actions, Article 5 of Regulation No 1957/69 provides that in order to prevent difficulties arising on markets on account of the characteristics of the products subject to a single price system, exported unprocessed or in the form of certain goods, the period during which the products may remain subject to one of the procedures referred to in Articles 2 and 3 of Regulation No 441/69 may be reduced in accordance with the Management Committees procedure.

That is what occurred seven years later with the adoption of Commission Regulation No 413/76 of 25 February 1976, published in the Official Jounal of the European Communities on the following day.

As regards the bonded warehouse procedure for *unprocessed* products Article 2 of Regulation No 413/76 provides that in the case of products falling within Common Customs Tariff heading No 11.07 the period during which the products may remain under customs control shall be reduced to the period of validity of the export licence which is outstanding on the date on which the products become subject to the customs control in question when such period of validity is less than six months. Where the application of that provision leads to a period under customs control of less than one month, such period shall be increased to one month.

As regards the bonded warehouse procedure *for products requiring processing* the period during which they may remain under customs control remains unchanged, that is, it is the period of validity outstanding on the export licence. However, Article 1 (2) of the regulation states that if the application of that rule results in a period under customs control of less than one month, such period shall be increased to one month.

Nevertheless, the periods which were formerly in force continued to apply to products which had been placed under one of those two procedures or which would be placed thereunder between publication of the regulation on 26 February 1976 and its entry into force on 5 March.

When the product is placed under the bonded warehouse procedure for the export of unprocessed products or is 'pre-financed' the maltster undertakes to:

1. Export the product (malt) to third countries within the period of validity of the licence, as increased by the period during which it may remain in the warehouse;
2. Refund the benefits attaching to the export which were granted when the product entered the warehouse and pay any duties and charges which may be payable on the quantities which it might not be possible to export within the time-limit provided;
3. Bear the consequences of the undertakings entered into if the product is not actually exported.

As a result, the applicants who, in producing, storing and marketing the malt make use of the bonded warehouse procedure for both unprocessed products and for products requiring processing, found themselves in the following economic situation:

Believing that no change would take place in the bonded warehouse procedures existing under Regulations Nos 441/69 and 1957/69 to which I have just referred the applicants applied in June/July 1975, having previously obtained a bank security, for licences fixing in advance the refund on considerable tonnages of malt. The licences expired 11 months later, that is, in May/June 1976. They were intended for the implementation of long-term undertakings for the export of malt entered into between the end of 1975 and the beginning of 1976 and extending until the end of 1976, which the applicants had thought they could give under a system which guaranteed them the possibility of exporting their goods until that date.

In the absence of any transitional measures the reduction in the periods fixed by Regulation No 413/76 obliged the applicants either to accelerate their exports, since their goods were to have left the warehouse before 30 June or 31 July, with novation of the contracts which were originally intended to be implemented between 31 July and 30 November 1976 and the costs of going back on the undertakings which that would involve, or to discharge their original agreements, while storing the product at their own expense (demurrage), or, finally, purely and simply to terminate their former contracts, which led to the curtailment of the pre-financing arrangement, to take out fresh licences with smaller refunds and to pay monetary compensatory amounts unless exonerated from them. All those points will have to be carefully and seriously examined if you decide to adopt the principle of the liability of the Community for the purposes of assessing the amount of the damage.

Those are the circumstances in which the applicants claim damages from the Commission amounting to FF 16 944 709.23.

V — According to your case-law the liability of the Community can only be incurred if a sufficiently flagrant violation of a *superior* rule of law for the protection of the individual has occurred. Such a violation must be in the nature of a wrongful act. The claimant must have suffered damage corresponding to the amount referred to. There must be a sufficient causal link between the action constituting the violation and the damage suffered. Finally, it must have been impossible for the claimant to prevent the damage occurring, that is, he must have discharged his obligation to limit it.

You have decided to limit your consideration of the question at first to the problem of the existence of a wrongful act on the part of the Commission which could cause it to incur liability to the applicants, without holding any preliminary inquiry but requesting the Commission to produce evidence which it appears to consider very important. I shall therefore devote the remainder of my opinion to that question.

In your judgment of 31 March 1977 in Joined Cases 54 to 60/76, *Compagnie Industrielle et Agricole du Comté de Loheac and Others* (ECR p. 645), it is stated that 'Since the disputed measure is of a legislative nature and constitutes a measure taken in the sphere of economic policy the Community cannot be liable for any damages suffered by producers as a consequence of that measure under the provisions of the second paragraph of Article 215, unless a *flagrant* violation of a *superior* rule of law for the protection of the individual has occurred'. A similar statement was already to be found in the judgment of 2 December 1971, *Aktien-Zuckerfabrik Schöppenstedt* v *Council of the European Communities* ([1971] 2 ECR 975).

The legislative measures referred to in those statements may be either regulations of the Council, that is, basic regulations or implementing regulations, or Commission regulations. The measure at issue in this instance is clearly such a legislative measure which concerns all the maltsters in the Community and not only French maltsters. Moreover, you have been seised of a related application by Belgian maltsters on which I shall shortly have to give an opinion. I consider therefore that one cannot criticize the Commission for having shown any particular animosity towards a certain category of traders.

It is true that one might wonder whether the applicants are not in fact seeking to call in question the contractual or quasi-contractual liability of the Community. They maintain that as a counterpart to the undertakings which they had entered into and which were guaranteed by a bank security the Community undertook not to modify the conditions applicable to the export of goods covered by the licences issued. They maintain that that 'agreement' between the EEC and the exporters has not been adhered to. However, I do not believe that the applicants are seeking to call in question the contractual liability of the Community, for to do so they would have had to base their application on the first paragraph of Article 215. They in fact base their action upon a violation of established rights or of the principle of the protection of legitimate expectation by maintaining that when it adopted its regulation the Commission did not draw up transitional measures protecting the trader's legitimate confidence in the Community rules.

According to your judgment of 14 May 1975 in *Comptoir National Technique Agricole (CNTA) SA* v *Commission of the European Communities* ([1975] ECR 533), the Community is ... liable if, in the absence of a matter of overriding public interest, the Commission abolished with immediate effect and without warning the application of compensatory amounts in a specific

sector without adopting transitional measures.

For traders to be able to make use of the principle of 'legitimate expectation' within the meaning of your case-law:

1. They must be able to claim an established right or personal interests worthy of protection;
2. The commercial transactions for which they claim that right or those interests must have been irrevocably entered into;
3. The interference with that right or with those interests must have been unforeseeable, it must have occurred without warning and without immediate effect and without any transitional measure of such a nature as to enable a prudent trader to avoid losses or to be compensated for them;
4. There must be no overriding public interest preventing such personal interests from being taken into account.

I shall attempt to apply those criteria to the situation in this instance.

VI — The advance-fixing obtained on the issue of the export licences constitutes an acquired right. The Commission admits that itself in its reply of 2 June 1976 to a written question from Mr Laban when it states that: 'Export certificates issued under the common organization of the markets are an acquired right which cannot be affected by subsequent measures'. That right came into being as soon as the products were placed under customs control. However, in theory at least, that right has not been prejudiced, since the applicants have remained entitled to place as much of the products as they wished up to the amount of the tonnages specified in the licences in a warehouse during the whole of the period for which the licences are valid, placing in a warehouse being assimilated to exporting the goods, and to claim the refund immediately.

What is established is that as a result of the new rules the date by which the goods had actually to leave the geographical territory of the Community was brought forward for products placed in warehouses after 5 March 1976.

The question is whether the applicants had an acquired right to the maintenance in force of the pre-financing of the refund *and also of the period during which the goods could remain in the warehouse provided for by the previous rules.*

Unlike the situation envisaged by your judgment in the *CNTA* case the reality and irrevocability of the export agreements in question are not necessarily established by the advance fixing of the refunds. Pre-financing is an additional advantage and necessarily gives a speculative character to the taking out of the licences, combined with the possibility of warehousing. The applicants accept that although, when the advance fixing takes place, the agreements are already being negotiated, they are not yet signed and must be 'regularized'. At first sight, however, it appears to me at least that the outline export agreements referred to by the applicants had been firmly and definitively concluded and that even if their implementation was to be staggered it had begun before 26 February 1976.

For my part I consider, therefore, that the applicants had a straightforward legitimate interest worthy of protection in placing in a warehouse until the end of June/July 1976 all the quantities corresponding to the tonnages for which refunds were fixed in advance and in only exporting those quantities after processing three or six months later.

In the light of the options which remained open to the applicants and of the particular alternative solution which they adopted, the question of the losses which they alleged to be inevitable should be reserved until the extent of the damage is considered. It will only be possible to verify the date on which the contracts were actually drawn up in the course of consideration of that question.

VII — On the other hand, it seems to me to be doubtful whether the interference with the legitimate expectation of the applicants was unforeseeable and whether it was adopted with immediate effect and without any transitional measure of such a nature as would enable a prudent trader to avoid the losses or to obtain compensation for them.

The measure at issue which, no doubt because they have been unable to set the dispute on that level the applicants do not claim was unlawful, was not adopted like a 'clap of thunder in a clear sky' if one remembers that a major new factor had itself intervened in the meantime, that is, the reversal after several years of the trend of world prices. If anything unforeseeable occurred it was the massive purchases of cereals by the Soviet Union, which began in July 1975.

That the nature of the refund fixed for malt in June/July 1976 in the light of those purchases (between 60 and 70 units of account per tonne) is exaggerated and led to a rise in the number of licences involving advance fixing (more than 1.5 million tonnes of malt) is shown by the fact that with effect from 14 July 1975 the Commission reduced the corrective to ten units of account per tonne which brought the aggregate amount of the refund applicable to the new barley harvested in August 1975 to 17.93 units of account although the levy on imports was again higher than 40 units of account per tonne.

According to the evidence produced by the Commission, the representative of the Association Syndicale des Malteurs Français (Union of French Maltsters) met an official of the Commission on 20 October 1975. It appears that a modification of the warehousing procedure was envisaged at that date but only with effect from the following marketing year. According to the representative of the French malt industry there was never any question, either at that moment or subsequently, of calling in question the bonded warehouse and pre-financing procedures, which would have affected the agreements being implemented during the 1975/1976 malt year. A modification in the warehousing procedure was only envisaged as from the following malt year.

However, I do not consider that any decisive conclusion can be drawn from evidence given more than a year after a meeting which was in no way official.

VIII — On the other hand, not only did Regulation No 413/76 not have retroactive effect but it did not even have immediate effect, since it only came into force on the seventh day after its publication. What is true is that under that regulation the lawful interest which the applicants may claim had to be put into more concrete form by placing the products under customs control before 5 March 1976 and that as a result their exports took more concrete shape before that date, whereas previously the placing of the goods under customs control could be staggered until the end of July 1976: if warehousing took place before 5 March the applicants continued to qualify both for the refund and for its pre-financing for goods whose withdrawal from the warehouse could be delayed until the end of 1976. If, on the other hand, warehousing took place after that date, they continued to qualify for the refund fixed in advance but there was a risk of its being reduced by 20 % if the goods

did not leave the warehouse before the expiry of the new time-limits fixed by Regulation No 413/76.

I do not really see what other transitional measures should have been brought into Regulation No 413/76, unless they were wholly to weaken the effect of the measure adopted by postponing for a year its application to transactions which were proved to have been irrevocably entered into. The bringing of such proof is extremely complicated and open to criticism of every sort.

IX — However, the decisive issue in the present cases appears to me to be a balance between the 'economic reality' referred to by the applicants and the existence, alleged by the Commission, of a matter of overriding public interest preventing the legitimate interests of the applicants from being taken into account.

The Commission claims that the tonnage represented by the taking out of the export licences exceeded at all times that of the exports actually carried out.

The applicants maintain, on the other hand, that the Commission artificially inflated the number of licences taken out and reduced exports to a minimum. That point might possibly form the subject of an investigation. However, I do not think that an expert assessment of the question is necessary, as although, as regards the applicants, the difference is only 2% for the years 1975/1976, there is a disparity of 10% at Community level, even if this is the result of speculations by certain dealers other than the French maltsters. At all events, the fact remains that the refunds granted in June/July 1975 were out of all proportion to world prices as from the spring of 1976.

In addition, the Commission observes that the maltsters conclude their export contracts at dates which are too distant from the dates of issue of their export licences fixing the refund in advance and, at all events, from actual exportation from the warehouse. For example, the contract concluded on 29 December 1975 between Union Malt and a Sudanese brewery provided for deliveries to take place between February 1976 and July *1977*. It is difficult to pass judgment on that practice. I can only say that although there actually exists in law a Community year for barley which runs from 1 August to 31 July and may be modified in the course of the year, there is no Community year for the malt industry even if in fact, in the trade, such a year runs from 1 May to 30 April.

I wonder, however, whether the same technical and commercial requirements referred to by the applicants compel them to bring their contracts with the brewers of the Common Market forward to the same extent and whether the 'general scheme for the malt industry' in the Common Market is the same as that which applies to customers in third countries.

Faced as we are with those points of view I think that we must take a cool look at the issue. There is no question of criticizing French industrialists for having used the system of pre-financing the refunds to extend *improperly* the period of validity of their advance-fixing certificates. Furthermore, in reply to a written question from Mr Hougardy, the Commission itself acknowledged on 24 September 1976 that it regarded 'the accusation' against European maltsters 'of fraud and miscalculation as ill-advised and unwarranted'. Put more simply, the question is whether the circumstances surrounding the adjustment of rules which, in the light of experience, no longer appeared to be economically justified are such as to call the liability of the Community in question.

It is true that the Community regulations enabled traders — in particular, dealers — to execute licences for the purposes of resale and that that transaction was in itself perfectly lawful. Although the obligations deriving from licences are not transferable, the rights deriving therefrom are during the period of validity of the licence (Article 3 (1) of Regulation No 193/75). In fact, certain of the licences produced by the applicants were transferred to other maltsters in the Common Market (as happened in Cases 44 & 45/77).

Finally, the maltsters could themselves resort to the inward processing system. The applicants maintain that it has not been possible to show that at any time a European maltster, especially a French maltster, imported barley in order to re-export it later in the form of malt with a higher refund. However, that was in fact done for up to 10% of the exports of barley, since only about 90% of the barley for brewing supplied to the Community malt-houses, whose capacity has been extended in the light of the boom in the beer industry in the third world, is of Community origin. Consequently, certain people were able to turn the balance maintained between the import levies and export refunds to advantage.

Even if the applicants are not involved the result has been a trade in licences, as in the sugar market, as well as possibilities of substitution or exchange ('duplication') and disturbances on the market.

At all events, if the speculation made possible by the bonded warehouse procedures was, in principle, lawful in nature, there was still express provision for adjustments to be made to that procedure. It must be open to the legislature to modify at any time a law which allows such speculations to take place: it is the terms of the contract which must be in accordance with the rules and not vice versa. Consequently, if the system of advance fixing of the refunds was indissolubly linked in the minds and practice of the applicants to that of payment of the refund before the products were placed in the warehouse and if they have adjusted their contracts in reliance on the length of the period of warehousing, the link thus established between the two systems is the result of their trading practice but it is not rendered in any way sacrosanct by the fact that, in the words of the applicants, 'they are connected by the performance of a single contract'.

The applicants have perhaps been encouraged in that view by a practice which has lasted for seven years but a matter of overriding public interest could legitimately justify an amendment. If, relying on the period of three or six months by which they were in practice permitted by Regulations Nos 441/69 and 1957/69 to overrun the period of validity of their export licences, the maltsters believed themselves able 'to implement their export contract over 15 to 18 months by recovering, at the end of the malt year, the period of three to six months which they had been *compelled* to devote at the beginning of the marketing year to the negotiation of their contracts and to the final formulation of their conditions of sale', that was not the aim of the system of pre-financing the processing or the storage.

The conviction that the former procedure would not be modified during the 1975/1976 malt year thus appears to me to be subjective, which is of course of the nature of any conviction, and the issue of the export licences to the applicants has not created any relationship of public law between them and the Community of the sacrosanct nature attributed to it by the applicants.

By way of a matter of overriding public interest the Commission refers to the fact that the practice led to dumping at

the expense of the maltsters of certain third countries and to threats of retaliation by certain of those countries (Switzerland, Australia . . .) against other sectors of the common market in agriculture. The applicants claim that the measure adopted by the Commission in no way benefited the maltsters of the third countries. However, in so far as the contracts concluded with the European maltsters have been terminated or modified their advantage over the other suppliers to brewers in third countries has been reduced and the maltsters in those countries have drawn the necessary inferences from it for the future.

Whilst maintaining that it had not wished to fix any quota for the refunds the Commission also invokes the need to set a ceiling on them, in accordance with the general policy followed by the Community in the fight against inflation. I consider that that is also an 'overriding' consideration which must call to mind the one leading to the abolition of the production refund on starch and connected with the Council's undertaking to amend the agricultural regulations in such a way as to fix a 'real, rather than a target', ceiling for the undertakings entered into by the EAGGF (European Agricultural Guidance and Guarantee Fund). In fact, the expenses arising from the fixing of the refunds at an excessive level have been assessed at almost 37 million units of account.

The truth is that in the light of the possible duration of the bonded warehouse procedure the refund on malt had been fixed in June/July 1975 with the agreement of the competent Management Committee at a level which bore no relation to the market conditions existing at the time when, in the absence of any modification of the system, the licences could have been discharged. According to the chairman of the Subcommittee on Control of the Committee on Budgets of the European Parliament 'much remains to be verified and explained' in that area. I believe, however, that I can accept the statement concerning the export refund for malt made by the Audit Board of the European Communities in its report drawn up on 24 October 1977 in relation to the accounts for the financial year 1976: 'it is clear that a large number of those licences have been requested for speculative reasons, without any real contracts to support the applications, and that they have led the Commission to pay considerable export refunds . . . It is clear that at that period the malt exporters anticipated the development of the market with a greater degree of accuracy than did the Commission; they therefore reacted more quickly to their own advantage, thereby imposing excessive burdens on the Commission . . .'. For my part I find therein an illustration of the 'game of cat and mouse' analysed so well by Mr Advocate General Alain Dutheillet de Lamothe in his opinion delivered on 10 February 1971 in the *Tradax* case ([1971] ECR 1 158) and it is a fresh example of the time lag between the appearance of the market trend which is quickly turned to advantage by particularly well-informed traders and the reactions of an administrative body which is subject to complex procedures.

Placed in that situation it is possible, as the applicants state, that on 5 February 1976 the Commission put before the Management Committee the alternative of a reduction in the periods during which the products remain in the warehouse or of a reduction in the periods of validity of the licences. For its part the Commission did not wish to alter the period of validity of the advance fixing of the refund (as it had done, for example, as regards the *import licences* for durum wheat by means of Regulation No 2607/75 of 14 October 1975) which in fact constitutes an established right and there was in the Management Committee a majority in

favour of approving the modification of the system for pre-financing the refund to which producers became entitled when the products were placed in the warehouse, even if at the following meeting that majority regretted the position which it had adopted.

Finally, the Commission is not alone in not having wished to recognize the 'scheme for the malt industry' praised by the applicants. In its Regulation No 1381/76 of 16 June 1976 the Council stated that 'experience has shown that speculative use may be made of a long period of validity' (of export licences) and took up again the essential points of measures drawn up by Regulation No 1157/76 of the Commission of 17 May 1976, which had not been in accordance with the opinion of the Management Committee for Cereals. Although it acknowledges that 'in accordance with international practice, a large proportion of delivery contracts are concluded for at least a year', the Council did not wish to extend the validity of the export licences beyond 12 months. Its regulation requires that entry of the destination of the products exported shall be made not later than two months following the day of issue of the licence. The security is only released on production of proof that the product has been imported into the sub-zone or the European non-Member country of destination concerned. The transfer of the rights deriving from long-term export licences has been prohibited for malt since August 1976 (Commission Regulation (EEC) No 2088/76 of 24 August 1976).

As it was required to make an assessment of a complex economic situation the Commission, with the support of the Management Committee, enjoyed a large measure of discretion. In the exercise of that discretion it did not commit any gross error, or misuse its powers, or manifestly exceed the limits of that discretion but, to express it in a positive way, it decided between the interests in question in accordance with the aims of the Common Agricultural Policy as defined by the Treaty.

I am therefore of the opinion that the application should be dismissed and that costs should be borne by the applicants.