On those grounds,

THE COURT

hereby:

1. **Dismisses the application as inadmissible.**

2. **Orders the applicant to bear the costs.**

Lecourt Monaco Kutscher Donner Mertens de Wilmars

Pescatore Sørensen Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 26 November 1975.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 12 NOVEMBER 1975 [1]

Mr President,
Members of the Court,

The applicant undertaking, which has its head office in a French overseas department, exported cereals to third countries during the 1972/73 marketing year; in respect of these transactions it had previously obtained from the competent French body, the Office national interprofessionnel des céréales (ONIC) the export certificates which entitled it to advance fixing of the refunds provided for in Article 7 (1) of Regulation No 139/67 of the Council and in Regulation No 1041/67 of the Commission, which lay down detailed rules for the application of these refunds. Article 10 of the latter regulation lays down that the refund shall be paid by the Member State in whose territory the customs export formalities were concluded. By virtue of Article 227 (2) of the EEC Treaty, Community rules on agriculture were applicable to the French overseas departments as soon as the Treaty entered into force with the sole, express exception of Article 40 (4), which

1 — Translated from the Italian.

provides that, in order to enable the common organization of the agricultural markets to attain its objectives, one or more agricultural guidance and guarantee funds may be set up.

Article 9 (1) of Regulation No 120/67/EEC of the Council further provides for a carry-over payment in respect of stocks of certain cereals remaining at the end of the marketing year. In accordance with Article 3 (1) of Regulation No 1554/73 the State where the stock is held is responsible for making the payment. At the end of the 1972/73 marketing year, the applicant had stocks in hand to which, it states, these provisions applied, as a result of which, in addition to automatic payment for the exports, it was entitled to a carry-over payment from its own State in respect of remaining stocks.

In two attempts to obtain payment of the sums thus due from the ONIC as the competent French authority, the undertaking concerned received contradictory answers from the authority which, after a reference to the absence of Community funds to meet the expenditure involved, stated that the question was still the subject of consideration. The applicant thereupon submitted an administrative complaint to the Commission on 28 August 1974, requesting to be paid a sum equivalent to the total amount of refunds and carry-over payments which it stated it was entitled to receive from its own State under Community rules.

The subject of the present application, which is being brought under the second paragraph of Article 215 of the EEC Treaty, is the implied rejection of this request.

The applicant contends that the Community is responsible for the fact that it has not yet received payment of the sums due to it. In fact, the work of the special fund established by the Community under Article 40 (4), quoted above, by means of which the Community finances the refunds on exports to third countries and the carry-over payments for stocks held at the end of the marketing year and covered by the abovementioned Community rules, has not yet been extended to the French overseas departments. The applicant maintains that, because of lack of Community funds, its State is not carrying out the tasks entrusted to it under Community regulations concerning the payment of refunds and carry-over payments and, accordingly, regards the failure to extend the European Agricultural Guidance and Guarantee Fund to cover French overseas departments as the reason why it has not received payment of the sums due to it.

In the light of the judgment in *Haegemann* (Case 96/71, Rec. 1972, p. 1005), I must at once state that the present application is inadmissible. In the present case, as in *Haegemann,* the application for compensation as the result of the Commission's refusal to make a payment is essentially an attempt to obtain payment of the outstanding amount. The previous case was concerned with repayment of a Community charge which was claimed to be illegal. The present case involves the payment of a sum which is alleged to be due under Community law.

In both cases, the claim rests principally on the relationship between an individual and the national administration which, in theory, improperly imposed or failed to make a payment due. As the Court held in *Haegemann,* in a case involving the relationship between individuals and a tax authoritiy which has been responsible for imposing a Community charge which is alleged to be illegal, it is for the national courts to pronounce on the legality of the charge; and since any corresponding liability on the part of the Community primarily depends on the outcome of their appraisal, the conclusion is inevitable that there is the same objection to the

action for damages brought in the present case against the Community without prior completion of the procedure in the national courts for determining the claims to payment which the applicant asserts against its State and for determining the precise reasons for the attitude of the French authorities towards the applicant and the legality of their attitude. Any liability, accordingly, on the part of the Community depends on the answer to these questions, and I believe the conclusion to be drawn from the aforesaid judgment is that these questions cannot be settled at first instance when brought before the Court on the basis of an action for damages but must first of all be dealt with by the competent national courts, which may if necessary refer to the Court for a preliminary ruling on interpretation.

But even if it were decided to go into the substance of the application, on the assumption that the facts as set out by the applicant and which have not been challenged by the defendant, are true, the outcome could not be any more favourable for the undertaking.

A few elementary considerations will suffice to demonstrate that the application for damages is clearly without foundation and there is no need to go into the question of the alleged illegality of the Community's conduct in, as the applicant sees it, failing to provide Community funds for the above-mentioned transactions carried out in the French overseas departments.

Let us assume for the moment that the applicant undertaking is, under the relevant Community agricultural rules, entitled to receive from the French state the amount of the refunds, fixed in advance, on the basis of export certificates granted by the ONIC and a compensatory amount for the cereals in stock at the end of the marketing year. The applicant does not dispute that, in order to assert the relevant rights to payment, it must refer to the competent French authority and bring an action against its own national administration. It takes the view, however, that it has the right to choose between such an action and a direct action for compensation against the Community, whose refusal to provide for the expenditure in question caused the French authorities to refuse to meet their obligations.

However, under the Community system, any failure on the part of the Community to discharge a duty which it owes to a State does not excuse the latter from fulfilling obligations directly imposed on it by Community law, especially if these involve the rights of third parties; any attempt to rely on the principle 'inadimplenti non est adimplendum' against the latter would be quite out of the question.

Moreover, as has long been established by the decisions of this Court, the Community legal order does not allow those subject to its jurisdiction to take the law into their own hands even in an emergency (Judgments in Cases 7/61, *Commission* v *Italian Government,* Rec. 1961, p. 643, Joined Cases 90 and 91/63, *Commission* v *Luxembourg and Belgium* [1964] ECR 625, and Joined Cases 52 and 55/65, *Germany* v *Commission* [1966] ECR 159). The traditional methods of self-protection, including the general principle of 'inadimplenti non est adimplendum', which the States are recognized as having under general international law, have been replaced in the Community by measures and procedures which are better able to ensure legal certainty and that the law is observed by all. If a State believes that its rights have been infringed by the Commission or by the Council, the Treaty provides it with adequate means of redress through the Court, and these constitute the only valid means of obtaining satisfaction when there is disagreement with the Community Executive on a question of law.

On the assumption, therefore, that the applicant is entitled to receive a given payment from its national administration, the latter's refusal to fulfil one of its obligations is, in law, the direct cause of the loss sustained by the applicant. Since, in such a case, the refusal would constitute an illegal act, this would, in any event, suffice to break the chain of cause and effect between illegal action by the Community and the injury suffered by the individual.

Although the so-called 'knock on' liability, contended for by the applicant, can sometimes be established in private law for the purpose of providing adequate protection for a creditor in a case where third parties have wilfully contributed to the insolvency of his debtor, it could not possibly be justified in the case of claims which, on the basis of Community law, private parties were asserting against a Member State.

For these reasons, the application is not only inadmissible but also manifestly without foundation and must therefore be dismissed, with costs against the applicant.