THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders each party to bear its own costs.**

Lecourt Mertens de Wilmars Mackenzie Stuart

Donner Monaco Pescatore Sørensen

Delivered in open court in Luxembourg on 4 February 1975.

A Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 3 APRIL 1974 [1]

Mr President,
Members of the Court,

1. By Resolution of 20 July 1972, published in OJ C 86 of 10. 8. 1972, the Council, considering that it was essential to ensure that persons with an economic interest should be aware immediately of the tenor of the implementation provisions to be adopted at the beginning of 1973 to carry out the transitional measures provided for in the agricultural field under the Act of Accession to enable the new Member States to adjust to the rules in force in the Community, announced its approval of the text of the draft Regulation, published as an Annex to the Resolution, and made it clear that the text would be formally adopted immediately after the Treaty of Accession came into force.

Article 1 of the draft Regulation provided that the compensatory amounts applicable until 31 July 1973 in trade between the Community as originally constituted and the new Member States, and between the new Member States and third countries, should, in the case of the United Kingdom, be 44·31 u.a. per metric ton for common wheat and 42·33 u.a. per metric ton for barley. The levy

1 — Translated from the Italian.

then applicable on imports of these products from third countries was, respectively, 67·61 u.a. and 52·88 u.a.

Under the provisions of the Act concerning the conditions of accession, especially Articles 2 and 151, the Community rules on agricultural products apply to new Member States with effect from 1 February 1973. The implementing regulation was designed to come into force on the same date.

In September 1972, the Compagnie Continentale France concluded a series of contracts for exportation from France to the United Kingdom of denatured wheat and barley totalling 108 900 metric tons. Deliveries were to take place during the period from February to June 1973.

In concluding these agreements, the Compagnie Continentale France, the applicant in the present case, had presumably taken account of the compensatory amounts published in the draft Regulation mentioned.

On 31 January 1973, the Council adopted Regulation No 229/73 (OJ L 27 of 1. 2. 1973) laying down general rules for the system of compensatory amounts for cereals. This Regulation substantially repeats the text of the draft Regulation to which, in the resolution of July 1972 mentioned above, the Council had given its approval. In particular, Article 1 of the Regulation textually reproduces the compensatory amounts set out in the draft.

In Regulation No 229/73, however, there are some additions to the text of the draft which the Council had previously approved. As far as the present case is concerned the main addition consists of Article 7, which in its first paragraph provides: 'If for any product referred to in Article 1 or Article 2 (1) the levy is lower than the compensatory amount fixed for that product or calculated in respect thereof by applying Article 2, the Commission shall apply the scale set out in the Annex to determine the amount applicable by way of compensatory amount in trade between the Community as originally constituted and the new Member States and between those States and third countries'. This provision is based on the first paragraph of Article 55 (6) of the Act of Accession, whereby 'the compensatory amount levied or granted by a Member State in accordance with paragraph 1 (a) may not exceed the total amount levied by that same Member State on imports from third countries'. Article 7 provides that, in cases where the levy is lower than the compensatory amount fixed, the amount to be applied under the latter head shall be determined on the basis of a scale annexed to the Regulation. This scale, which was designed to prevent slight variations in the amount of the levy from automatically affecting the compensatory amount, consists of a list of flat rate compensatory amounts, each of which remains applicable so long as the rate of levy lies within a given range of values.

During the period between the conclusion of the contracts of sale in Great Britain and their execution, there was a sharp increase in the price of cereals on the world market, with the result that, at the time arranged for export to Great Britain, the difference between the price of cereals in the original countries of the Community and the world price had been reduced to such an extent that the levy on imports of these products from third countries into the Community as originally constituted went down to 15 u.a. per metric ton. This was much lower than the sum fixed as the compensatory amounts in trade between the Community as originally constituted and the new Member States.

As the Compagnie Continentale France could not, at the time arranged for deliveries to be made in Great Britain, receive in full the compensatory amount on which it was counting when it concluded the contracts for sale, it suffered a consequential loss which it estimates at FF 5 728 660·17. This is the amount which the company now claims as compensation from the Community.

2. The applicant maintains that the harm done by the Council, giving rise to liability on the part of the Community, consists in having, by Regulation No 229/73 of 31 January 1973, radically changed the system of which notice was given in July 1972.

According to the applicant, whereas the system described in the Resolution of 20 July 1972 was based on the principle of advance fixing of the compensatory amounts, Regulation No 229/73 completely abandoned this basic principle. In view of the fact that the compensatory amounts represent nothing more than differences between fixed marketing-year prices, the principle of fixing compensatory amounts in advance reflected both the spirit and the letter of the common organization of the market. Moreover, the fact that the compensatory amount is fixed meets the needs of commerce, since it enables exporters to make their arrangements in advance of the time when they are to be put into operation on the basis of an assurance that an essential factor, viz. the level of the compensatory amount, will remain unchanged. Otherwise, there would be a difference between the treatment accorded to export business with third countries and that accorded to trade within the Community between the old and new Member States, to the detriment of the latter, since in relation to third countries it was possible to fix the levy in advance.

It is true that the first paragraph of Article 55 (6) of the Act of Accession provides that an entirely extraneous factor, viz. the world price, can affect the fixed bilateral relationship which governs trade within the Community. But, according to the applicant, by introducing an element of flexibility and uncertainty, this provision may conflict with Articles 51 and 52 of the Act of Accession concerning the fixing of agricultural prices in the new Member States and their progressive alignment with Community prices. These articles call for absolute stability and despite the terms of Article 55 (6), the system of which the Council gave advance notice in July 1972 was based upon them.

3. Before this argument is considered, it is necessary to establish whether actions of the kind with which this case is concerned can, in principle, give rise to non-contractual liability on the part of the Community.

The notice given by the Council when, in OJ C 86, it published the draft Regulation laying down general rules for the system of compensatory amounts for cereals, set out therein a Resolution in which it expressed its approval of the text and declared that it would be formally adopted as soon as the Treaty of Accession came into force, was something more than a piece of information; it was also an undertaking addressed to all who would be affected when the draft was implemented.

The extent to which the State or other public administration is liable for failure to carry out undertakings given in the exercise of a discretionary power varies from Member State to Member State.

In French law the tendency is to hold the administration liable but the tenor of the decisions of which I am aware mainly relates to information given or undertakings conveyed direct to specific persons or bodies, and imposes the further requirement that there has been no contributory negligence or misjudgment on the part of the injured party.

Italian law has, in principle, no difficulty in recognizing the liability of the administration for damage caused through actions performed in exercise of a discretionary power, such as informing undertakings concerned of the direction which the administration's future policy will take, when the authority in question can be shown to have ignored elementary standards of care and judgment and, accordingly, to have infringed the basic rule of *'neminem laedere'*. It is also accepted that departure from provisions in directives

of an essentially informative nature such as 'circulars' sent out from the offices of the administration which issued such directives can constitute an act *ultra vires*.

The position is much the same in German law, which regards the administration as having imposed a restriction upon its discretionary power when an undertaking has been given; German law, accordingly, regards subsequent conduct inconsistent with such an undertaking as unlawful on the basis of the duty to respect the legitimate expectations of those to whom the undertaking was given. Here again, however, the available precedents refer to information given by the administration to individual enquirers and not to the public at large.

In English law, though it is not wholly impossible for a private party to obtain compensation for damage suffered as a result of incorrect information supplied to it by the public administration, the courts are non-committal on the point because of the general principle of English law that the executive has no power to restrict its future freedom of action, since it must do what the public interest requires at the time when the power is exercised.

4. The case law of this Court of Justice faces clearly in the direction of giving legal force to acts of the Community executive, which, even when described as mere 'opinions', give notice of future action (see the Judgment in Case 14/57, *Usines à tubes de la Sarre*, Rec. 1957, p. 216); it also recognizes the legal effect of decisions, whatever their designation or description in law, which express an intention to lay down a future line of conduct (Judgment in Case 22/70, *AETR*, Rec. 1971, p. 276-277; Judgment in Case 81/72, *Commission v Council* [1973] ECR, 583).

It is a principle recognized in the Community legal system that assurances relied upon in good faith should be honoured. This Court has only recently had occasion to pronounce on the question in its judgment of 4 July 1973 in Case 1/73 (*Westzucker*) and in the judgment noted earlier in Case 81/72 of 5 June 1973 (*Commission v Council*).

In the latter case, the principle of safeguarding the interests of those who, with justification, place their confidence in a public administration played a decisive role in establishing the binding nature of decisions affecting whole categories of those subject to the administration concerned. The Court declared that the principle of the protection of the legitimate confidence of those subject to a public administration is infringed by a provision in which, without valid excuse, a Community institution departs from a previous provision in which it committed itself as to its future course of action.

On the other hand, the Community has been absolved from liability when, even though expressed in terms which create doubts about its real meaning, the enactment has not been such as to give the undertaking the certainty that the interpretation more favourable to it was the correct on (Judgment in Case 36/62, *SNUPAT*, Rec. 1963, p. 591).

This brief review of national and Community precedents permits us to draw the conclusion that, if, as the applicant maintains, it were true the system of compensatory amounts adopted by the Council at the beginning of 1973 is substantially different from that which it announced in July 1972, the undertaking, as the injured party, could justify a claim for compensation for damage suffered as a result of failure to carry out the commitment. The fact that the Resolution of 22 July 1972 was adopted in exercise of a discretionary power (the exercise of discretion consisted here not only in the choice of the rules announced, but also in the very fact of making the announcement and the commitment implicit therein, since the Council was under no obligation to give that information at that time) does not detract from the validity of the

commitment freely undertaken by the Council and, consequently, its liability for any unjustifiable failure to honour it.

5. The applicant does not contest the validity of Regulation No 229/73. That does not, however, rule out consideration on its merits of its action for damages which, according to decisions taken by this Court, constitutes a separate cause of action from that for annulment.

The ruling given in the judgment dated 2 December 1971 in Case 5/71 *(Zuckerfabrik Schöppenstedt,* paragraph 11 under 'Grounds of Judgment') that 'in order to give rise to non-contractual liability on the part of the Community it is at the very least necessary that the offending act should be illegal' has not recurred in later decisions on the subject of liability. Indeed, in its judgment of 13 June 1972 in Joined Cases 9 and 11/71 *(Compagnie d'Approvisionnement,* Rec. 1972, p. 408) the Court implicitly accepted that the Community might be liable for a valid legislative act when (at paragraph 46 and 47 of the Grounds of Judgment) it declared: 'We cannot see that liability for a valid legislative act could arise in a situation such as this, having regard to the fact that the measures taken by the Commission were intended, as a matter of general economic interest, only to mitigate the consequences that would be felt, particularly by French traders as a whole, following the national decision to devalue the franc'. Thus, it is only in the light of the facts in the particular case under consideration and not as a matter of principle that the Community was absolved from liability for a valid legislative act.

However, it remains to be said that, as this Court has consistently held, 'in the case of a legislative act involving choices of economic policy, the liability of the Community for damage sustained by individuals as a consequence of that act can, within the terms of the second paragraph of Article 215 of the Treaty, arise only when there has been a clear infringement of a superior rule of law for the protection of the individual'. (Judgment in Case 5/71, *Zuckerfabrik,* Rec. 1971, p. 984; Judgment in Joined Cases 9 and 11/71, *Compagnie d'Approvisionnement,* Rec. 1972, p. 404; Judgment in Case 43/72, *Merkur,* paragraph 8; Judgment in Case 63-9/72, *Kampffmeyer* paragraph 10).

Accordingly, for infringement of a rule of this kind to constitute a legal wrong, creating liability on the part of the Community, it is not necessarily a condition precedent that the legislative act should be invalid. In the case of a rule designed to safeguard the interests of private parties, the latter, especially in respect of circumstances which are over and done with and cannot recur in the future, can be adequately compensated for the harm done by payment of damages for the loss sustained by those affected, without the need to annul the legislative act concerned.

This principle is sound both in theory and in practice. It is, in fact, possible to conceive of principles whose breach can involve a legal wrong and therefore a non-contractual liability on the part of the administration without, however, making the legislative measure invalid, as is the case when a measure which is admittedly in the general interest represents, for certain parties, a breach of the general principle that the administration must honour undertakings given to those subject to its control. This principle is clearly relevant in the present case, since, assuming that there has in fact been a breach of an undertaking, the balance can be redressed by payment of compensation for consequential damage sustained by individual Community exporters.

6. Arguing on the basis of an alleged inconsistency between the system represented by, on one hand, Articles 51, 52 and 55 (1) of the Act of Accession and, on the other, the principle in the first paragraph of Article 55 (6), the

applicant maintains that in July 1972 the Council opted for a system based on the first group of the above provisions.

It is necessary therefore to consider whether the interpretation of the Act of Accession contended for by the applicant is the correct one. Articles 51, 52, 55 (1) and 55 (2) govern application to the new States of the rules prescribed by the common organization of the agricultural market on the subject of prices. Articles 51 and 52, which, under Article 73 of the Act, apply to the derived intervention prices for cereals, provide that in the case of new Member States whose agricultural prices were, at the time when they joined the Community, much closer to the world level than to Community prices, prices should be fixed at a different level from that of the common prices to enable them to adapt progressively to the higher Community level. To facilitate movement, under satisfactory conditions, of products between Member States with different price levels, Articles 55 (1) and 55 (2) provide for these differences to be offset in trade between the new Member States themselves and with the Community as originally constituted, as well as in trade between the new Member States and third countries. For products in respect of which prices are fixed in accordance with Articles 51 and 52, Article 55 (2) lays down a formula for calculating the compensatory amounts applicable in the types of trade it covers. The compensatory amounts are equal to the difference between the intervention prices fixed for the new Member States concerned and the common prices.

The compensatory amount provided for exports from the original Member States to new Member States serves, therefore, to compensate for the difference between the higher level of prices in the original Member States and the lower level prevailing in the new. That difference depends in turn on the difference between the level of world prices and the Community level, after allowance has been made for the rate of levy imposed on imports from third countries into the new Member States into which the Community products concerned are to be exported. It is clear that once this difference diminished or disappeared altogether, there would be no point in keeping a compensatory amount at a level based on a difference in prices which no longer existed. Once they had lost their *raison d'être,* compensatory payments would no longer be justified.

For this reason, far from militating against the system described above, as the applicant contends, the rule in Article 55 (2) operates as an integral part of it and is itself reinforced by the provision in Article 55 (6), under which the compensatory amount levied or granted by a Member State in accordance with paragraph 1 (a) — i. e. in trade between the new Member States themselves and with the Community as originally constituted — may not exceed the total amount levied by that same Member State on imports from third countries.

7. It is true therefore that, in practice, exports from third countries into the Community could thus, in certain circumstances, receive preferential treatment to the detriment of trade within the Community. Because, in fact, an export transaction is not normally completed on the day on which the deal was concluded, there can be no doubt that in a fluid market situation in which there is a pronounced tendency for prices to rise, when this tendency becomes widespread the Community trader who exports to new Member States where prices are lower than the common ones could find himself at a disadvantage compared with the exporter from third countries where a system is in operation under which the compensatory amount varies according to changes in the world price for the product concerned. In these circumstances, the Community exporter is faced with the prospect of receiving a smaller compensatory amount than the one in force on the day when he

concluded the contract and agreed the relevant purchase price, whereas the exporter from third countries is in the reverse situation of being able to count on having to pay a levy which is lower than that in force on the day when the contract of sale was concluded.

This result, which hardly fits in with the principle of Community preference embodied in paragraph 1 of Protocol No 16 on the markets and trade in agricultural products, annexed to the Act concerning the conditions of accession by the new States of the Community, could be avoided by a provision making it possible to fix the compensatory amount in advance, as was subsequently done in Regulation No 3280/73 of the Commission of 4 December 1973. However, to make things harder for speculators, the power to do so must be subject to strict time limits: the transaction which derives advantage from it must be completed within a short time of the day on which the amounts are fixed. For the same reason, the freezing of the compensatory amount would have to be effected in respect of a single transaction and not as a general provision, in view of the fact that the amount would be determined after taking into account prices actually prevailing at the time when the process of advance fixing was carried out.

On this ground alone, the applicant undertaking, which certainly does not lack experience of the rules applied in the agricultural market and of the business of exporting the products concerned, must have had every reason for doubting whether, in reality, the publication of compensatory amounts by means of a draft Regulation due to come into force more than six months after it was first published, and to remain in force for six months thereafter, could be regarded as an 'advance fixing' which, until the Regulation itself was made permanent, applied without qualification to any transaction which might be carried out in the meantime.

If this can be called 'advance fixing', (and this would be an incorrect use of that term) it was only in relation to the *maximum level* of compensatory amount which, given the requisite market conditions, may be paid to anyone who exports from a State where prices are higher than in a new Member State to which the goods are sent.

8. At this juncture, it should be noted that the present case is not concerned with the intrinsic importance of the fact that the general rules adopted by the Council for trade between the original States and the new Member States of the Community could, as a result of development which, in normal circumstances, could hardly be foreseen, prove less advantageous than those governing trade with third countries or imports from third countries. Even if, in theory, it could be shown to involve a difference of treatment infringing the principle of Community preference, any factor vitiating the legality of the act would be insufficient in itself to make the Community liable for the damage which the undertakings had sustained as a result. The Community's liability for the loss of which the applicant complains could arise only if the announcement by the Council in its Resolution of 20 July, and the draft Regulation attached to it, of its future course of action had been such as to give the applicant undertaking reasonable grounds for receiving a mistaken impression of certainty that the compensatory amounts indicated were bound to remain unchanged regardless of the direction in which the market might move.

In this connexion reference has been made to the fact that, as regards trade with third countries, export from third countries into the Community not only enjoyed the advantage of having the amount of export refund guaranteed over a period of some months: they also benefited from the possibility of advance fixing of the levy. It was stated that, when viewed against the principle of Community preference, this could have

created the impression that, in the absence of any machinery for any advance fixing of the amount appropriate to each case as it arose, the amount laid down for exports from the Community to Great Britain itself constituted a general advance fixing which was valid until 31 July of the following year.

It must be borne in mind, however, that the unfavourable position in which the applicant claims to have been placed compared with exporters from third countries could not have been foreseen when the above-mentioned measures were adopted. The position was created and brought to light only as a result of abnormal developments at a later date outside the Community's control, which resulted in an unprecedented increase in the world price for cereals. It would be wrong to assess the meaning and effect of those measures in the light of subsequent events; this applies particularly to the feeling of confidence engendered in the mind of the applicant at the time when the company signed the contracts on which it suffered loss. At the time when the Council Resolution was published and the contracts of sale were signed by the applicant, the wide difference between the published compensatory amount and the difference between the Community target price and the world price and, consequently, the amount of the levy, created the justifiable assumption that, given normal fluctuations in the world price for cereals, this was sufficient safeguard for Community traders. The expectations created by the enactments referred to at the time when the applicant concluded his contracts cannot, therefore, be assessed on the basis of the principle of Community preference, because this principle began to assume importance only at a later date, viz. after a substantial change in the market situation, providing such a contrast with the system and what proved to be the more effective guarantees provided for trade with third countries.

Moreover, as regards the products on the British market which were in direct competition with Community products, it should be noted that the guarantee provided for the benefit of third country exporters into Great Britain was not such as, in practice, to place them in a really favourable position compared with Community exporters; this was because the guarantee, which lasted for the short space of 30 days, did no more than make allowance for the greater amount of time required for transport of goods from overseas into the Community compared with the time required to export a consignment of goods between neighbouring countries like the States of the Community. What placed exports of cereals from third countries into the Community at an advantage compared with exports from an original Member State into a new Member State was the occurrence of a rise in the world price for cereals so that the 30-day guarantee proved to be quite unnecessary.

9. As the fixing of the compensatory amount is a way of compensating not only for negative differences, by means of full payment of the amount to the company exporting from a Member State to another Member State where the prices are lower, but also, in the reverse situation, is a way of compensating for positive differences by means of a levy, the way in which the applicant proposes to interpret the system announced would, in the latter case, have led to manifestly erroneous results. Even where there was a marked rise in prices, exports from the new Member State to the remainder of the Community would have been subject to the same charge even if this was greatly in excess of the difference between the prices prevailing in the markets concerned, and this would also hold good for transactions concluded under changed market conditions. On the other hand, Community exporters to Great Britain would, until 31 January 1973, when Regulation No 229/73 was adopted,

have been able, thanks to the rise in the price levels of cereals in Great Britain, to take advantage of the system of a fixed compensatory amount as described by the applicant to indulge in speculation without risk to themselves.

If, therefore, the question of Community liability is viewed in its correct perspective (and is thus limited to the expectations which, in fact and with justification, the applicant could, at the time when he concluded his contracts of sale in Great Britain, have drawn from the actions of the Council in July 1972), it must be conceded that, despite all aspects of the rules announced and later adopted by the Council which, in the light of subsequent developments, are open to criticism, the published wording of the Regulation on the compensatory amounts with the new Member States was not such as to create in the mind of the applicant any reasonable certainty in the sense claimed.

It was not even necessary for the Compagnie Continentale France to ponder the inconsistencies indicated above to realize that this was so. It would have sufficed for it to note the provisions in Article 6 of the draft of the Regulation of which notice was given in July 1972, and substantially incorporated in Regulation No 229/73: this provided that 'the compensatory amount levied by the importing State shall be that ruling on the day of importation' and by the same token, in the reverse case, 'the compensatory amount granted by the exporting State shall be that ruling on the day of exportation'. Even though its precise meaning may not have been entirely clear, this provision surely indicates that the compensatory amount was liable to change.

In view of this, the applicant cannot now validly claim that an expectation was not fulfilled. Even without any need to be aware of Article 55 (6) of the Act of Accession, the fact that the level of the amounts fixed might change was abundantly clear from the draft Regulation itself.

10. A decision contrary to the applicant's contention, therefore, is not simply a matter of invoking the basic rule that ignorance of the law is no excuse: although liability is associated with something in the nature of a breach of a binding undertaking on the part of the Council of the Community, certain aspects — explicit or implicit — of the undertaking referred the reader not only to the words of Article 55 (6) but to what is more important, its *raison d'être* as part of the system.

It is urged on behalf of the applicant that in the 'recitals' of the Resolution of 20 July 1972, the Council recognized an obligation to provide for advance notice to be given of the compensatory amounts which would apply throughout 1973 to meet the need of those dealing in cereals to take them into account in future contracts and, to some extent, to provide an incentive for them to develop inter-Community trade. The complaint is that, on the contrary, the outcome was a failure of expectations, created by one party and accepted as valid by the other, to which there had been an express commitment. In this connection, I have already expressed the view that, in reality, it is a case only of notice but also very much of undertakings binding the Council and the figures were in fact given on the reasonable assumption that fluctuation in world market prices would take place within a foreseeable range. Against this background, it was all the more desirable that the parties should be given figures on which to base their transactions and, consequently, develop trade. But the forecasts, and the undertaking associated with them, were closely related to the working of the system: it would be a mistake to view them in isolation and read an unconditional commitment into them as though, instead of forecasts, they constituted something immutable which was unaffected by change and which went against and beyond the requirements of the Act of Accession. The Council did not, in fact, have the

discretionary power which would enable it to create exceptions in applying paragraph 6, to which I have referred more than once. And because the undertaking and the rights to which it may give rise are strictly dependent on the actual state of affairs and not on the form of declarations taken in a general sense, it could not seriously be argued that, to an undertaking as well versed as the applicant is in the working of the system, the commitment could appear to be entirely unconditional.

11. From another point of view, it has been sought to present the problem not as a breach of a straightforward undertaking but as a breach of a more general duty to inform, based on the importance of giving full information once it was decided to publish an announcement in advance. The answer to this is that information about the system was fully supplied in the Act of Accession: the compensatory amount would be subject to the maximum laid down in Article 55 (6). The Council did not repeat this because the purpose of the rules embodied in the Regulation which was first announced and subsequently implemented with effect from February 1973 was to indicate the actual size of the compensatory amount and not to guarantee an unconditional subsidy; and underlying everything was, reasonably enough, the reservation inherent in the basic premise of the Regulation.

Nor can one refer to an infringement of rights acquired. The system was not designed to make up prices in individual contracts but the prices prevailing at the time of delivery; indeed, the compensatory amount referred to deliveries of goods to be carried out in the course of the year and not to individual prices agreed within a given period.

The event which upset calculations and caused the damage was the unforeseen and unforeseeable surge in world prices. There is an element of risk in every commercial operation: if the exporting firm had foreseen the abnormal conditions it would certainly not have concluded the contracts with the British wholesale importers. The company's position was aggravated by the partial loss of the benefit of the compensatory amount, which it had certainly counted upon receiving in full. But, on the date of delivery, it would not have made sense to grant the maximum compensatory amount provided for, because the world market had moved nearer the level of Community prices. Selling at a lower price than the Community price in anticipation of receiving the compensatory amount was a miscalculation, but the main error which caused the loss arose from the unpredictability of what happened on the market and not the unpredictability of what the consequences would be under the system governing trade between the various countries of the Community. The probability is that these losses would have been incurred even if the provision in Article 6 of the Regulation referring to the prices on the date of delivery had been expressly made subject to the reservation contained in Article 55 (6) of the Act of Accession.

12. On the other hand, a flexible system of 'advance fixing' enabling allowance to be made for the differences in price actually prevailing at the time when an undertaking concludes the transaction to which advance fixing is applied, as it was on 1 December 1973, could not in any case have been applied before 1 January 1973 to operations involving the new Member States because the essential conditions were still lacking: one of them was the entry into force of the Community rules on the agricultural markets in relations with the new Member States.

Purely in order to avoid the serious difficulties which, under certain conditions, could affect trade within the Community, provision was made in the escape clause contained in the second paragraph of Article 55 (6) whereby

exceptions could be created to the principle embodied in the first paragraph by appropriate decision of the Council, acting by a qualified majority on a proposal from the Commission, in order to avoid deflections of trade and distortions of competition. Nevertheless, even if it were possible to demonstrate that, in this case, development of this kind had occurred, it would still not have entitled the applicant to benefit automatically from such derogation, because this depends on a specific decision of the Council and there had not been one; nor, moreover, had one been sought.

The restriction imposed under Article 55 (6) represents a mandatory rule of immediate application and is an integral part of the system established under Article 55: exceptions to the Article could have been created only within the limits and under the conditions laid down in the second paragraph of Article 55 (6).

Apart from the possibility of abuse, which the applicant has not even mentioned, it would be extremely difficult to maintain that it was an act of omission giving rise to liability not to make use of such a delicately balanced discretionary power as that conferred on the Council by the subparagraph of Article 55 (6) of the Act of Accession and whose application, as an instrument for dealing with exceptions, poses delicate and complicated questions.

To sum up, I hold that no 'faute de service' in the sense alleged by the applicant — even by omission — could be discerned in the adoption of Regulation No 229/73 since, particularly as regards the aspects with which we are concerned, its wording did not substantially alter the system set out in the text annexed to the Council Resolution of July 1972.

If it is true that, as is borne out by all these considerations, the provisions of the Act of Accession on which the applicant relies cannot reasonably justify the construction placed by the applicant on the system of compensatory amounts outlined in the Council Resolution of July 1972, it follows that to an undertaking not without experience or means of ascertaining the actual rules governing its export operations (a description which undoubtedly fits the applicant), that document could not possibly have given so misleading an impression of the effect of the determination of the compensatory amounts contained therein.

In conclusion, neither the fact that, in adopting the first Resolution, the Council omitted any express reference to the general rule in the first paragraph of Article 55 (6) of the Act of Accession, nor the failure to implement the escape clause contained in the second paragraph of Article 55 (6), can give rise to liability on the part of the Community for the damage sustained by the applicant as a result of the changed situation of the world market in the products concerned because the applicant had, in respect of its future export operations, erroneously relied on the total of compensatory amounts indicated by the Council, since the documents relied upon were not such as to justify the belief that this total could never change.

For these reasons I submit that the claim for compensation should be dismissed, with all that, under the rules of this Court, this implies.