OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 1 MARCH 1973 [1]

Mr President,
Members of the Court,

The Federal Administrative Court has by order dated 18 August 1972 referred the following questions for a preliminary ruling:

1. Was the decision of the Commission dated 8 May 1969, authorizing the Federal Republic of Germany to limit intervention purchases to certain cereals, (OJ No L 112/1) valid?

2. Did this decision directly authorize the taking of measures?

The decision of the Commission mentioned in the National Courts reference did as we know already play a part in cases 49 and 50/71 (Rec. 1972 p. 23 and p. 53). In order to understand the problems raised in the main action long discourses will not therefore be required.

At present one needs to remind oneself that the Regulation of the Council No 120/67 (OJ No 117, p. 2269) created a definitive market organization for cereals with a single price system and that pursuant to Article 7 thereof the State intervention agencies are obliged throughout the whole marketing year to buy in cereals (inter alia wheat) from within the Community.

We must further remember that in spring of 1969, due to the then expected devaluation of the French franc, there occurred a fall in the rate of exchange of that currency. Accordingly, importers in other Member States (inter alia undertakings in the Federal Republic of Germany) were evidently able to buy up French cereals in France at the intervention price and, notwithstanding the expenses involved in such transactions were able to dispose of them at a profit to the German intervention agency (the 'Einfuhr- und Vorratsstelle für Getreide und Futtermittel' in Frankfurt on Main). In this way the German intervention agency is said to have got into difficulties as regards storage facilities. The Federal Government therefore on 2 May 1969 applied to the Commission of the European Communities for authorization to take protection measures pursuant to Article 226 of the EEC Treaty. The Commission acceded to this application by its aforementioned decision of 8 May 1969. By virtue of this the Federal Republic was empowered — insofar as it is now relevant — pursuant to Article 7 of Regulations No 120/67 to limit the purchase of common wheat and barley to those harvested in the Federal Republic. The 'Einfuhr- und Vorratsstelle' thereupon, on 8 May 1969 published an announcement according to which the intervention measures were 'with immediate effect' limited to common wheat and barley harvested in the Federal Republic. This announcement was published in the 'Bundesanzeiger' of 10 May 1969. — Furthermore on 17 June 1969 an order was made by the Federal Minister for Food, Agriculture and Forestry by which likewise — on this occasion with effect from 9 May 1969 at 8.45 am. — the intervention measures on common wheat and barley were limited to cereals harvested within the Federal Republic of Germany.

The aforementioned legal acts are also of importance to the plaintiffs in the main action who are an import and export business established in the Federal Republic of Germany. On 22 May 1969 they asked the 'Einfuhr- und Vorratsstelle' within the framework of the duty of intervention to accept a

1 — Translated from the German.

certain quantity of French common wheat. This application was rejected on the authority of the Regulations which I have just mentioned. The 'Verwaltungsgericht' to which the applicants appealed confirmed that rejection. On appeal to the next higher appellate Court, (the Hesse 'Verwaltungsgerichtshof',) the importing firm were however successful. In essence, the 'Verwaltungsgerichtshof' stated, that only as from the date of the Regulation of 17 June 1969 had effective use been made of the Commission's authorization, and that on the other hand to give retrospective effect to the Regulation must be regarded as inadmissible. The 'Verwaltungsgerichtshof' furthermore held that the taking over of the cereals offered during the period of possible retrospective effect must from the point of view of market disturbance, be regarded as hardly significant.

The 'Einfuhr- und Vorratsstelle' appealed against this judgment to the 'Bundesverwaltungsgericht'. — In the course of the appeal proceedings the importing firm maintained that the Commission's decision was invalid since it was not covered by Article 226 of the EEC Treaty and that in particular the special provisions in Article 8 of Regulation No 120 excluded the application of Article 226; furthermore that the conditions of Article 226 had not been met. Storage difficulties could have been avoided by other means. They further maintained that in the period between the date of the decision of authorization and the coming into force of the German regulation only insignificant quantities of cereals had been offered.

In deference to these arguments the 'Bundesverwaltungsgericht' decided to suspend the proceedings and to refer the aforementioned questions to the Court.

It is now my task to examine what replies might be given to the National Court in reply to its questions.

As regards the first question, i.e. as to the validity of the Commission's decision dated 8 May 1969.

As has already been stated, the decision was based on Article 226 of the EEC Treaty, that is to say on the provision which reads as follows:

'1. If, during the transitional period difficulties arise which are serious and liable to persist in any section of the economy or which could bring about serious deterioration in the economic situation of a given area, a Member State may apply for authorization to take protection measures in order to rectify the situation and adjust the section concerned to the economy of the common market.

2. On application by the State concerned, the Commission shall, by emergency procedure, determine without delay the protective measures which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.

3. The measures authorized under paragraph 2 may involve derogation from the rules of this Treaty, to such an extent and for such periods as are strictly necessary in order to attain the objective referred to in paragraph 1. Priority shall be given to such measures as will least disturb the functioning of the common market.'

If one is to examine whether a decision based upon this provision is lawful, a whole series of problems will clearly have to be considered in the light of this wording.

1. At first admittedly we will have to answer the general question, whether Article 226 could be applied at all in a context such as the one with which we are concerned. As we know, even that is disputed by the plaintiff in the main action and it puts forward two arguments in support of this view. Firstly it claims that in the market organization for cereals (Regulation No 120) itself special intervention measures are provided for, which exclude a

recourse to the general protection clause of Article 226. Furthermore, the plaintiff takes the view the application of Article 226 was limited to the transitional period and that such transitional period had as regards the market organization for cerals expired as from the coming into force of Regulation No 120.

Let us therefore first of all consider the position in this respect.

(a) As regards the first objection there is in my view not much to be said. It clearly refers to Article 8 (1) of Regulation No 120 which states that 'the Council ..... acting on a proposal of the Commission ..... shall determine the conditions under which intervention agencies may take special intervention measures to prevent substantial purchases being made in pursuance of Article 7 (1) in certain regions of the Community.' If one concludes from this that in the event of difficulties occurring under the intervention system one could not fall back on Article 226 of the Treaty for the reason that Regulation No 120 in itself provides special means of intervention one might as against this refer above all to the existing case law. In fact, the Court in its judgment in case 37/70 (Rec. 1971 p. 23) already emphasizes that the special protective clauses of the agriculture Regulations would not reduce the area of application of Article 226. Rightly, the Commission has also stressed that the Council's powers anchored in Article 8 of Regulation No 120 merely constitute secondary community law, and it cannot be inferred from them that powers of the Commission founded in the Treaty itself have ceased to have effect.

In my view these considerations are sufficient to demonstrate that the applicants' objections referring to Article 8 of Regulation No 120 do not carry weight.

(b) As to the other objection, which is based on the view that Article 226 could only be applied during the transitional period, the applicants submit that the relevant date in this connection cannot be the end of the general transitional period (31 December 1969). Rather was it crucial that the transitional period could be abridged, and that this could be done for certain limited sectors. Such an abridgment could be gleaned from the fact that by Regulation No 120 the market organization for cereals had finally been achieved. To this extent, one might therefore assume that the transitional period came to an end on 1 July 1967 and that from that date onwards no further recourse could be had to Article 226, but that only measures of the Council of Ministers could enter into consideration for the purpose of changes to Regulation No 120.

This reasoning too is basically not new. It has already played a part in case 37/70. In that case the Court did not accept it, since it held that the period of validity of Article 226 was not restricted by the fact that the transitional arrangements provided for certain agricultural sectors had to come to an end, but that this Article referred to the transitional period within the meaning of Article 8 of the Treaty. One ought in my view to adhere to this view; at any rate I cannot see how its correctness could be shaken by the argument now put forward by the plaintiff. The argument based on the system of Article 8 is particularly persuasive according to which for the purposes of the Treaty there exists only *one* transitional period, not special transitional periods in respect of partial sectors. One ought to understand it in this way, since Article 8 speaks of the establishment of the common market during the transitional period, of a set of actions to be carried through at each stage, and merely of a curtailment of *stages* as such. In particular, one cannot read into paragraph 7 of Article 8 the concept that an earlier coming into force of a definitive organization of the market thereby constitutes the end of the transitional period; in reality, paragraph 7 only states that at the expiry of the

transitional period all the rules laid down had to enter into force.

Since however Article 226 only refers to the transitional period per se, its applicability in the present context cannot really have been excluded by the fact that as regards cereals a definitive organization of the market came into existence before the expiration of the transitional period.

2. If we now ask ourselves whether in May 1969 there could rightly in law have been assumed to exist the conditions for applying Article 226, we must first remember the manner in which the reasoning of the disputed decision of the Commission was expressed. Therein it was, as we know, stressed that due to the decline in value of the French currency French cereals had come into German market at below the intervention price. Despite an excellent German harvest this situation had led to an appreciable increase in imports, to German cereals being pushed into the intervention system and likewise to French cereals being directly offered for German intervention. As a result this caused storage difficulties to the German intervention agency which gave grounds for fearing that the intervention system would become unworkable.

As you know, these conclusions are attacked by the plaintiff with particular vehemence. In support of this the plaintiff calculates from figures which it has itself obtained, that in May there was available to the German intervention agency storage space for around 1·5 million metric tons of cereals to which there was added in August (as was already known beforehand) space for a further 480 000 metric tons. They pointed out that at the end of the market year under this system due to an insufficient monthly raising of the intervention price small quantities of cereals had in any event got into the intervention system. Since as from June the supplements to the intervention prices had wholly ceased, one did not as from this month, when the new lower intervention prices had already applied, have to expect any further requests for intervention. However, as regards the intervention offers which admittedly still were to be expected during the month of May, the available storage space had been more than sufficient and an appreciable deterioration in the storage situation did not have to be feared by reason of such offers. If however there had been concern in regard to intervention offers arising from the new harvest, then this would at the most have justified protective measures with effect from 1 August 1969. In this respect one furthermore had to consider that in practive it was already known in spring of 1969, that in the summer there would be introduced in the Federal Republic of Germany the so-called 'Intervention B', i.e. a system of aids in respect of stocks kept by private individuals which was intended to avoid a situation whereby large quantities of cereals would immediately be added to the normal intervention system. The plaintiff contends that, looked at in this way, there had been no danger at all as regards the storage of the new harvest.

I will readily admit that after reading the plaintiff's statement I was much impressed by these arguments. Indeed they could have no other effect, not only in the light of the rather slender figures that have been made available by the Community but also having regard to the principle that any application of the protective clauses of the Treaty ought to be subjected to a strict examination.

Nevertheless now that we are at the conclusion of the proceedings, after thoroughly weighing up all the factors and after going more deeply into some aspects, I have considerable doubt as to whether one can agree with the plaintiff in its deductions and in its contentions that the existence of conditions justifiying the application of Article 226 had not been proved.

Allow me to explain this in detail.

In judging the matter one has to proceed from the point as to what at the

beginning of May 1969 was the storage space situation within the framework of the Intervention system in the Federal Republic of Germany. On this point the Commission has demonstrated by means of convincing explanations (that is to say by referring to the necessity of storing cereals of different kinds, of differing quality, originating from many different customers as well as cereals requiring drying) that one could not count on the contractual assured maximum capacity (7 to 7·5 million tons), but that a far smaller *real* storage facility (between 5·5 to 6 million tons) had to be taken into account. If one deducts from this the space already used at the time (that is to say storage space for 4·7 million tons altogether) then one finds that usuable space of only the order of 1·3 million tons was available.

As seen at the time this could indeed be regarded as a very menacing situation having regard to the new harvest. In this connection, we had to proceed from the fact that in the marketing year 1968/69 very large quantities had been transferred to the intervention system (according to figures supplied to the Commission, the intervention system had to take over in relation to Federal Republic of Germany around 2·7 million tons arising from the 1968 harvest). Furthermore, in the light of the fact that a very good new harvest could be expected one was entitled to assume that the volume of intervention would not recede to any appreciable extent (this is so even if one disregards the Federal Government's argument — disputed by the plaintiff — that even in May there had already existed contracts by German purchasers for the delivery of French cereals arising from the new harvest to a total amount of 1·8 million tons). Even the 'Intervention B' which was to be applied in the Federal Republic in relation to the new harvest (i.e. a system of premiums for private storage in order to relieve the normal intervention system) could not decisively affect the picture. Admittedly it allowed one to expect that certain quantities would not immediately proceed into the normal intervention system; strictly speaking however, it only constituted an interim solution, which did not exclude the possibility that in the course of the marketing year further considerable quantities would have to be released to the intervention authorities (a fact that indeed occurred in respect of 1·6 million tons of cereal up to the end of the marketing year). It can therefore certainly not be denied that during the month of May serious difficulties for the further functioning of the intervention system made their appearance.

It is further not to be denied that the cereal deliveries originating in France played an important role in triggering off the difficulties. As we have heard, imports of French wheat and French barley had during the marketing year 1968/69 (up to and inclusive of April) more than doubled in comparison with the corresponding period of the preceding year, and taking the month of April alone, they had nearly trebled in comparison with April of the preceding year. Since in the following years also there was never again a corresponding amount of imports it must no doubt be assumed that in this way an appreciable displacement of German cereals occurred i.e. that there developed in this way a corresponding increase in offers to the intervention system.

In the face of this already very tense situation, the decisive questions for the responsible bodies could only be whether in the months of May and June one had to expect an appreciable deterioration in the position and whether accordingly, even before the start of the new harvest the taking of protective measures was justified. As we know, this question was answered in the affirmative and I would accept that there were good grounds for this.

Obviously one cannot object to this by saying — as the applicants did — that after 8 May 1969, according to statements of the applicants, only 12 000 tons of French cereals had been offered,

for this state of affairs in itself constitutes an effect of the protective measures that had been taken. Rather is it important to know what developments might have been feared without the promulgation of protective measures on a reasonable prognosis and proceeding from experience acquired up to that date. In this connection one must attach importance to the fact that even up to 30 April 1969 385 000 tons of French cereals had been taken over by the German intervention agency and that the corresponding intervention quantity during the first week of May alone had amounted to 93 000 tons. It was further — more of importance, — that in the month of May supplements on the intervention prices were in force, and that offers to the intervention system therefore could certainly still be expected in that month. As the Commission has shown, in referring to the price advantages for French cereals that had become possible as a result of the decline in value of the French currency (as is known, French cereals fell by up to 40 DM below the German intervention price), one could even in the month of June and despite the lower intervention prices then applicable, expect similiar intervention offers. Looked at in this way, it was certainly not unrealistic to assume that even in the months of May and June 1969 appreciable amounts of French cereals would be added to the German intervention and it is a fact that the import statistics prepared at a later date show that during the remaining part of the marketing year — despite protective measures — 600 000 tons of French cereals were still imported into the Federal Republic. These figures show unequivocally what quantities of French cereals were still available at the relevant time and consequently had to be taken into account for the purpose of the intervention. If one contrasts this with the amount of storage space available at that time within the Federal Republic (i.e. space for 1·3 million tons) then having regard to the relevant figures which I have mentioned one cannot reject the conclusion that there was looming large the danger of a considerable increase in the already appreciable difficulties. One might add besides, that this danger was not limited to a short period of time; as was shown by later developments, one could not count on a rapid settling-down of the currency situation. Having regard to the special features of the market organization in cereals, one may well assume that — adhering to the terminology of Article 226 — these were difficulties which were *liable to persist.*

All this included would justify the conclusion that the Commission, which in the field under discussion in any event enjoys considerable discretionary powers, assumed not without good grounds that in May 1969 there existed the conditions for applying Article 226 of the EEC Treaty.

3. Recognition of this does not however exhaust the possibility of testing the validity of the Commission's decision. One still has to ask oneself the question whether the measures adopted by the Commission, viz. to cease intervention in respect of French cereals, were the appropriate means of removing the difficulties that had occurred.

That also is disputed by the applicants for various reasons.

(a) In the first place there are considerations which it is said should lead us to conclude that the measures adopted were *not suited* to bring about the successful outcome that was desired. — In this respect the applicants emphasise that in the event of difficulties in the currency sector one was only justified in attacking the evil at the roots. In order to do this in the present context there was available a recourse to Articles 104 and 105 of the EEC Treaty or even the application of paragraph 6 of the German Außenwirtschaftsgesetz (Foreign Trade Law). — The applicants further maintain that to cease intervention in respect of French cereals in the face of an unchanged possibility of continuing

imports could not bring about an alleviation; in such situation one ought to have reckoned with the possibility that even more German cereals pushed out of the market would be offered to the intervention system. Only the introduction of compensatory levies, which would have had a direct impact on import businesses, would have been likely to have been more effective.

In my view one might comment as follows.

— It seems very natural in the event of difficulties arising from the fields of monetary policy, to consider above all a remedy which directly solves the problem, which as the applicants are saying, gets rid of the evil at the root. As regards the EEC Treaty, only Articles 104 and 105 are relevant for consideration. Of these, Article 105 as we know provides for a coordination of monetary policy. That object is to be contributed to by a Monetary Committee, which keeps the monetary and financial situations of the Member States under review, which reports thereon and which delivers opinions to the Council and the Commission. We are therefore concerned with tasks conceived in extraordinarily wide terms, which require regard be had to many different points of view and the fulfilment of which is of necessity difficult and time-consuming. If however it appears that in a crisis situation quick results cannot be achieved in this way (a situation that can easily occur in the light of the rather imprecise obligations of Member States) it can indeed only make sense to permit a recourse to the general protective clauses of the Treaty so that acute difficulties might in this way be dealt with promptly and — as it is expressed in the judgment in Case 37/70 — to provide a first and immediate remedy.

— Then as regards the reference to the possible actions anchored in paragraph 6 of the German Foreign Trade Law (i.e. the tightening of conditions of delivery and payment, the limitation of trade in terms of French currency, the prevention of dealings in futures) one is obliged to ask oneself firstly whether their result would have been sufficiently quick and effective (which in the light of the dealings in futures that had already taken place and their effect on rates of exchange seems somewhat doubtful). Secondly a politico-economic appraisal does to a certain extent play a role in this field and on making this appraisal the German Government might well hesitate as regards taking far-reaching measures, not least when they realise that their effectiveness, as experience has taught us, is in any event limited. As regards the possibilities existing under the German Foreign Trade Law, one cannot seriously term the action taken at the Community level avoidable and therefore unsuitable.

— Finally, as regards the argument that to cease intervention remained ineffective because no obstacle was placed in the way of imports as such and one did not therefore prevent German cereal from being forced into the intervention system, I would say the following: — in my view the Commission was not wrong when it considered that even the cessation of intervention, that is to say a certain guarantee in favour of export dealings, would be bound to lead to a noticeable decline in foreign trade dealings involving French cereals, and thus to an alleviation of the situation prevailing in the Federal Republic of Germany. One might also assume that the occurrence of exchange transactions of this kind described by the applicants (the importation of French cereals by German processing undertakings and, in exchange the release to the intervention agencies of German cereals in their possession) was in the light of the costs involved only to be feared to a limited extent. Since moreover, bearing in mind all sorts of objections one could not immediately introduce more effective measures (such as the introduction of compensatory charges), it did indeed seem appropriate at the time by means of measures capable of immediate

implementation to provide a certain minimum assistance, however modest.

In view of these considerations, which bear upon the suitability of the measures, their validity can likewise be in doubt.

(b) It therefore only remains for me to examine whether there is substantial weight in the applicants' plea that the Commission has infringed Article 226 of the EEC Treaty because an import stop was not necessary, or to put it more precisely, because measures which were less drastic and more in conformity with the principles of the market would have been sufficient in overcoming the difficulties.

— In this connection — and I can quickly dispose of this point at the outset — the argument that the danger that had become apparent in May 1969 could have been disposed of by the creation of new storage space or by restorage elsewhere, clearly will not do. It is really doubtful whether from a technical point of view it would have been feasable to any greater extent than was attempted on the German side, with the support of the Commission, with a view to the provisions of storage space (both in other Member States and in third countries). Besides, in such considerations it is important to bear in mind the financial aspect. One ought not really seriously to contemplate employing substantial public resources in connection with operations which from the point of view of national economics are wholly devoid of sense. But it would have been precisely such an absurdity if notwithstanding an otherwise satisfactory storage situation within the Community one were to have provided additional storage space within the territory of a Member State that had got into difficulties only on account of some exceptional movement of cereals, or if one were to have arranged for re-storage once again in the country of origin.

— As for the applicants' arguments that it could also have been possible by means of denaturing premiums and export refunds to achieve an alleviation of market conditions and consequently of the situation as regards storage space, one feels bound to comment as follows:

One ought not in this connection to proceed from the assumption that there must be a kind of automatic process which in the event of the existance of large quantities in the Member State provides without further ado the means necessary for denaturing or for encouraging exportation. Rather would I say, that we are dealing here with a field in which the discretion of the bodies concerned is of considerable importance. In this conncetion one must have due regard to the total situation within the Community, one has to weigh up — here the financial aspect again makes its appearance — whether more is to be said in favour of providing the means for storage rather than reducing stocks; last but not least there are considerations of economic and trade policy in relation to which both the world market situation and other countries interest in the field of trade policy are of importance. All these are points of view which render it desirable to observe the greatest possible reticence from the outset and only to criticize in the event of clearly incorrect use of discretionary powers. One must add that the Commission — in my view convincingly — has commented that in the situation as it existed at the beginning of May 1969, the measures envisaged by the applicants were not at all capable of bringing about an alleviation in the German situation. Indeed, it cannot be denied that if in implementing the rates of refund to be uniformly assessed for the whole Community one started from the German price level, then having regard to the difference in prices as between the Federal Republic and France, one would have produced the effect of French rather than German cereals being exported — Looked at in this way the competent bodies — were therefore right in postponing the application of such measures to a later date.

Having regard also to the Commission's explanations and the margin of discretion at its disposal one cannot really consider declaring invalid the decisions under review by basing oneself upon the possibility of promulgating measures that are less drastic and more in conformity with market principles.

4. In view of all this the conclusion on the first question must be: Even if one can concede that arguments presented by the applicants carry some weight and that the set of facts under consideration perhaps constitute a border line case for applying Article 226, yet in the last resort there do not remain decisive grounds for doubting the validity of the Commission's decision of 8 May 1969.

II — As to the second question

One can be much shorter in making observations on the second question put by the national Court, as to whether the Commission's decision directly authorized the taking of measures. In replying to this question one must proceed from the fact that the national intervention agencies are under an obligation to buy in which arises directly from Article 7 of Regulation No 120, i.e. from directly applicable Community law.

This obligation was not however directly set aside, we are not dealing with an instruction to the German intervention agency to cease intervention. As is clear from the wording of the Commission's decision, it rather limited itself to the grant of an authorization, and such authorization concerned directly only to Federal Republic, to whom the decision was addressed. It therefore falls to be decided under national law and when the authorization was to be used, and especially whether specific national measures were still required in relation to the national intervention agency. To this extent we are dealing here with a set of facts which tallies with that in cases 51-54/71 (Rec. 1971 p. 1107) to which the Commission has rightly referred.

That probably covers in relation to the second question everything that needs to be said from the point of view of Community law.

III — By way of summary I would therefore advise that the Court reply as follows to the questions from the Federal Administrative Court:

1. In the course of the proceedings no facts have emerged on which the Commission's decision of 8 May 1969 — with its authorization directed to the Federal Republic of Germany — could be held to have been invalid.

2. Since the decision was directed to a Member State it is a question of national law whether in order to suspend the duty to intervene anchored in Article 7 of Regulation 120, further national measures were required.