In Case 72/72

REFERENCE for a preliminary ruling made to the Court of Justice under Article 177 of the EEC Treaty by the Bundesverwaltungsgericht, Berlin, in the case pending before the said Court between

EINFUHR- UND VORRATSSTELLE FÜR GETREIDE UND FUTTERMITTEL, Frankfurt-on-Main,

and

BAER-GETREIDE GMBH, having its registered office at Künzelsau (Württemberg), on the validity and interpretation of the Decision of the Commission of 8 May 1969 (OJ No 112/1) authorizing the Federal Republic of Germany to limit intervention purchases of certain cereals.

THE COURT

composed of: R. Lecourt, President, R. Monaco and P. Pescatore, Presidents of Chambers, A. M. Donner (Rapporteur), J. Mertens de Wilmars, H. Kutscher, C. Ó Dálaigh, M. Sørensen, A. J. Mackenzie Stuart, Judges,

Advocate-General: K. Roemer
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Facts and procedure

The facts and procedure may be summarized as follows:

When a devaluation of the French franc appeared probable in 1969, speculators offered increasingly substantial quantities of cereals harvested in France to German, Belgian or Dutch intervention agencies in order to profit from the exchange premium arising, on the one hand, from the difference between the official parity of the French franc and that used on the futures market in cereals, and on the other hand, from the preferential discount rate for exports which was then in force in France.

The Commission considered that this influx of offers to certain Member States

threatened to disturb the common organization of the market in cereals, and by Decisions Nos 69/138 EEC, 69/139 EEC and 69/140 EEC (OJ No L 112, pp 1, 2 and 3) of 8 May 1969 authorized the Federal Republic of Germany, the Kingdom of Belgium and the Kingdom of the Netherlands to limit their intervention purchases of common wheat and barley to cereals harvested in these Member States.

These authorizations constituted a derogation from the provisions of Articles 4 and 7 of Regulation No 120/67 of the Council of 13 June 1967 (OJ No 117, pp 2269/67 *et seq.*) on the common organisation of the market in cereals whereby the intervention agencies were obliged to purchase the common wheat and barley harvested in the Community which was offered to them. In consequence of these Decisions, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Import and Storage Agency for Cereals and Feedingstuffs, hereinafter referred to as 'EVSt') notified the parties concerned through an official announcement published in the 'Bundesanzeiger', that as from 8 May 1969 the agency would no longer accept intervention offers for the sale of common wheat and barley unless these cereals had been harvested in Germany. This announcement was confirmed by a decree published in the 'Bundesanzeiger' on 17 June 1969.

On 22 May 1969, the company of Baer-Getreide (hereinafter referred to as Baer-Getreide), requested the EVSt to make an intervention purchase of a certain quantity of common wheat of French origin. This request was rejected by the EVSt. Baer-Getreide took the case before the administrative tribunal to establish the illegality of the decision of rejection. In the second instance, before the Hessisches Verwaltungsgericht, Baer-Getreide won their case, in essence. According to the judgment of that court, paragraph 3 of the decree of 17 June 1969, which provided that the measures should be retrospective, was illegal, as the German legislature had not enabled the executive to make retrospective provisions. Furthermore, there was no necessity to protect the market against disturbances or threats of disturbances during the period for which the decree was retrospective.

The EVSt lodged an appeal against this judgment with the Bundesverwaltungsgericht which, as the Decision of the Commission, of 8 May 1969, No 69/138 was at issue before it, referred to the Court the following two questions for preliminary rulings:

1. Was the Decision of the Commission of 8 May 1969 (OJ No L 112/1), authorizing the Federal Republic of Germany to limit intervention purchases to certain cereals, valid?
2. Did this decision directly authorize the taking of measures?

The order referring the questions, dated 18 August 1972, was registered at the Court on 3 October 1972.

Baer-Getreide and the Commission of the European Communities submitted written observations, in accordance with Article 20 of the Statute of the Court of Justice of the EEC.

On hearing the Judge-Rapporteur and the opinion of the Advocate-General, the Court decided to dispense with preparatory inquiries.

The oral observations of Baer-Getreide and the Commission were made at the hearing of 8 February 1973. Baer-Getreide was represented by Mr Modest, of the Hamburg Bar and the Commission by its legal adviser, Mr Kalbe.

The Advocate-General presented his opinion at the hearing of 1 March 1973.

II — Observations submitted by virtue of Article 20 of the Statute

The observations submitted by virtue of Article 20 the Statute may be summarised as follows:

A — On the first question

1. *Baer-Getreide* maintains that the Commission's Decision of 8 May 1969 is invalid for the following reasons:

(a) Article 226 of the EEC Treaty provides no legal foundation for the contested decision

By Article 226 (i), this Article is only applicable during the transitional period provided for in Article 8 of the EEC Treaty. Although Article 8 (1) provides that the Common Market shall be progressively established during a transitional period of twelve years, it is clear from Article 8 (5) and (7) that this period might be curtailed in certain economic sectors. Regulation No 120/67 of the Council of 13 June 1967 constitutes a measure by which the Common Market, in a certain economic sector, was definitively established. This thesis is corroborated by Article 7 of the Regulation No 120/67, whereby the intervention agencies are obliged to purchase cereals harvested in the Community which are offered to them. It follows from this, that the transitional period for the common market in cereals ended on 1 July 1967, the date of entry into force of this Regulation. The reservations set forth in Articles 28 and 32 of Regulation No 120/67 relate only to some points of procedure and are not of such a nature as to conflict with the thesis developed above.

Article 226, then, can no longer form a sufficient legal foundation for adopting a decision authorizing a Member State to take protective measures in the economic sector in question.

Baer-Getreide also emphasizes that as the disturbances in the cereals market stemmed from the economic difficulties in France, the sole efficacious remedy is recourse to the procedures provided for in Article 105 of the EEC Treaty. *Per contra,* since Article 226 is not the appropriate instrument to remedy the causes of the disturbances, it was inapplicable in the present case.

(b) The conditions for the application of Article 226, viz. the presence of difficulties which are serious and liable to persist in any sector of the economy, were not fulfilled at the time of the adoption of the Decision under criticism

This Decision was founded principally on three arguments:

1. French cereals came into Germany at a price well below the intervention price, which situation engendered an abnormal increase in the cereal trade;

2. homegrown cereals disappeared almost entirely from the distributive networks in Germany;

3. the storage facilities available to the German intervention agencies were already inadequate, when the Decision was adopted, to cope with the quantities tendered for intervention.

Regarding the first argument, Baer-Getreide observes that after Regulation No 120/67 came into force, imports of French cereals to Germany increased, a completely normal development in view of the inability of German production to supply its domestic requirements. The second argument is not founded in fact. Lastly, the third argument is not justified. On the basis of data supplied to them by the EVSt, Baer-Getreide submitted that the reserves of storage available to the intervention agency at the beginning of May 1969 amounted to 1 500 000 metric tons.

Total storage capacity at the beginning of May 1969:	7 000 000 t
Quantity stored towards the end of April 1969:	5 500 000 t
Reserves of storage	15 000 000 t

The Commission must submit data to the Court to prove that homegrown cereals had in fact disappeared from normal distribution networks in Germany. To this end, a valid criterion was the information on the quantity of

German cereals for which the carry-over payment provided for by Article 9 of Regulation No 120/67, had been claimed at the end of the 1968/69 season. Then, the Commission must submit figures which would make it possible to calculate, on the one hand, the reserves of storage in Germany at the time, and on the other hand, the increase in tenders of cereals of French origin for intervention in the years 1968/69 and 1969/70.

Baer-Getreide maintains that the reserves of storage available at the end of May 1969, according to its calculations, were fully adequate, to cope with the quantity likely to be tendered for intervention in the near future. From a comparison of Regulations Nos 120/67, 444/68 of the Council of 9 April 1968 (OJ No L 91/1) prescribing the monthly price increases for cereals and flour, groats and meal of wheat or rye for the season 1969/70, it emerges that tenders for intervention of common wheat and barley from the season 1968/69 would have ceased after 31 May 1969, because from 1 June 1969 the intervention price for the season 1969/70, which was at a lower level than the increased intervention price for the year 1968/69, (9·50 units of account as opposed to 10·45 units of account) had to be applied to intervention purchases. Since the profits from the variations in the rate of exchange of the French franc were not such as to compensate for the reduction of the intervention price, the influx of French cereals would inevitably have come to a halt after 31 May 1969. Consequently, it could not be expected that the reserves of storage in existence when the Decision was adopted would be exhausted by the tenders for intervention of French cereals from the season 1968/69.

Regarding the season 1969/70, Baer-Getreide maintains that the Commission should have taken account of

(a) the increase in reserves of storage of 480 000 t during the year 1969,

(b) the foreseeable result of intervention B, established by Commission Decision No 69/287 EEC of 5 August 1969 (OJ No L 220/68) authorizing the Federal Republic of Germany to undertake special intervention measures in the cereals sector, which would have slowed down the tenders for intervention, and

(c) the lessening of the quantities in storage, due to denaturing and export of cereals.

The progress of tenders for intervention during the season 1969/70 and the rapid fall in the quantity in store clearly shows that the Commission had wrongly evaluated the situation on the cereal market in Germany. According to Baer-Getreide, in the period from 31 July 1969 to 31 January 1970, intervention purchases amounted to a total of about 520 000 t, while the quantity in storage was reduced from 5 500 000 t to 4 100 000 t. It emerges from this that the Decision of 8 May 1969 did not correspond with the conditions set out in Article 226 (1), *viz.* the presence of 'difficulties which are serious and liable to persist.'

(c) The Decision of 8 May 1969 was not of such a nature as to eliminate the alleged difficulties in the cereal market in Germany

By Article 226 (1), the protective measures therein referred to should make it possible 'to rectify the situation'. The measures provided for by the Decision would only have been appropriate to achieve this aim if imports of common wheat and barley of French origin to Germany had been the cause of the difficulties. According to Baer-Getreide, the scarcity of reserves of storage was caused in the first place by the plentiful harvest in Germany during the season 1968/1969 and in the second place by the neglect of the competent authorities to reduce their stocks in time by denaturing or sale on the world market.

The rules relating to the monthly increases in the intervention prices,

provided for by Regulations Nos 120/67 and 444/68, meant that, at the end of May 1969, almost all the excess French cereals had already been tendered for intervention. The Decision in question could therefore only have had a very slight effect and was not of such a nature as to eliminate the alleged difficulties.

Even supposing that a considerable quantity of French cereals remained on the market, the Decision in question was inefficacious. As they remained free to import French cereals to Germany after 8 May 1969, buyers were always able to supply themselves with French products and replace the homegrown cereals already in stock with French cereals, tendering the former for intervention. A diminution in the quantities tendered for intervention appeared improbable while this means of avoidance was available.

In this respect, Baer-Getreide criticises the provisions of Article 2 of the disputed Decision since, they claim, these provisions encouraged German flour mills to use only French cereals imported after 8 May 1969. On the assumption that German flour mills had French cereals in stock when the Decision was adopted, it was to be expected that these stores would remain intact. It was unrealistic to think that traders would replace cereals for which they received on 31 July 1969 the whole carryover payment provided for by Article 9 of Regulation No 120/67, by quantities of new cereals for which this payment was only partial. It must be concluded, then, that the Decision was in any case inefficacious.

(d) The protective measures provided for by the Decision of 8 May 1969 were unnecessary and the Commission neglected to select such measures as would least disturb the functioning of the Common Market

It follows from the fact that, for the season 1968/69, the effects of the Decision could only cover the period until 31 May 1969, that the protective measures were unnecessary for the year 1968/69.

The same conclusion is valid for the season 1969/70, if account is taken of the fact that the Decision was not of such a nature as to eliminate the causes of the difficulties in the cereals market.

Finally, Baer-Getreide claims that the Commission took a false step in suspending the intervention purchase of French cereals. Such a measure was a direct infringement of the intervention, mechanism, the foundation of the common organization of the cereals market, and caused a discrimination against French cereals. On the other hand, Regulation No 120/67 has provided instruments suited to eliminating these difficulties while leaving the organization of the market intact, *viz* grants of denaturing premiums and the increase of refunds for exports to third countries. A third instrument, corresponding to the principles of the organisation of the market, was recourse to intervention B, referred to in Article 8 of Regulation No 120/67, which could encourage those concerned to put excess cereals in store on their own account. It is clear that from 1 August 1969 these three methods have been put in operation, and not without effect.

It emerges from these findings that the Commission ought to have availed itself of these methods, which disturb the functioning of the common market in cereals less than a suspension of intervention purchases. The Decision is thus invalid due to infringement of Article 226 (3).

The *Commission*, referring to the judgment of 11 February 1971 in the case of Rewe-Zentrale, Case 37/70, Rec. 1971, page 23, points out that there is no doubt that Article 226 provides a legal basis for protective measures within the framework of the organization of the agricultural markets. The thesis defended by Baer-Getreide in the main action, according to which Article 8 of Regulation No 120/67 constituted a *lex*

specialis replacing on this matter the *lex generalis* of Article 226, is wrong, since it fails to recognize the principle whereby a rule of secondary Community law cannot suspend a provision of primary Community law.

The Commission further points out that the Decision was adopted at the request of the German Government during the transitional period, and it was revoked prior to the end of that period, so that the formal requirements of Article 226 had been satisfied.

The Commission claims in the first place that it possesses a wide power of appraisal with regard to the substantive requirements for the application of Article 226. The fact that the application of this Article is based on an appraisal of economic factors, on the one hand, and the necessities of economic policy on the other, lead to this conclusion; moreover, this is borne out by Article 226 (2), which provides that the Commission shall 'determine ... the protective measures which it considers necessary'. The Court's supervision of the legality of the disputed Decision should thus be restricted to a peripheral examination of the Commission's appraisal of the factors concentrating in particular on the three following points:

(a) Was the Commission's appraisal founded on facts which were substantially correct?

(b) Was the appraisal of the factors correct?

(c) Was the adoption of a measure manifestly less at variance with the rules of the Common Market excluded?

According to the Commission, an examination of these three points established that its Decision of 8 May 1969 was well-founded.

(a) The facts on which the disputed decision was founded were correct

The Commission outlined the origins of the influx of cereals into Germany, and disclosed that in comparison with the preceding season the import of French cereals had tripled during the year 1968/69; imports of common wheat had increased to 1 292 789 t as against 326 112 t during the year 1967/68, and of barley to 953 466 t as against 598 092 t.

As the German market was only partially able to absorb these exorbitant quantities, most of the imported cereals would have had to be purchased by intervention, which would have led to the rapid exhaustion of the reserves of storage, which were already considerably reduced.

The Commission emphasized also that due to the difference in price between German cereals and imported cereals, the former had been almost entirely replaced in the usual distribution networks, subjecting the reserves of storage to additional stress.

(b) The disputed decision was founded on a correct appraisal of the facts

As tender for intervention was the sole way by which German farmers could dispose of their products, which were dearer than French cereals, due to fluctuations in the real parity of the French franc, it was most important to keep this route open. Due to exceptional tenders of French cereals for intervention the reserves of storage at the disposal of German intervention agencies had been in danger of exhaustion, at the latest by the end of the season 1969/70. In support of this thesis the Commission referred to the figures made available to it by the German Government:

Total storage capacity during the year 1969/70	5 600 000 t
Quantity expected to be in storage on 31 July 1969	4 600 000 t
Anticipated intervention purchase during the year 1969/70	2 300 000 t
Deficit of reserves	1 300 000 t

Faced with the serious consequences, for the German producers, of an imminent

deficit of reserves of storage, it was essential to ensure that these last reserves were not used up by an unusual influx of French cereals.

(c) The measures taken occasioned the least possible disturbance to the functioning of the common market

At the time of the adoption of the decision there was no prospect of disposing of the cereals in storage on the world market in the near future. For that reason it was necessary to choose between the two following options: a considerable extension of storage capacity or else a freeze of the influx of French cereals for intervention. At first, efforts were made to increase the storage capacity, but it became rapidly apparent that the measures were inefficacious and too expensive.

The following measures would have been necessary:

1. Removal of a quantity of 1 330 000 t in order to make the most efficient use of the existing reserves of storage. The costs of such an operation amounted to a figure of 21 000 000 DM.
2. The preservation of supplementary reserves of storage would have been difficult and burdensome given the general lack of storage capacity in Germany. The gravity of the situation was illustrated by the fact that considerable quantities of cereals were stored in barges and even in Army tents.
3. Certain quantities were transported to the Netherlands and Belgium, which practice was rapidly stopped because of the high transport costs. The notion of having the German surplus transported to France was rejected, as it was considered unacceptable to support with Community funds, and thus at the expense of the Community taxpayers, the costs of a purposeless traffic solely to enable certain merchants to enrich themselves without risk.
4. The effects of intervention B would have been insufficient to remedy the lack of storage capacity. Furthermore the use of this method is extremely onerous (the costs of intervention B in Germany amounted to approximately 132 000 000 DM).

In these circumstances the only reasonable solution was to check the influx of French cereals for intervention. To this end two possibilities presented themselves, *viz* to reduce French exports to a tolerable level or to restrict intervention measures in Germany to the existing storage capacity.

Since the first possibility involved measures limiting the freedom of intra-Community trade, such as the prohibition or quota restriction of imports to Germany or the operation of a system of compensatory levies, the Commission chose the second solution, which scarcely effected the functioning of the common market in cereals. Thus only the deflection of trade, caused by the fluctuation in the parity of the French franc, were eliminated. The Commission submits that its Decision of 8 May 1969 satisfied both the formal and the substantive requirements of Article 226.

B — On the second question

1. *Baer-Getreide* maintains that the disputed decision was addressed to the Government of the Federal Republic of Germany. It merely contained an authorization to the Federal Government to limit intervention measures to homegrown cereals. It was the duty of that government to decide when it was appropriate to avail itself of the authorization. In consequence the decision was not such as to impose a direct obligation on EVSt to refuse intervention purchases of French cereals.

2. The *Commission* observes that the decision under criticism gave the Government of the Federal Republic power to limit intervention purchases to

German cereals. The Court cannot pronounce on the procedures for implementing the measures taken in connection with that authorization as they, pertain to the sphere of internal law.

Grounds of judgment

1 By an order of 18 August 1972, lodged with the Registry of the Court on 3 October 1972, the Bundesverwaltungsgericht, by virtue of Article 177 of the EEC Treaty, referred for preliminary rulings two questions on the validity and interpretation of the Decision of the Commission of 8 May 1969 (OJ No L 122/1) authorizing the Federal Republic of Germany to limit intervention purchases of certain cereals.

2 The fall of the French franc in Spring 1969, gave speculators the chance to re-sell French cereals in Germany at a considerable profit on the exchange. This caused the cereals to be tendered on a vast scale at prices below the intervention price expressed in German marks with the effect that homegrown cereals were largly excluded from the German market and tendered for intervention purchase on a vast scale.

In the course of April and May significant quantities of French cereals were even directly tendered to the German authorities for intervention purchase in order to profit from the difference in the intervention prices expressed respectively in French francs and German marks.

Amongst other measures, by the disputed decision, the Commission authorized the Federal Republic of Germany to take protective measures on the basis of Article 226 of the Treaty, then still in force, in particular to limit intervention purchases of common wheat and barley to cereals harvested in that State.

The German intervention agency then refused to admit a lot of French common wheat which the plaintiff in the main action had presented for intervention, and the latter submitted the legality of this refusal to the national administrative judge

I — On the validity of the Decision of 8 May 1969

3 The first question asked is whether the Decision of 8 May 1969 was valid.

It emerges from the dossier that the question is, in the first place, whether the adoption of Regulation No 120/67 EEC (OJ No 117, p. 2269) and in particular Article 8 thereof, excluded the application of Article 226 of the Treaty in this case, and, in the second place, whether the conditions which Article 226 provides for its application had in this case been met.

(a) On the possible effect of Regulation No 120/67 EEC on the applicability of Article 226 of the Treaty

4 The plaintiff in the main action considers that since the first paragraph of Article 8 of Regulation No 120/67 EEC conferred on the Council the power to 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,' it follows that Article 226 of the Treaty is no longer applicable in such a situation.

5 By Article 226 of the Treaty, during the transitional period provided for by Article 8 thereof, protective measures may be taken where there are serious difficulties which are liable to persist in any sector of the economy.

By Article 38 (2) of the Treaty, the provisions of Article 226 shall apply to agricultural products.

The fact that Regulation No 120/67 EEC completed the common organisation of the market in the cereals sector is not of such a nature as to restrict the application of a general provision of the Treaty, such as Article 226.

Even if, as is wrongly alleged, this Regulation provided measures for situations such as that which led the Commission to apply Article 226 of the Treaty, the latter would not thereby be deprived of the power to authorise the protective measures necessary to remedy the economic difficulties caused by an exceptional influx of French cereals into Germany.

Since Article 226 remained applicable until the end of the transitional period provided for in Article 8 of the Treaty, the fact that Regulation No. 120/67/EEC terminated the transitional arrangements provided for the cereals sector by other regulations, was not of such a nature as to limit the period of application of Article 226.

6 The validity of the decision in question is not impaired by the fact that after Regulation No 120/67/EEC came into force, it was founded in Article 226.

(b) On the conditions of application of Article 226 of the Treaty

7 The plaintiff in the main action disputes the validity of the Decision of 8 May 1969 on three points.

In the first place, difficulties which were serious and liable to persist in the cereals sector, and which alone could have justified the Commission's exercise of the power, were not present, the German intervention agency having at its disposal at the date of the Decision sufficient storage to cope with the quantities tendered for intervention.

In the second place, the protective measures authorized were not appropriate to rectify the situation, as the limitation of intervention purchases to German cereals did not result in fewer tenders for intervention purchase but only displacement of the tender, the French cereals driving homegrown cereals from the market so that the latter were presented in increased quantities for intervention purchase.

Finally, it is alleged, the Commission did not choose measures which would least disturb the functioning of the Common Market; measures corresponding more to its general scheme, in particular the granting of denaturing premiums and refunds on exports to third countries, were better remedies for the lack of means of storage than the measures authorized, which by restricting the obligation to take intervention measures, infringed the very essence of the organisation of the market.

8 The plaintiff in the main action understands that the decision was principally caused by the German intervention agency's lack of means of storage, which lack at that time constituted the difficulty which was serious and liable to persist, and which the Decision was intended to remedy.

9 However, this is not the proper way of looking at the matter.

In fact, the decision was directed chiefly towards the situation described in its first two recitals, *viz.* the abnormal increase in the trade in cereals in the Community in the course of 1968/69, caused by the tender of French cereals on the German market at prices below the intervention price on that market, and resulting in 'homegrown cereals being almost entirely replaced in the usual distribution network; and a considerable increase in interventions.'

If insufficient means of storage, had, as the third recital relates, caused the request for authorization by the Government of the Federal Republic of Germany and the adoption of the disputed decision, it had been presented

and taken into account purely as a consequence of the abnormal development of the market.

Thus, the examination of the legality of the protective measures which had been authorised should be carried out not principally in the limited contect of a more or less significant lack of means of storage, but in the more general context of the abnormal increase in the supply of French cereals in German distribution networks as a consequence of the monetary situation.

1. On the existence of difficulties within the meaning of Article 226

10 The plaintiff in the main action, while maintaining that the increased importation of French cereals to the Federal Republic of Germany was partly to be explained by the coming into force of Regulation No 120/67/EEC, it does not dispute that the unusual increase in imports in the Spring of 1969 was the product of the monetary situation and had in large measure replaced homegrown cereals which were almost all tendered for intervention.

11 The exceptional nature of the situation was underlined by the fact that large quantities of French cereals had been purchased and transported to Germany where they were immediately offered for intervention.

Taking the monetary situation into account, it was impossible to foresee an end to this situation, so that there were apprehensions lest it persist throughout the season 1969/70, with the same disturbing influence on trade in the Community.

Such a situation was equally at variance both with the objective set out in Article 2 of the Treaty, which states that the Community shall have as its task 'to promote throughout the Community a harmonious development of economic activities', and the aim of the common agricultural policy described in Article 39 of the Treaty, in particular that of stabilizing markets.

In that respect the organisation of the cereals market, as established by Regulation No 120/67 EEC corresponded with these objectives, since the sixth recital of that Regulation declares that 'free movement of cereals within the Community should enable surpluses in production areas to be offset against requirements in deficit areas', and states that the mechanism of the intervention prices had been fixed 'so as not to impede such offsetting'.

A situation which could have caused the German intervention agency to purchase French cereals to send back to France for storage, contradicted these objectives.

12 In these conditions it was open to the Commission to judge that there were difficulties sufficiently serious and liable to persist to justify recourse to Article 226.

Even if the means of storage available to the German intervention agency sufficed for the quantities of the season 1968/69, the increase partly due to artificial causes in tenders for intervention purchase was none the less such as to justify the fears of the Commission regarding the prospects for the season 1969/70, which would have begun under abnormal conditions, if the monetary situation persisted.

13 The disputed Decision, therefore, cannot be impugned on this ground.

2. On the efficacy of the protective measures authorised

14 By Article 226 of the Treaty the protective measures which are authorized should 'rectify the situation and adjust the sector concerned to the economy of the common market'.

The plaintiff in the main action claims that limiting intervention purchases by the Federal Republic of Germany to cereals harvested in Germany was in no way likely to stop the increase in tenders of French cereals, as that increase was caused by the disturbance of the monetary situation and therefore required appropriate monetary remedies.

Consequently, limitation of intervention purchases to homegrown cereals only caused a change in the offers for intervention purchase, in that non-homegrown cereals simply replaced on the market the homegrown cereals which were offered for intervention.

15 Due to their limited competence in monetary matters, the Community authorities could not have employed appropriate monetary measures to counteract the cause of the said difficulties.

Furthermore, Article 226 cannot be interpreted as requiring, by preference, protective measures which were aimed at removing the basic causes of the difficulties which occasioned the request for authorization.

Since it could not control the monetary situation the Commission considered that it was important to preserve the organization of the Common Market in

the cereals sector against the consequences of such a situation by authorizing measures capable of restraining the influx of French cereals into the other Member States.

16 The argument that German speculators would thenceforth have obtained supplies of French cereals exclusively, and tendered their stocks of German cereals for intervention, disregards the fact that such operations require French cereals, which were excluded from intervention, to be available at a price sufficiently low to ensure that such transactions continue to be profitable.

There is therefore reason to consider that the exclusion of the said cereals from intervention had consequences of sufficient importance to cause the trade to restrict its operations.

17 It follows that the validity of the disputed decision cannot be impugned on this ground;

3. On the question whether the measures authorized occasioned the least possible disturbance to the functioning of the common market

18 Due to the nature of the difficulties to be faced and the objective of the Decision, the Commission's choice of measures occasioning the least possible disturbance to the functioning of the common market cannot be appraised solely by means of a comparison of different measures capable of solving the storage problems of the German intervention agency.

19 As the most important factor was to restrict the influx of French cereals, measures such as granting denaturing premiums or refunds for exports to third countries, and the application of the mechanisms provided for in Article 8 of Regulation No 120/67/EEC might be considered insufficient;

As they required financial charges all the greater since they had to bring about an accelerated solution to the storage problem, such measures would have contributed nothing towards remedying the real difficulties;

Furthermore, French cereals were not excluded from the intervention mechanism, since they could still be offered to the French intervention agency;

In these circumstances, it was open to the Commission to consider that the measures authorized occasioned least disturbance to the functioning of the common market, so that the validity of its Decision cannot be impugned on this ground;

20 There is no factor amongst the preceding grounds of such a nature as to impugn the validity of the Decision of 8 May 1969.

II — On the interpretation of the Decision of 8 May 1969

21 It emerges from the order that the second question is whether, in authorizing the Federal Republic of Germany to limit her obligations arising from Article 7 (1) of Regulation No 120/67/EEC, the Decision directly released the administrative authorities from their obligation to purchase French cereals;

22 By Article 226 a Member State may apply for authorization to take protective measures, and the Commission shall then determine according to the requirements of the situation those which it considers necessary, specifying the circumstances and the manner in which they are to be put into effect.

It follows that the Commission's Decision only constitutes an authorization addressed to the Member State in question, permitting it to adopt the measures sanctioned therein;

The manner in which the Decision it to be carried out must therefore fall within the province of national law;

23 The reply must therefore be that the sole effect of the Decision of 8 May 1969 was to authorize the Member State to whom it was addressed to require the measures sanctioned therein to be adopted by its competent authorities.

Costs

24 The costs incurred by the Commission of the European Communities, which submitted observations to the Court, cannot be reimbursed, and since, insofar as the parties to the main action are concerned, the proceedings are a step in the action before the national court, it falls to the latter court to decide the question of costs.

On those grounds,

Upon reading the pleadings;
Upon hearing the report ot the Judge-Rapporteur;
Upon hearing the oral observations of Baer-Getreide and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Articles 2, 39, 177 and 226;
Having regard to Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals;
Having regard to the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European communities;

THE COURT

in reply to the questions referred to it by the Bundesverwaltungsgericht, by its order of 18 August 1972, hereby rules

1. **The examination of the first question has revealed no factors of such a nature as to impugn the validity of the Decision of the Commission No 138/69 af 8 May 1969;**

2. **The sole effect of that Decision was to authorize the Member State to whom it was addressed to require the measures sanctioned therein to be adopted by its competent authorities.**

Lecourt	Monaco	Pescatore
Donner	Mertens de Wilmars	Kutscher
Ó Dálaigh	Sørensen	Mackenzie Stuart

Delivered in open court in Luxembourg on 22 March 1973.

A. Van Houtte
Registrar

R. Lecourt
President