influence on price levels on the market, that charge is likely to encourage economic agents to alter the structure of their production or consumption.

It is for the national court to determine whether the charge at issue in a dispute before it has had such effects.

REPORT FOR THE HEARING
in Case C-235/90 *

I — Background to the proceedings

1. *The relevant legislation*

The parafiscal storage charge on cereals (hereinafter referred to as 'the charge') levied for the benefit of Office National Interprofessionnel des Céréales (National Cereals Trades Board) (hereinafter referred to as 'ONIC') was introduced by Decree No 53-975 of 30 September 1953 on the organization of the market in cereals and the Office National Interprofessionnel des Céréales (*Journal Officiel de la République Française* of 1 October 1953, p. 8635) as subsequently extended and amended on a number of occasions. In its current version, that charge is governed by Decree No 87-676 of 17 August 1987 on the parafiscal storage charge in the cereals sector (*Journal Officiel de la République Française* of 19 August 1987, p. 9520). Articles 1 to 4 of that measure are worded as follows:

'Article 1

The levying of a parafiscal charge intended to cover national expenditure for storage and intervention on the market in cereals shall be authorized for the 1987/88 marketing year and the four subsequent marketing years.

That charge shall be levied on approved collectors and producers of cereals in respect of all quantities of common wheat, durum wheat, barley and maize sold or utilized. It shall also be levied on importers in respect of the quantities of those cereals imported.

That charge shall be wholly borne by the users and the proceeds shall be allocated to the Office National Interprofessionnel des Céréales.

Article 2

The following shall be exempt from the charge introduced by this decree:

* Language of the case: French.

— exported cereals;

— certified seed grain exchanged for cereals of ordinary quality, within the limit of a ceiling fixed by decree.

The charge shall be repaid in respect of cereals utilized in the manufacture of products eligible for the production refund provided for in Article 11 of Regulation No 2727/75 of the Council of the European Communities, as amended.

Where products derived from cereals are imported or exported, the charge shall be levied or repaid, as the case may be, taking account of the corresponding quantities of cereals laid down by the regulations of the European Economic Community.

Article 3

The chargeable event shall be the sale or utilization of the cereals by approved collectors or producers of grain or the importation of the cereals.

Article 4

The maximum rates of the charge shall be as follows:

— 0.30% of the intervention price for common wheat, barley and maize;

— 0.20% of the intervention price for durum wheat'.

The implementing rules for that decree were laid down by the Order of 14 March 1988 on the storage charge and the charge on imports and exports of cereals and products derived from cereals intended for the supplementary budget for agricultural social security benefits (*Journal Officiel de la République Française* of 10 April 1988, p. 4750).

For the years subsequent to 1987, the levying of the charge has been authorized each year by the Finance Law. The rate of the charge, initially fixed at FF 3 per tonne of barley, wheat or maize, was subsequently reduced to FF 1.50 per tonne for the 1989/90 marketing year and to FF 0 for 1990/91.

2. *Background to the case*

Aliments Morvan S. à r. l. (hereinafter referred to as 'Morvan') manufactures animal feedingstuffs from cereals, in particular, wheat. After paying the charge on the purchase of such cereals, it requested repayment of it for the period 1 July 1986 to 31 May 1988. Its request was refused by decision of the Directeur des Services Fiscaux du Finistère (Director of Finistère Tax Department), dated 1 December 1988, whereupon it brought proceedings before the Tribunal de Grande Instance (Regional Court), Morlaix.

3. *The question referred for a preliminary ruling*

By judgment of 27 June 1990 the Tribunal de Grande Instance, Morlaix, held that Morvan's action was admissible, stayed the proceedings and requested the Court to provide it, by way of preliminary ruling, with

'such guidance as to the interpretation of Community law as will enable it to determine whether the storage charge introduced by Decree No 53-975 of 30 September 1953, the period of application of which was extended by Decrees Nos 82-732 and 82-733 of 23 August 1982 and by Decree No 87-676 of 17 August 1987 and its implementing order of 14 March 1988, is compatible with Community law as interpreted by the Court'.

In its judgment, the national court states that the contested charge might infringe the prohibition of charges having equivalent effect to customs duties on imports and exports and also the prohibition of discriminatory internal taxation laid down in Article 95 of the EEC Treaty.

4. *Procedure*

The judgment of the Tribunal de Grande Instance, Morlaix, was received at the Court Registry on 30 July 1990.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by Morvan, represented by Alain Pierre, of the Rennes Bar, and Patrick Dibout, of the Paris Bar; by the French Government, represented by Philippe Pouzoulet, Assistant Director in the Department of Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and by Gérard de Bergues, Principal Deputy Secretary in the same Ministry, acting as Deputy Agent; and by the Commission of the European Communities, represented by Johannes Føns Buhl, a member of its Legal Service, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

By decision of 6 February 1991 under Article 95(1) and (2) of the Rules of Procedure, the Court assigned the case to the Sixth Chamber.

II — Summary of the written observations submitted to the Court

1. *Jurisdiction of the Court*

Morvan submits *in limine* that the fact that the question referred is too general and insufficiently precise cannot justify the Court's refusing to give a preliminary ruling. It recalls that, as the Court has consistently held, it may interpret the scope and meaning of questions referred to it for a preliminary ruling. In particular, it may extract from all the factors provided by the national court, and in particular from the

statement of grounds contained in the reference, the elements of Community law requiring an interpretation or an assessment of their validity, having regard to the subject-matter of the dispute (judgment in Case 204/87 *Bekaert* [1988] ECR 2029).

The fact that the national court has failed to specify the provisions of Community law in the light of which it is to appraise the legality of a national measure can have no bearing on the jurisdiction of the Court (judgment in Joined Cases 209/84 to 213/84 *Ministère Public* v *Asjes and Others* [1986] ECR 1425). Moreover, the Court may interpret Community provisions even though an interpretation of those provisions has not been requested (judgment in Case 70/77 *Simmenthal* v *Amministrazione delle Finanze dello Stato* [1978] ECR 1453) and even supplement the questions put (judgment in Case 101/63 *Wagner* v *Fohrmann* [1964] ECR 195).

2. *The prohibition of charges having equivalent effect*

Morvan contends in the first place that the charge infringes the prohibition of charges having equivalent effect to customs duties on imports or exports laid down in Article 9 et seq. of the Treaty and expressly referred to in Article 18(2) of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975 L 281, p. 1, hereinafter referred to as 'the basic regulation').

With regard, first, to charges having equivalent effect to customs duties on imports, the Court's case-law indicates that that concept includes any pecuniary charge, whatever its designation and mode of application, which is unilaterally imposed on goods imported from another Member State when they cross the frontier (judgment in Case 87/75 *Bresciani* v *Amministrazione Italiana delle Finanze* [1976] ECR 129). Even if the charge were imposed both on products crossing the frontier and on domestic products, it would still have to be classed as a charge having equivalent effect unless it applied systematically to domestic and imported products according to the same criteria. It would thus be necessary to compare not only the rates applied but also the basis on which the charge was assessed and the way in which it was levied (judgment in Case 78/76 *Steinike und Weinlig* v *Germany* [1977] ECR 595). The purpose to which the proceeds of the charge are put could also be taken into account. A levy applying to both domestic products and similar imported products could constitute a charge having equivalent effect if it were limited to particular products and had the sole purpose of financing activities for the specific advantage of the taxed domestic products so as to make good in full the fiscal charge imposed on them (judgment in Case 77/76 *Fratelli, Cucchi* v *Avez* [1977] ECR 987).

As far as the disputed charge is concerned, neither its parafiscal character nor the fact that it is levied for the benefit of a body other than the State should be taken into account. It is settled that the prohibition on charges having equivalent effect is aimed not only at fiscal measures properly so-called, but also, more generally, at all duties which, in any way whatsoever, are levied more heavily on products crossing the frontier than on domestic products; furthermore, the prohibition also concerns charges levied for the benefit of a public body other than the State.

Admittedly the charge is imposed on both domestic and imported products, but the chargeable event and, consequently, the machinery for imposing the charge are not the same. In so far as domestic products are concerned, the chargeable event is the sale or utilization of the cereals by approved collectors or producers of grain, whereas in the case of imported products it is purely and simply the fact of crossing the frontier. That results in a tariff barrier to imports and in discrimination, owing to the fact that the charge is imposed on imported products at an earlier stage in comparison to domestic products.

Furthermore, in view of its purpose, the charge is wholly or partially neutralized in the case of domestic products, since it is used to finance national aid measures in the production sector in which the charge is imposed. It cannot be held, as the French Government contends, that the charge is intended to finance the residual costs of the expenditure for intervention storage which are not covered by refunds from the European Guidance and Guarantee Fund (hereinafter referred to as 'the Fund'). There are no longer any specific national storage costs and expenditure for storage connected with the machinery of the common agricultural policy should be covered exclusively by refunds from the Fund, according to the principle that that expenditure is to be met entirely by the Community which is set out in Article 2 of Regulation (EEC) No 1883/78 of the Council of 2 August 1978 laying down general rules for the financing of interventions by the European Agricultural Guidance and Guarantee Fund, Guarantee Section (Official Journal 1978 L 216, p. 1). ONIC's accounts reveal that the proceeds of the charge are used, not to cover the residual costs, but rather to finance national expenditure, such as aid for processing sectors or transport operations for cereals. The charge is thus, as a result of the purpose to which it is put, of advantage only to domestic products, to the exclusion of imported products.

In the second place, the charge also constitutes a charge having equivalent effect to a customs duty on exports, since it places a greater burden on exports than on sales made within the country. Even though Article 2 of Decree No 87-676 establishes that exported cereals are to be exempt from the storage charge, that is not the case with products processed from exported cereals and in particular with feedingstuffs, which definitively bear the cost of that charge in their price, even when they are exported. French feedingstuffs producers are thus obliged either to pass on the cost of the charge in their export sales price, which affects the competitiveness of their products, or to refrain from doing so, which reduces their profit margin and could deter them from exporting. In both cases, in so far as that charge is definitively borne by feedingstuffs exported from France to the other Member States, which have no similar domestic taxation, it creates discrimination detrimental to such exports and therefore constitutes a barrier to trade contrary to Article 9 et seq. of the EEC Treaty.

Finally, the charge does not satisfy the conditions laid down by the case-law of the Court in order to qualify for exemption from the prohibition of charges having equivalent effect. It does not correspond to any service provided either to importers of cereals or to exporters of feedingstuffs, does not compensate for a charge levied on domestic products and has no basis in Community law.

The *French Government* takes the view that the charge cannot be described as a charge having equivalent effect in view of the criteria laid down by the Court in its judgments in Case 94/74 *IGAV* v *ENCC* [1975] ECR 699 and Case 73/79 *Commission* v *Italy* [1980] ECR 1533, which take account of the purpose to which the proceeds of the charge are put. In this case, it is necessary to take into consideration the low level of the charge and, above all, the fact that imported cereals may be placed in intervention on French territory and thus take advantage of the storage facilities financed by the charge at issue.

The *Commission* takes the view that the charge does not infringe the prohibition of customs duties on imports and of exports or charges having an equivalent effect thereto. It is common ground that the charge is imposed on domestic products and imported products in accordance with the same criteria. Moreover, its proceeds are intended to cover national storage expenses, from which, not only domestic products, but also products imported from the other Member States benefit.

3. *The prohibition of discriminatory domestic taxation*

Morvan takes the view *in limine* that it is not easy to distinguish between charges having an equivalent effect to customs duties and discriminatory internal taxation within the meaning of Article 95 of the Treaty. It is apparent from the case-law of the Court that the prohibition laid down by the latter provision is in the nature of a *lex specialis* in relation to the prohibition of charges having an equivalent effect (judgment in Case 57/65 *Lütticke* v *Hauptzollamt Saarlouis* [1966] ECR 205) and that, as a result, a fiscal charge cannot belong simultaneously to both categories (judgments in *IGAV* v *ENCC* cited above, and in *Steinike and Weinlig* v *Germany*, cited above).

If the charge were to be regarded as a charge falling under a general system of internal dues, it would be contrary to Article 95 of the Treaty as a result both of its machinery and the purpose to which it is put. As the Court stated in the judgment in Case 132/78 *Denkavit* v *France* [1979] ECR 1923, in order to comply with the requirements of that article, the chargeable event giving rise to the duty must be identical in the case of both domestic and imported products and must be imposed at the same marketing stage. The Court has declared, in particular, that an internal duty paid by importers on crossing the frontier which was payable within a period different from that laid down for domestic products was contrary to Article 95 (judgment in Case 55/79 *Commission* v *Ireland* [1980] ECR 481). With regard to the purpose to which the charge is put, it has already been shown that it is used to finance expenditure benefiting domestic products. It follows that the fiscal charge borne by nationally-produced cereals is neutralized in economic terms whilst the fiscal charge imposed on imported products remains a net charge.

Continuing the analysis, it is also apparent that the charge constitutes a discriminatory internal tax to the disadvantage of feeding-stuffs for export to other Member States. That type of obstacle was held by the Court to be unlawful in its judgment in Case 142/77 *Statens Kontrol med Ædle Metaller* v *Larsen* [1978] ECR 1543).

There is no legitimate reason for the existence of that discriminatory internal taxation. The judgment in Case 196/85 *Commission* v *France* [1987] ECR 1597 indicates that, whilst the Member States remain free to lay down tax arrangements which differentiate between certain products on the basis of objective criteria, such differentiation is compatible with Community law only if it pursues objectives of economic policy which are themselves compatible with the requirements of the Treaty and its secondary legislation and if the detailed rules are such as to avoid any form of discrimination, direct or indirect, in regard to imports from the other Member States or any form of protection of competing domestic products. In this case, the tax arrangements, which differentiate between domestic cereals and imported cereals, are not based on any objective criterion since the products are the same in each case. Furthermore, that differentiation does not correspond to any national objective of economic policy compatible with the requirements of the Treaty and, in particular, of the common agricultural policy, which is based on free movement of agricultural products within the Community.

The *French Government* takes the view that Article 95 of the Treaty does not prohibit the disputed charge. With regard to the curb on exports that the charge causes by inflating the costs of French feedingstuffs manufacturers, the Court has held that, although Article 95 prohibits any Member State from imposing internal taxation on products imported from other Member States in excess of that on national products, it does not prohibit the imposition on national products of internal taxation in excess of that on imported products (judgment in Case 86/78 *Peureux* v *Services Fiscaux de la Haute-Saône et du Territoire de Belfort* [1979] ECR 897).

With regard, on the other hand, to the criticism that the charge, which is also imposed on imported products, is contrary to Article 95 in so far as it is of only indirect advantage to those products, it is not disputed that the charge is imposed on domestic products and imported products in the same way.

The *Commission* recalls that, in its judgments in *Commission* v *Italy* cited above and in Case 212/87 *UNILEC* v *Larroche Frères* [1988] ECR 5075, the Court held that internal taxation is of such a nature as indirectly to impose a heavier burden on products from other Member States than on domestic products if it is used exclusively or principally to finance aid for the sole benefit of domestic products. In this case, intervention financed from the proceeds of the charge is used not only for domestic products but also for imported products. Accordingly, that charge does not infringe Article 95 as interpreted by the Court.

4. *The prohibition on State aid incompatible with the common market*

Morvan recalls that Article 22 of the basic regulation expressly provides that Articles 92, 93 and 94 of the Treaty are to apply to the production of and trade in cereals. In relation to this case, Morvan claims, first of all, that the repayment of the charge for starches constitutes an operational aid falling within Articles 92 and 93 of the Treaty even though, since 1 July 1987, those products have no longer benefited from the production refund provided for in Article 11 of the basic regulation. That view was also taken by the Commission when it initiated

the procedure provided for in Article 93 of the Treaty against France by decision of 7 March 1990. In the second place, the charge constitutes a specific resource of ONIC, which is intended to finance national expenditure on aid in the cereals sector, while also imposing a burden on imported products. Furthermore, the charge constitutes an unlawful aid for the operation of ONIC because it was not notified to the Commission and it is substantively unjustified. Morvan refers in that respect to Commission Decision 90/189/EEC of 11 October 1989 concerning aid granted in the Netherlands financed by means of levies payable by the Commodity Board for the Seed Sector (Official Journal 1990 L 101, p. 38).

5. *Compatibility of the charge with the machinery of the common agricultural policy*

Morvan points out there is particularly abundant case-law in which the Court has held that once the Community has, pursuant to Article 40 of the Treaty, legislated for the establishment of the common organization of the markets in a given sector, Member States are under an obligation to refrain from taking any measure which might undermine or create exceptions to it (judgments in Case 83/78 *Pigs Marketing Board* v *Redmond* [1978] ECR 2347 and Case 177/78 *Pigs and Bacon Commission* v *McCarren* [1979] ECR 2161). The Court has held, in particular, that the aim assigned by the Treaty to the common organizations of the market might be jeopardized by national tax measures exerting an appreciable influence, even if unintentionally, on the market price (judgment in Case 297/82 *Samvirkende Danske Landboforeniger* v *Ministry of Fiscal Affairs* [1983] ECR 3299; see also the judgment in the *Cucchi* case, cited above).

The charge gives rise to serious disturbance of the market in cereals by distorting competition on two counts. In the first place, it undermines the Community system for the financing of storage costs, as laid down in Articles 2 and 6 of Regulation No 1883/78. That system is based on the principle that expenditure is to be met entirely by the Community, but, for a temporary period, and the fact that the amount of expenditure for storage met by the Fund was restricted to three-quarters of the total amount by Council Regulation (EEC) No 1334/86 of 6 May 1986 amending Regulation No 1883/78 (Official Journal 1986 L 119, p. 18), with the result that a quarter of the expenditure necessarily fell to be paid by the States. However, the national authorities cannot pass on that residual charge to traders without creating distortions of competition and deflections in trade that are incompatible with the rules of the common organizations of the markets. Those are precisely the effects of the disputed charge.

In the second place, the charge is such as to have an effect on the level of prices in the market in cereals. It is therefore contrary to Article 39 of the Treaty and to the aim of the common organization of the markets. Those negative effects are felt by cereal users and, in particular, by feedingstuffs manufacturers, who are, once again, led either to pass the charge on in their prices, which disturbs the level of prices on the market, or to deduct it from their profit margin, resulting in their being penalized contrary to the aim of Article 39 of the Treaty, which is intended to ensure a fair standard of living for Community

producers. To that must be added the cumulative effect of the charge, since, in a situation where feedingstuffs producers pass on the charge in their prices, domestic users of their products, in other words stock-raisers, are penalized in comparison with their counterparts in the other Member States of the Community.

The *French Government* explains *in limine* that the charge serves to cover the portion of the financial costs incurred by ONIC in implementing the intervention procedure which the Fund does not cover. The repayments made by the Fund are not sufficient to offset the actual cost of intervention, in so far as the Fund applies an average rate of interest which penalizes higher-interest-rate countries, like France. Whilst it is common ground that the proceeds of the charge cannot always correspond precisely to ONIC's actual costs, a reserve has been established under the heading 'storage' in ONIC's budget and thus allows adjustments to be carried out over several years.

It follows from the case-law of the Court relating to levies collected from agricultural producers, but applicable to all charges assigned, that the obligation on non-member producers to contribute to the financing of the funds established by a producers' organization is unlawful in so far as it is used to finance activities which are themselves deemed to be contrary to Community law (judgments in Case 218/85 *Cerafel* v *Le Campion* [1986] ECR 3513 and in *Larroche*, cited above). That is not the case here, since the intervention agencies' obligation to purchase cereals and the inferred necessity to store them ensues directly from the Community rules on the common organization of the market in cereals.

Furthermore, the charge does not constitute a measure capable of disturbing the functioning of the machinery established by the common organizations of the market within the meaning of the judgments in Cases 55/83 and 56/83 *Commission* v *Italy* [1985] ECR 683 and 703), or of interfering with the price mechanism resulting from the common organization of the markets (judgment in Case 154/77 *Procureur du Roi* v *Dechmann* [1978] ECR 1573). The fact that ONIC's financial costs are covered by the storage charge does not enable any advantage to accrue to farmers who benefit from intervention. The French Government chose to have that charge borne by users, but it could have opted for direct financing by the State budget. The charge has no effect on market supplies or on price levels owing to its very low level and to the existence of other parafiscal charges imposed on competing agricultural products, which precludes the possibility that cereals will be ousted from the market.

The *Commission* takes the view that the reduction in income resulting from the levying of a parafiscal charge is not in itself contrary to the agricultural rules. However, such a charge could be challenged if it should prove that, owing to its rate, its duration and the basis on which it is assessed, it constitutes the means whereby a Member State deliberately places an obstacle in the way of the Community aim of securing a particular income to a

category of farmers through the mechanism of guaranteed prices. However, the Commission does not regard it as appropriate to take action in respect of charges of a derisory amount.

The charge in question, levied on all cereals marketed in France, but wholly borne by users of such products, does not affect farmers' income and is thus not open to criticism on the basis of the criteria laid down in the Court's case-law. Furthermore, it is common ground that the ONIC's activities cannot be regarded as being incompatible with the Community agricultural rules.

As the charge is repaid in respect of all cereals exported from France, it does not appear to be capable of constituting a barrier to trade in those products. It does, however, have a discriminatory effect on users of cereals established in France compared with users established in the other Member States by virtue of the fact that the charge is not levied or repaid in respect of processed products, such as feedingstuffs, entering or leaving France. However, having regard to its very low level, it is doubtful whether the charge is capable of constituting an obstacle to the Community objective of ensuring a particular income to a category of farmers through the mechanism of guaranteed prices.

G. F. Mancini
Judge-Rapporteur