OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 15 MAY 1975

My Lords,

The Court is, in this case, once again concerned with the Decision of the Commission of 8 May 1969 (69/138/EEC) authorizing the Federal Republic of Germany temporarily to confine its intervention purchases of common wheat and of barley to common wheat and barley grown on its own territory.

Your Lordships will remember the reason for that Decision. A fall in forward rates for the French franc, in anticipation of its devaluation, had made it profitable to buy cereals in France and re-sell them to the German intervention agency. As a result there were vast deliveries of French cereals to the German intervention agency. These threatened to exhaust that agency's storage capacity and to bring about a collapse of the intervention system in Germany. A similar situation prevailed in Belgium and in the Netherlands, and identical Decisions in favour of those countries were adopted by the Commission on the same day. All three Decisions were taken in exercise of the powers conferred on the Commission by Article 226 of the EEC Treaty.

The second paragraph of Article 1 of each Decision provided that the authorization thereby granted should not apply in these case of cereals offered to the intervention agency concerned before the entry into force of the Decision.

On 9 May 1969, at 8.45 a.m., the German intervention agency screened a notice to the effect that, by order of the Federal Minister of Food, Agriculture and Forestry, and in accordance with the Decision of the Commission, intervention would thenceforth be effected by the agency in respect of common wheat and of barley only where they had been harvested in the Federal Republic. It added that the order did not apply to common wheat or barley offered to the agency for intervention before the entry into force of the Decision, at 6.40 p.m. on 8 May 1969. The notice was published on 10 May 1969 (Bundesanzeiger No 87/69 — Notice No 65-68/69). It seems, however, that neither the notice nor the order on which it was based was effective in German law. On 19 June 1969, the Federal Minister of Food, Agriculture and Forestry, with the agreement of the Federal Minister of Trade, made a Regulation to the effect that, as from 8.45 a.m. on 9 May 1969, intervention in respect of common wheat and barley should be restricted to cereals harvested in the Federal Republic (Bundesanzeiger No 108/69 of 19 June 1969). Whether that Regulation could validly have such retroactive effect is an issue in this case, but not one that it is for this Court to decide.

At the time when the Decision of the Commission entered into force, a number of loads of French wheat and barley which had been bought by German firms for re-sale to the German intervention agency were still on their way to their destinations by barge of ship.

Among the firms thus concerned were *Hagen OHG* and *Wünsche OHG*, both of Hamburg, who became the appellants in Cases 49/71 and 50/71 respectively (Rec. 1972, pp. 23 and 53). Your Lordships remember that, in those cases, the Court held, among other things, that, for the purposes of the Community legislation relating to intervention buying, in particular Article 7 of Regulation No 120/67, and Regulations Nos 132/67 and 1028/68

1. An offer should be regarded as made when it reached the intervention agency in writing;

2. Such an offer, in order to be valid, must state the place where the cereals offered were at the time when it was made;

3. An offer that was originally incomplete in that respect might be completed later but would then take effect only from the moment it was completed; and

4. The reference to the place where the cereals were when the offer was made (in Article 1 of Regulation No 132/67) was to be interpreted as connoting that the goods must then be available to the intervention agency so that any further movement of them should be a matter entirely for that agency.

Then came Case 72/72, [1973] ECR 377. There, another German firm, *Baer-Getreide GmbH*, attacked the validity of the Decision of the Commission on a number of grounds, each of which the Court rejected. The question was also raised in that case whether the Decision directly released the German intervention agency from its obligation to buy French cereals. The Court, not surprisingly, answered that question in the negative, holding that the sole effect of the Decision was to authorize the Federal Republic 'to require the measures sanctioned therein to be adopted by its competent authorities'.

In the present case the German firm concerned is C. Mackprang jun. OHG, which carries on business in Hamburg as a trader in cereals. That firm is the respondent to an appeal at present pending in the Bundesgerichtshof, which Court has referred the case to this Court for a preliminary ruling.

The facts of the case are briefly these. On 6 May 1969, the respondent offered to the German intervention agency, which is the appellant in the appeal, eight lots of French wheat, amounting to 7 500 metric tons in all. The respondent stated in the offers that the wheat in question was at various places in the Federal Republic, which it particularized: Hamburg, Hamm, Mannheim and Neuss. In fact all the wheat was still afloat. On 8 May 1969, the appellant accepted the offers. On the same day it took delivery of part of one of the lots, which had by then been unloaded at Hamburg, the place where the respondent had stated it to be in the relevant offer. But as regards the wheat that arrived subsequently the appellant repudiated the contracts, in reliance on the Decision of the Commission, on the notice that it had screened on 8 May, on the subsequent Regulation made by the Federal Minister of Food, Agriculture and Forestry, and on the fact that the respondent had, in the offers, misstated the location of the goods.

I refrain from taking up Your Lordships' time with a detailed account of the events that followed. They included a telex dated 30 May 1969 from the respondent to the appellant which, on one view, cured the defect in the offers, in respect of at least some of the wheat in question. Those events are relevant only to questions that it will fall to the Bundesgerichtshof to decide, including of course the question whether the Regulation made by the Federal Minister of Food, Agriculture and Forestry could have retroactive effect.

Essentially, the questions referred to the Court by the Bundesgerichtshof are these:

1. Is the Decision of the Commission of 8 May 1969 valid in respect of cereals harvested in other Member States of the Community which on that day were already in transit to the Federal Republic of Germany and in respect of which an offer in proper form was not made to the intervention agency until after that day?

2. If so:

   Is that Decision valid in respect of such cereals which were already in transit on 2 May 1969?

I should perhaps remind Your Lordships that the significance, if any, of 2 May 1969 is that that was the date of the Federal Republic's application to the Commission for authority under Article 226 to take protective measures.

In setting out the questions asked by the Bundesgerichtshof, I have of course read from the English translation of its order, made by the English Section of the Translation Service of the Court. In that translation the German word 'gültig' used by the Bundesgerichtshof is rendered as 'valid'. But 'gültig' can also mean 'applicable' and indeed is rendered in that sense in the French translation of the Bundesgerichtshof's order made by the French Section of the Translation Service. I propose to take it in both senses, because the respondent puts its case in the alternative. It submits, first, that the Decision of the Commission should be interpreted as not applying to cereals that were already in transit at the dates mentioned. It submits, secondly, that, if that is wrong, the Decision is, to that extent, invalid.

Before dealing with the respondent's arguments, I must refer to some of the provisions of the relevant Community Regulations about intervention prices and intervention buying, familiar though these are.

Your Lordships remember that, under Article 2 (3) of Regulation No 120/67, the 'basic' intervention price is fixed for Duisburg and that under Article 4 (1) of the same Regulation 'derived' intervention prices are fixed for all the other marketing centres in the Community. Article 4 (1) states at the outset that the purpose of the system is 'to guarantee to producers that the market price does not fall below a minimum level'. It provide that

'The derived intervention prices shall be calculated in such a way that the differences between them correspond to the disparities in prices to be expected in a normal harvest under natural conditions of price formation on the market and allow the free movement of cereals within the Community in accordance with the requirements of the market (OJ No 117 of 19. 6. 1967).

Article 7 of the Regulation, subject to qualifications on which I need not dwell, requires intervention agencies to buy in cereals of Community origin that are offered to them 'at the intervention price ruling for the marketing centre at which the cereals is offered'.

Regulation No 131/67, which bears the same date as Regulation No 120/67, lays down rules for deriving intervention prices and for determining certain marketing centres. Adopted in pursuance of Article 4 of Regulation No 120/67, it recites among other things that —

'... derived intervention prices in the different marketing centres should be fixed at such a level that cereals coming from other areas cannot be offered at a price below that level (OJ No 120 of 21. 6. 1967);'

and that

'... intervention prices for the marketing centres to be determined by the Commission must not lead to disturbances in the normal pattern of trade;'

The operative provisions of the Regulation are designed to give effect to those objectives among others.

Lastly, Article 1 of Regulation No 132/67 (OJ No 120, 21. 6. 1967), which again bears the same date, provides:

'1. In pursuance of Article 7 of Regulation No 120/67/EEC, all offers for intervention shall be made to an intervention agency in respect of a marketing centre chosen from among the three centres nearest to the place where the cereals are when the offer is made.

2. The nearest marketing centres mean centres for which intervention prices have been fixed and to which the cereals can be sent at least cost. These transport costs shall be determined by the intervention agency.'

In my opinion, a consideration of those provisions leads to the clear conclusion that the importation of French wheat into Germany for sale to the intervention agency there, in order to derive a profit from a temporary and fortuitous imbalance between the French and German intervention prices, whilst not forbidden by the Regulations, was certainly not a transaction of a kind that the authors of the Regulations even envisaged, let alone one of a kind that they intended should occur. On the contrary, it was inherently subversive of the intervention system. I say this because it seems to me that much of the respondent's argument in this case is implicitly founded on the premise that such importations were normal inter-Community trade, which the common organization of the market in cereals was there to facilitate. That premise is manifestly false.

The respondent's argument on the question of interpretation of the Commission's Decision consists in giving reasons — of, the respondent says, cumulative force — for thinking that the Commission cannot have meant to use the expression 'offered', in the second paragraph of Article 1 of its Decision, in the sense that the Court, in the *Hagen* and *Wünsche* cases, held it bore in the relevant Regulations, but must have meant to use that expression in a sense comprehending offers of cereals in transit. My Lords, not only does this conclusion seem to me highly improbable, but each of the reasons that are said to support it seems to me unsound.

The respondent argues that the Commission cannot, when it formulated its Decision in May 1969, have anticipated what the Court would decide in February 1972: the Commission, says the respondent, is much more likely to have had in mind the then practice of the appellant of accepting offers of goods still in transit, and therefore to have intended to include such offers in the proviso. This argument, in my opinion, overlooks two things. The first is that the interpretation adopted by the Court in the *Hagen* and *Wünsche* Cases was precisely that urged upon it by the Commission in those cases, where, moreover, it was of the essence of the Commission's argument that 'offered' meant the same in the Regulations and in its Decision (Rec. 1972, pp. 28-29 and 58-59). The Commission is, I think, hardly likely to have changed its mind about this between the two dates mentioned by the respondent. The second thing is that, even if there was such an established practice of the appellant as is all ged by the respondent, which is far from clear, there is absolutely nothing to show that that practice was known to the Commission. Nor, moreover, is there anything to show that such a practice prevailed in Belgium or the Netherlands, in whose favour, as I have mentioned, identical Decisions were adopted on the same day. It must, I think, be borne in mind in this connexion that such a practice, if it existed anywhere, was inconsistent with the Regulations.

Another argument put forward by the respondent is that one should infer from the second paragraph of Article 1 of the Decision that the Commission was thereby declining to authorize protective measures having a retroactive effect. My Lords, I do not think that this is an appropriate case in which to embark upon a discussion of already much-discussed question when should legislation that affects the future consequences of preexisting situations be regarded as having retroactive effect. It is, I think, enough for me to say that my inference from the wording of the paragraph in question is that the Commission intended only to preserve rights that had already been acquired under the existing legislation. Under that legislation, nothing short of a valid offer could confer on a trader rights enforceable against an intervention agency, and it was, to my mind, only to cereals that had been the subject of such an offer that the Commission intended to refer.

Then the Respondent relies on the Jugdment of this Court in Case 13/63 *Italy* v *Commission* [1963] ECR 165, saying that, in that Judgment, the Court held that Article 226 of the Treaty did not empower the Commission to authorize measures that were not 'strictly necessary', and that the Commission must have known this. The respondent did not explain, in this part of its argument, why it said that what the Commission authorized in this case was not strictly necessary. It may be, however, that it regarded that as covered by its later submissions on the principle of proportionality. These went to the validity of the Commission's Decision, and I shall come to them. At all events it seems to me that Case 13/63 is of no assistance. The Court did not there lay down any such principle as the respondent contends for. The words 'strictly necessary' are to be found, if anywhere relevant, in paragraph (3) of Article 226. They impose a limitation on the powers conferred on the Commission by paragraph (2) of that Article — a limitation applicable only to the exercise of those powers in derogation from the rules of the Treaty. Any such derogation is required to be only 'to such an extent and for such periods as are strictly necessary'. Paragraph (3) adds that 'Priority shall be given to such measures as will least disturb the functioning of the common market'. But the measures authorized by the Commission in the present case — authorized of course under paragraph (2) of Article 226 — did not in any way derogate from the rules of the Treaty or disturb the functioning of the common market. On the contrary, they were designed to safeguard, in the emergency that had arisen, the functioning of the common organisation of the market in cereals set up under the Treaty.

Lastly, on this part of the case, the respondent put forward an elaborate and ingenious argument based on the second paragraph of Article 22 (2) of Regulation No 19 of 4. 4. 1962. That Regulation, your Lordships remember, was, as it were, the ancestor of Regulation No 120/67. The paragraph in question forbade Member States, when taking protective measures of an emergency nature during the course of the progressive establishment of the common organization of the market in cereals, to do so in a way that would affect goods in transit. The argument, in short, is that the Commission cannot have intended, in the more advanced conditions of 1969, when Regulation No 120/67 had superseded Regulation No 19, to do something more drastic than Regulation No 19 would have permitted Member States to do in 1962. My Lords, I would reject this argument as being quite unrealistic. The Commission was confronted, in May 1969, with a situation that had not been foreseen by the authors of Regulation No 120/67, and in which the very survival of the Community intervention system instituted by that Regulation was threatened. There was no reason why the Commission should feel particularly tender towards those traders whose operations had exacerbated the situation and no reason at all why it should give a thought to the provisions of Regulation No 19, under which there had been no Community intervention system and which were spent.

I would therefore hold that the respondent was wrong about the interpretation of the Commission's Decision. I turn, on that footing, to the question of the validity of that Decision.

The respondent rests its argument on the question of validity upon two familiar principles of Community law, the principle of proportionality and the principle of the protection of legitimate confidence or expectation.

As regards the principle of proportionality the respondent relies on the Judgment of this Court in Case 62/70 *Bock* v *Commission* (Rec. 1971, pp. 909-910). That case does not, however, seem to me to be in point. It is true that the principle of proportionality was there discussed, but the decision of the

Court turned simply upon the interpretation of Article 115 of the Treaty, which was the Article under which the Commission had authorized the protective measures there in question. That Article provides among other things that 'In the selection of such metasures, priority shall be given to those which cause the least disturbance to the functioning of the common market . . .' I was having regard to this, and to the fact that the measures there authorized did disturb the functioning of the common market, by derogating from Articles 9, 30 and 113 of the Treaty, that the Court decided the case as it did. Here, in contrast, the measures authorized, far from disturbing the functioning of the common market, were designed to correct a malfunction of it.

That does not quite dispose of the respondent's argument on the principle of proportionality, because the respondent alleges and offers to prove that, at the time when the Commission's Decision entered into force, there were not more than 12 000 tonnes of French cereals in transit to Germany for sale to the appellant, and that this quantity represented a minute proportion of Germany's monthly imports of cereals from France. The question then is whether, if those facts were shown to be correct, it could be said that it was unnecessary for the Commission, in order to achieve the object it had in view, to authorize the Federal Republic to impose on the traders concerned the burden of having either to sell the cereals in question at a loss on the German market or to return them to France. My Lords, I do not think that that could be said. In my opinion, in the situation as it was, with the evident strain on the appellant's storage capacity and the threat of the breakdown of the intervention system in Germany, and having regard to the consequences that such a breakdown could have for German producers and indeed for the common agricultural policy itself, the Commission was well entitled to take the view that every ton mattered and that, as regards the traders in question, its only duty was to safeguard legal rights already acquired.

I come lastly to the respondent's argument based on the principle of the protection of legitimate expectation. This is, in a nutshell, that the traders in question, including the respondent, had bought cereals in France and had them despatched to Germany, before 8 May 1969, trusting in the continuance in force of Article 7 of Regulation No 120/67. They could not thereafter resile from their contracts of purchase or of carriage, and must suffer loss if their trust were disappointed. The Commission was not therefore entitled to disappoint it. A fortiori must that be so where the goods had been bought and dispatched before 2 May 1969.

My Lords, it seems to me that this argument overlooks that an expectation, in order to be entitled to protection under the principle in question, must be legitimate. Here again it is relevant that the situation that had arisen as a result of the fall in the French franc was an abnormal one which was subversive of the intervention system. No trader who was exploiting that situation in order to make out of the system profits that the system was never designed to bestow on him could legitimately rely on the persistence of the situation. On the contrary, the only reasonable expectation that such a trader could have was that the competent authorities would act as swiftly as possible to bring the situation to an end. Not, as I have said, could he expect particular tenderness at their hands. I am reminded of a famous dictum of Lord Greene M.R. in a case where elaborate transactions designed to avoid income tax had not only failed but had redounded to the detriment of their author: 'It scarcely lies', said Lord Greene, 'in the mouth of the taxpayer

who plays with fire to complain of burnt fingers' — Howard de Walden v C.I.R. [1942] 1 K.B. p. 397. A fortiori, in my opinion, is that so in the case of a person who is not merely seeking to avoid his taxes but is seeking an artificial profit at the expense of public funds.

I am therefore of the opinion that the questions referred to the Court by the Bundesgerichtshof should be answered as follows:

1. The Decision of the Commission of the European Communities of 8 May 1969 authorizing the Federal Republic of Germany temporarily to limit intervention to certain cereals (Decision No 69/138/EEC, 9 May 1969, OJ L 112, p. 1) is valid and applicable in respect of cereals harvested in other Member States of the Community which, on 8 May 1969, were already in transit to the Federal Republic of Germany and in respect of which an offer in proper form was not made to the intervention agency until after that date.

2. The same is so in respect of such cereals that were already in transit on 2 May 1969.