JUDGMENT OF THE COURT
30 NOVEMBER 1967[1]

Firma Kurt A. Becher
v Commission of the European Communities[2]
Case 30/66

Summary

1. *Procedure — Proceedings in matters arising from non-contractual liability for reparation for the same damage brought both against the EEC and a Member State — Necessity for a decision of the national court before a decision by the Court of Justice*

2. *Non-contractual liability — Damage resulting from an act illegal under Community law and the law of a Member State — Existence of a right to reparation against the EEC dependent upon proof of the prior exhaustion of all methods of recourse*
   (EEC Treaty, Article 215)

3. *Non-contractual liability — Injury suffered owing to the reliance of a person subject to the jurisdiction of the EEC on the apparent legality of an administrative act held to be illegal — Compensation*
   (EEC Treaty, Article 215)

4. *Agriculture — Common organization of the markets — Cereals — Protective measures taken by Member States — Examination by the Commission*
   (Regulation No 19, Article 22)

5. *Agriculture — Common organization of the markets — Cereals — Regulation No 19 — Sphere of application — General interests concerned — Possibility of protection of individual interests*

1. Cf. paragraph 2, summary, Joined Cases 5, 7 and 13 to 24/66, [1967] E.C.R.
2. Cf. paragraph 3, summary, Joined Cases 5, 7 and 13 to 24/66, [1967] E.C.R.
3. Cf. paragraph 4, summary, Joined Cases 5, 7 and 13 to 24/66, [1967] E.C.R.
4. Cf. paragraph 6, summary, Joined Cases 5, 7 and 13 to 24/66, [1967] E.C.R.
5. Cf. paragraph 7, summary, Joined Cases 5, 7 and 13 to 24/66, [1967] E.C.R.

In Case 30/66

FIRMA KURT A. BECHER, an undertaking having its main office in Bremen, represented by its duly authorized representative, Hans Pinkpank, assisted by Willi Mielke and Kurt Schäfer, Advocates of the Hamburg Bar, with an

1 — Language of the Case: German.
2 — CMLR.

address for service in Luxembourg at the Chambers of Georges Reuter, Advocate, 7 avenue de l'Arsenal,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, assisted by Claus-Dieter Ehlermann, Legal Adviser in the Legal Department of the Commission of the European Communities, with an address for service in Luxembourg at the offices of Henri Manzanarès, Secretary of the Legal Department of the Commission of the European Communities, 2 place de Metz,

defendant,

Application for damages under the second pargraph of Article 215 of the EEC Treaty,

THE COURT

composed of: R. Lecourt, President, A. M. Donner, President of Chamber, (Rapporteur), A. Trabucchi, R. Monaco and J. Mertens de Wilmars, Judges,

Advocate-General: J. Gand
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

I — Summary of the facts

The facts may be summarized as follows:

The applicant is a German importer of cereals. Among other things, it makes regular importations into the Federal Republic of maize originating in France. Since 31 July 1962, these imports have been made under Regulation No 19 of the Council, on the gradual establishment of a common organization of the market in cereals.

In order to co-ordinate prices in trade between the Member States Regulation No 19 provides that the State into the territory of which goods are imported shall impose a levy. This levy corresponds to the difference between the free-at-frontier price of the exporting country, fixed daily by the Commission, and the threshold price, fixed by the importing country. When the free-at-frontier price is equal to or higher than the threshold price, the levy is fixed at zero.

In Germany, the rates of levy per metric ton are calculated by the German department responsible for organization of the market, the Einfuhr- und Vorratsstelle für Getreide und Futtermittel (hereinafter referred to as 'the EVSt'), and posted in its buildings. An import licence which is necessary for the importation of cereals is issued by the EVSt upon request.

Article 2 (1) of Regulation No 31/63 of the Council provides for the possibility of fixing the rate of levy in advance in the import licence in the case of the importation of maize originating in France. In this case the EVSt is obliged to apply the rate applicable on the date on which the request for the licence is received.

On 1 October the EVSt published, by notice in its buildings, a rate of levy applicable to maize originating in France of 0.00 DM. On the same day the applicant company lodged two separate applications with the EVSt for the issue of import licences for the importation of French maize with the rate of levy fixed in advance at 0.00 DM for the month of January 1964. In all, import licences for a total of 126 000 metric tons were applied for on 1 October for January 1964. On the same date, the applicant company concluded 13 contracts for the purchase of French maize.

By a decision of 3 October 1963 the EVSt refused to grant the import licences requested for January 1964, basing its refusal on the protective measure taken by the German Government on 1 October, in accordance with Article 22 (1) of Regulation No 19, and including a suspension of import licences.

The applicant lodged an appeal against the refusal of the EVSt with the Verwaltungsgericht (Administrative Court), Frankfurt (ref. 11/2/815/64). The Verwaltungsgericht, by judgment of 20 March 1964 (ref. 11/2-914/63), held the decision of the EVSt to be illegal.

By a decision of 3 October 1963 the Commission, which had already fixed a new free-at-frontier price as from 2 October 1963, authorized the German government to keep in force until 4 October the protective measures which had been notified to it on 1 October, in accordance with Article 22 (2) of Regulation No 19.

In its judgment of 1 July 1965 in Joined Cases 106 and 107/63, the Court of Justice held the decision of the Commission of 3 October to be illegal and annulled it.

The applicant carried out seven contracts for the purchase of French maize concluded by it on 1 October 1963 and imported a part of the maize against payment of the levy calculated at the rate applicable at the date of importation; the remainder, which was in transit, was sold abroad. Under another contract the supplier repurchased the maize at the price ruling on the day of re-purchase, with reimbursement of the difference between that price and the original purchase price.

On 7 December 1966 the applicant company made an application for damages against the Commission.

II — Conclusions of the parties

The applicant claims that the Court should:

'1. Order the defendant to pay to the applicant the sum of DM 1 268 567 plus interest at the rate of 4% from the date of the institution of proceedings;
2. Order the defendant to pay the costs.'

In its reply, the applicant claims that the Court should:

'1. Order the Commission to pay to the applicant the sum of DM 1 265 221.01, together with default interest at the rate of 4% from the date of the application;

2. Order the defendant to pay the costs.'

The defendant contends that the Court should:

— dismiss the application as unfounded; and

— order the applicant to pay the costs.'

III — Submissions of the parties

The *applicant* states that, by its decision of 3 October 1963, which was held by the Court to be illegal, the Commission has caused it damage which must be made good in accordance with Article 215 of the Treaty. It alleges that its application for reparation is necessary as the fact that numerous other German importers have already instituted proceedings against the Commission for the same reason shows that the Commission is not disposed to settle the applicant's claim for damages out of court.

A — *The illegal act committed*

According to the applicant, since the Court found in its judgment of 1 July 1965 that the Commission's decision of 3 October 1963 was illegal, it is established that the Commission was guilty of an illegal act in the performance of its duties. The Commission should not have retained the protective measure taken by the Federal Republic of Germany but should rather have decided that the freeze on imports ordered by the Federal Republic should be abolished.

The applicant states that the Commission did not fulfil its official duty towards the 27 German importers, including the applicant, which applied for licences. By improperly retaining the protective measure, the Commission infringed not only Article 22 but also Article 18 (1) of Regulation No 19, both of which provisions are intended to protect commercial interests. As Regulation No 19 obliges importers actually to use the import licences and to pay the various deposits, the right of importers to the strict observance of the rules of law laid down and the fixing of prices resulting therefrom must correspond to the considerable risks arising from that obligation. The Commission has thus failed to carry out its duty towards the applicant to take a fair and proper decision.

According to the applicant, the illegal decision of the Commission is the result of improper conduct on the part of its members or officials who, before approving the protective measure, failed to make an exact and careful analysis of the facts in order to ascertain whether the conditions laid down in Article 22 of Regulation No 19 were satisfied in every respect. The facts of the case should have led the Commission to make a particularly careful examination.

Alterations in the market price in the exporting Member State oblige the Commission immediately to fix a new free-at-frontier price but a retroactive alteration of that price is not legally permissible. An importer must be able to be certain that the fixing of that price is correct and definitive, both when it is favourable and when it is unfavourable to him.

The decisions of the Commission of 20 and 27 September 1963 not to fix any free-at-frontier price were in no way incorrect but corresponded precisely to the actual price situation. In view of the risk of the misapplication of a protective measure the Commission should have been particularly suspicious when examining the protective measure which was clearly adopted in order to obtain the equivalent of a retroactive fixing of a new free-at-frontier price. A detailed examination of the facts and of the situation did not take place, as is clearly indicated by the completely general wording of the preamble to the decision of 3 October 1963. The argument that

it is impossible for the Commission (which is nevertheless assisted by particularly highly qualified officials and has the most modern technical installations at its disposal) to carry out precise supervision in the very short space of time provided is tantamount to admitting that its administration is disorganized, which very fact also gives rise to liability on its part.

Finally, according to the applicant, the preamble to the decision of 3 October 1963 admits of the presumption that the Commission itself wished to prevent the unforeseen consequences of its decision, appropriate in itself, of 27 September not to fix a free-at-frontier price, which again gives rise to liability on its part.

The *defendant* relies on the absence of two conditions which in its opinion are indispensable for the existence of a right to reparation.

(a) The nature of the rule infringed

According to the principle laid down in Joined Cases 9 and 12/60 (*Vloeberghs*) and borrowed from the law of public liability in Germany and Italy in particular, the right to reparation is available only if the rule infringed was intended to protect the interests of the applicant. The duty of the Commission to verify the legality of protective measures was not laid down in the interests of the applicant, but in the collective interest of the proper functioning of the common organization of the markets in cereals. The defendant refers to the similarity of Article 22 to the third subparagraph of Article 44 (4) and Article 73 (2) of the Treaty, the second paragraph of Article 4 and the second subparagraph of Article 8 (2) of Regulation No 19 as well as the second subparagraph of Article 3 (3) (a) of Regulation No 16/64, claiming that all these provisions have the same objective as the power conferred by Article 169 of the Treaty, that is to say, a power to review the legality of the actions of Member States. With regard to the alleged infringement of Article 18 of Regulation No 19, the defendant maintains that the prohibition contained therein is directed towards Member States and not to institutions of the Community. Thus an infringement of Article 18 by the Commission can only be indirect as being the consequence of an infringement of its power of supervision in accordance with Article 22, a power which, according to it, was not provided for in the interests of trade. In a more general manner, Article 18 (1) is not intended to protect the interests of importers, as the principle of free movement of goods was conceived in the interests of the Community and not in the particular interests of trade. It is not possible to reply to these arguments that they deprive Article 18 of its 'self-executing' character and are thus contrary to the case-law of the Court of Justice, as the possibility of obtaining the annulment of a measure for infringement of a rule of law does not automatically include the right to bring an action for damages.

Finally, the defendant refers to the general principles common to the laws of the Member States and particularly the law of public liability in Germany and Italy.

In its reply, the *applicant* states:

— that by holding in its judgment of 1 July 1965 that the illegal decision was of direct and individual concern to the 27 importers in question the Court established that the provisions of Article 22 also serve to safeguard the interests of the applicant;

— that the right to damages arising from the second paragraph of Article 215 constitutes the indispensable corollary to the right of action under the second paragraph of Article 173, as is evidenced both by the opinion of the Advocate-General in Case 25/65 and by the judgment in Joined Cases 9 and 12/60;

— the free movement of goods as provided for by Regulation No 19 is

stipulated not only in the general interest of the Member States, but also so that the individuals subject to the rules of the common organization of the markets may possess rights and enjoy the corresponding legal protection to the extent to which obligations are imposed upon them (see the judgment in Case 26/62).

(b) The wrongful act (das Verschulden)

The *defendant* alleges that the subjective condition which is indispensable for liability of a public body, that is to say, the existence of a wrongful act or omission, is not fulfilled in the present case. In its case-law on Article 40 of the ECSC Treaty, the Court has recognized that behaviour which is illegal when viewed objectively does not by itself provide the basis for an action for a civil wrong, but that it is necessary to add negligence thereto (judgments in Case 23/59 (*Feram*), Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 (*Meroni*), Joined Cases 19 and 21/60 and 2 and 3/61 (*Fives-Lille-Cail*), Case 33/59 (*Chasse*), Joined Cases 46 and 47/59 (*Meroni*) and Joined Cases 29, 31, 36, 39 to 47, 50 and 51/63 (*Providence*) and the opinions of the Advocates-General in the Cases of *Feram, Vloeberghs, Chasse* and *Plaumann* (25/62).

The question of the existence of a wrongful act or omission and the degree of blame necessary to provide the basis of a right to reparation depends on the nature of the public activity in question and the circumstances in which that activity is carried on.

In this connexion the defendant states:

— that it interpreted Article 22 of Regulation No 19 as meaning that there is a serious disturbance of the market caused by imports and likely to endanger the objectives laid down in Article 39 of the Treaty when there is a danger that the imports may cause prices to fall to the level of the intervention price, so that the intervention agencies must purchase substantial quantities of indigenous cereals; this interpretation is based on both the opinion of the Advocate-General and the judgment of the Court in Joined Cases 106 and 107/63 (*Toepfer*), but even if it appears that such interpretation is mistaken, there is still no wrongful act. According to German legal theory, an interpretation is not wrongful unless it infringes a clear provision which is precise and perfectly evident or if it is contrary to the established case-law of a higher court; if, on the other hand, the provisions allow doubts on their interpretation or obscure passages to exist and if the opinion which has been reached at the end of a careful examination may be regarded as legally defensible (vertretbar), the mere fact that this opinion is subsequently disapproved cannot be regarded retroactively as a wrongful act; a similar attitude is found in Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 (*Meroni*);

— that action under Article 22 of Regulation No 19 is complicated by the fact that a decision must be taken within not more than four working days of the notification of the protective measure, during which time the Member States must be consulted, the agreement of the various departments of the Commission must be obtained, a collective decision must be taken and that decision of the Commission must be notified to the Member State concerned, that such a decision, which moreover must always be taken without any warning, cannot be subject to the same requirements as a normal measure and that mistakes likely to give rise to public liability must show a marked degree of seriousness;

— that in putting forward the arguments already advanced in Joined Cases 106 and 107/63 (*Toepfer*) the defendant claims that its attitude was

legally defensible and that it could have regarded the German market as being threatened by a serious disturbance in the sense mentioned above;

— that its decision was not motivated by reasons foreign to the objective of Article 22, that it also denies that the adoption of protective measures by the German Government was intended to obtain the equivalent of a retroactive fixing of the free-at-frontier price, which is legally impossible, and that the chronological order of events on 1 October 1963 suffices to prove the incorrectness of such an assertion (see the opinion of the Advocate-General in Joined Cases 106 and 107/63);

— that it was not alone in considering that the conditions for applying Article 22 were fulfilled, that the Federal Government and the represetatives of the Member States in the Management Committee for Cereals were of the same opinion and that, because of this, it is not possible to complain of negligence on the part of the defendant capable of amounting to a wrongful act or omission;

— that, if the Court considers, however, that there was negligence on the part of the defendant, the latter relies upon the fact that under the terms of Article 22 as regards a Member State it carries out only a duty of supervision; that the Advocates-General have stated time and again that carrying out such duty does not result in public liability except in case of 'gross malfeasance' and that it is sufficiently clear from the foregoing observations that the defendant cannot be accused of such conduct in this case.

In its reply, the *applicant* states as follows:

— that it is not aware whether the defendant knew before 3 October of the facts upon which it now relies that it disputes whether this is so and requests the production of all the documents in question;

— that it folows unequivocally from the judgment of the Court of 1 July 1965 that the defendant's allegation as to the complexity of the tasks which it must carry out before taking its decision is unjustified;

— that the defendant cannot rely on the shortness of the period of time, in view of the fact that it did not even allow it to run its course;

— that, with regard to the defendant's argument that its belief in the imminence of a serious disturbance within the meaning of Article 22 was justified from the economic point of view and to the detailed arguments advanced in this connexion, the Court has already rejected the Commission's conclusions in its judgment of 1 July 1965 and that they are clearly incorrect;

— that, when deciding on the legality of a protective measure on its own responsibility, the defendant may not merely rely on the legal argument of the Member State whose very actions are being reviewed;

— that the Management Committee, which merely gives an expert opinion, cannot exonerate it from a responsibility which devolves upon it and it alone;

— that no common principle exists according to which administrative liability is not involved in the case of slight negligence, that in any event such a principle does not exist in German law, that the defendant wrongly refers to the case-law of the Court in support of such a principle, that that case-law only deals with a failure to act on the part of the supervisory bodies of the High Authority and that in this case the Commission did not merely omit to act but expressly approved the German protective measure.

B — *The causal link*

The parties have hardly discussed the existence of a causal link between the wrongful act or omission and the alleged injury.

The *applicant* states that, if the Commission had abolished the protective measure, as it was obliged to do, the applicant would, as a result, have been able to make the intended imports without payment of a levy. After the judgment of the Court of 1 July 1965, expressly holding that the German importers in question had suffered direct and individual injury as a result of the Commission's decision, it is certain that there is a relationship of cause and effect between the wrongful act or omission on the part of the Commission arising from illegal conduct and the damage suffered by the applicant.

The *defendant* refrains from discussing the questions of cause and effect in depth and merely states that its conduct was not improper and outlines the limits of its power of supervision.

C — *The concurrence of obligations to make reparation*

The *applicant* asserts that the Commission and the German authorities, against which the applicant has instituted legal proceedings before the competent German courts, are jointly responsible and that liability on the part of the Commission cannot be excluded by reason of the fact that the German authorities are equally liable.

D — *The amount of the damage*

The *applicant* states that it applied for two import licences on 1 October 1963 for January 1964 in respect of the quantities of maize shown in its application and that it bought on the French market the quantities of maize also shown in anticipation of receiving the licences applied for. The refusal to issue the said licences following the protective measure of the Federal Government, which was retained by the Commission, caused it to suffer considerable injury which it distinguishes as follows:

I — (a) the amount paid by way of penalties on repudiation of certain contracts,

(b) the alleged losses suffered in carrying out other contracts (*damnum emergens*);

II — the loss of profit resulting from the failure to issue the licences applied for (*lucrum cessans*).

The *defendant* disputes the correctness of the calculations set out and, more generally, raises two points:

(a) The first concerns the *losses suffered* by the applicant. The defendant alleges that the losses resulting from the contracts of purchase concluded on 1 October 1963 were due to the improper conduct of the applicant itself; the excessive quantity for which the import licences were requested on 1 October shows without any possible doubt that the importers knew on that day that a large gap had been opened in the levy system. The applicant acted without due consideration in making contracts of purchase, in spite of this knowledge, before having received a favourable reply to his application or in making such contracts without providing for the possibility of cancellation should the licences, which had not yet been issued, be refused. It should have known that a situation such as that obtaining on 1 October 1963 was certain to give rise to protective measures and it should itself therefore bear the losses resulting from the cancellation and repudiation of the contracts of purchase made on 1 October. The defendant refers in this connexion to the judgment in Case 3/65 (*Espérance-Longdoz*) and the opinions in Joined Cases 9 and 12/60 (*Vloeberghs*) and in Joined Cases 19 and 20/60 and 2 and 3/61 (*Fives—Lille—Cail*).

It adds that in any case there was reason to presume improper conduct, having regard to the fact that the applicant made contracts of purchase after 2.15 p.m. on 1 October, as the EVSt announced at that time by means of a notice that the published levy had been withdrawn.

In its reply, the *applicant* states that it had no reason to doubt the correctness of the notice posted up by the EVSt, that the zero levy corresponded exactly to the existing legal situation and that, when the Commission states that the applicant should have anticipated the protective measures, it is requiring the applicant to have known in advance that the German authorities and the Commission were going to act illegally. Furthermore, the applicant claims that it concluded its contracts before 2.15 p.m. on 1 October 1963. It considers that the burden of proof on this point falls on the Commission. For the rest it states that the EVSt should have notified by telex the content of the new notice to all the importers who had applied for import licences.

(b) The second point raised by the defendant concerns the alleged failure to make a profit. It relies upon the principle, which it claims to be common to the laws on liability of the Member States, according to which no reparation can be claimed for the loss of benefits which are contrary to public policy. As the object of Regulation No 19 is to compensate for the difference between prices ruling in exporting countries and those ruling in importing countries (see Articles 2, 3 and 10 as well as the fifth and ninth recitals in the preamble), the fact of importing with a zero levy cereals which could be purchased in the exporting country at a price considerably lower than the threshold price of the importing country is incompatible with the principles of the said regulation. It is even less in accordance with the said principles that the importers should obtain from this situation benefits of 26.33 or 23.41 DM per metric ton, because these benefits far exceed the margin for importers which Regulation No 19 regards as normal, namely the margin which should be taken into account at the time of fixing of the threshold price in accordance with Article 4 and which amounts in Germany to 3 DM per metric ton.

In consequence, the applicant may claim at the most that it failed to obtain for the imports actually made a sum of 3 DM per metric ton whilst in respect of the quantities not imported only a fraction of this sum may be taken into account.

In its reply the *applicant* disputes the existence of a principle common to the law of the Member States, as claimed by the defendant. It states that there is no question in this case of a loss of benefits which are contrary to public policy.

The decisions of the Commission with regard to the free-at-frontier prices were mandatory in law. As the decision of 27 September 1963 did not fix a free-at-frontier price it was never reversed. The applicant was therefore entitled to take this decision, which moreover, corresponds perfectly to reality, as the basis of its provisions, the fact that the levy resulting therefrom was to its advantage being irrelevant. The advantage obtained by a strict observance of all the legal provisions remains legitimate even when it is greater than usual. The commercial margin of 3 DM per metric ton alleged by the Commission is unacceptable, having regard to the principle of the free economy of the market. Moreover a system of fixed prices does not exist.

In its rejoinder, the *defendant* considers that the principles of the judgment of the Court of 14 July 1967 are applicable in the present case, which is distinguished solely by the fact that it involves a fourth head of damages relating to the sale in transit abroad of a part of the maize bought by the applicant on 1

October 1963. The Commission considers that this head should be treated like the second, as damage resulting from sale in transit may be compared with penalties paid on repudiation of the concluded contracts of purchase and that, in addition, the grounds of the judgment of 14 July 1967 relating to the second head (in particular, with regard to the loss of profit) are applicable to the fourth head.

IV — Procedure

After 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. The parties presented oral argument at the hearing on 18 October 1967 and the Advocate-General delivered his opinion at the hearing on 7 November 1967.

Grounds of judgment

On the basis of Article 215 of the Treaty the applicant requests the Court to order the Community to make good the damage which has been caused to it by the Commission as a result of its decision of 3 October 1963 'authorizing the Federal Republic of Germany to retain the protective measures relating to the import of maize, millet and sorghum'.

By that decision, which was annulled by a judgment of the Court of 1 July 1965 in Joined Cases 106 and 107/63, the Commission, in application of the third subparagraph of Article 22 (2) of Regulation No 19 of the Council, retained in force up to and including 4 October 1963 the protective measure taken by the Federal Republic of Germany consisting in the suspension as from 1 October of the issue of import licences for maize, sorghum, millet and other products mentioned in Article 1 (d) of the said regulation at a rate of levy equal to zero.

As the applicant requested import licences on 1 October for the following January and purchased certain quantities of maize in anticipation of the grant of the said licences, it is claimed that the Commission should be required to make good the injury caused to it which consisted on the one hand of the penalties paid for repudiation of the contracts and the loss resulting from importation on unfavourable conditions of quantities actually delivered and, on the other hand, in the loss of profit resulting from the impossibility of importing the cereals at a zero levy.

The applicant complains that the Commission incorrectly applied Article 22 of Regulation No 19 and that a correct application would have required the abolition and not the retention of the German protective measure which, according to it, would have led to the non-execution, if not the complete disappearance, of the said measure. The defendant replies that its conduct was

not such as to render it liable because, on the one hand, it did not amount to a wrongful act or omission and, on the other, the rule of law which it is supposed to have infringed is not intended to protect interests such as those of the applicant.

The effect and scope of the decision of 3 October 1963 which is the object of the complaint should be considered within the framework of the common organization of the markets in cereals and particularly in relation to the application which was made of this system by the decision of the Commission of 27 September 1963 against the consequences of which the decision of 3 October was intended to protect the German market.

Regulation No 19 of the Council established a system of intra-Community levies in the cereals sector corresponding to the difference between the prices ruling in the exporting Member State and in the importing Member State, in such a way as to prevent, on the market of the Member State where the prices are higher, disturbances which might result from imports coming from a country where the prices are lower. Consequently the levy is established on the basis of the difference between, on the one hand, the price of the product coming from the exporting Member State delivered free-at-frontier in the importing Member State, a price settled by the Commission in accordance with the procedure laid down in Article 26 of the said regulation on the basis of prices ruling on the most representative markets of the exporting Member State, and, on the other hand, the threshold price of the importing Member State, which is fixed annually in accordance with the procedure and the criteria laid down in Article 4 of the regulation. When the free-at-frontier prices fixed by the Commission for the exporting State are equal to or higher than the threshold price of the importing State, the levy is then equal to zero.

It appears from the recitals in the preamble to its decision of 3 October 1963 that the Commission, owing to a lack of knowledge concerning the level of prices for the new harvest in France, had not taken into account in its decision of 27 September 1963 the effect of these prices on the formation of prices on the French market and had based that decision solely on the price of the maize, sorghum and millet of the old harvest originating in France, delivered free-at-frontier in Germany, which were higher than the threshold price fixed by the Federal Republic of Germany. The said decision of 27 September 1963 did not thus fix free-at-frontier prices for these products and there followed on 1 October 1963 a zero levy for imports originating in France into the Federal Republic of Germany. As Regulation No 31/63 of the Council allowed, as from 1 October, advance fixing of levies for maize at the rate in force on the day of lodging of the request for licences for imports

to be effected three months later, the applicant took advantage of this option to benefit from the prices of the new harvest which were lower than both the free-at-frontier prices fixed by the decision of 27 September and the German threshold price in force and, on 1 October 1963, it lodged with the Einfuhr- und Vorratsstelle, the competent department of the Federal Republic of Germany, applications for licences with the levy fixed in advance in respect of relatively large quantities of the said products.

The Government of the Federal Republic of Germany considered that the issue of these licences would have led to the importation into that State during the month of January of large quantities of maize at prices below the threshold price and on 1 October 1963 adopted and notified to the Commission the protective measure consisting in the suspension as from that date of the issue of import licences. By its decision of 3 October the Commission kept the said protective measure in force up to and including 4 October.

As is clear, moreover, from the judgment of the Court of 1 July 1965, this decision constituted an improper application of Article 22 of Regulation No 19, in particular in that it likened the undeniable difficulties caused by the decision of 27 September to serious disturbances which might endanger the objectives laid down in Article 39 of the Treaty. On 3 October 1963 the Commission applied Article 22 (2) of Regulation No 19 in circumstances which did not justify protective measures in order to restore the situation resulting from the fixing by it of a zero levy. As it was aware of the existence of applications for licences, it caused damage to the interests of importers who had acted in reliance on the information provided in accordance with Community rules. The Commission's conduct constitutes a wrongful act or omission capable of giving rise to liability on the part of the Community.

In trying to justify itself by the assertion that in view of the economic data at its disposal on 3 October 1963 a threat of serious disturbance was not to be excluded and that consequently its mistaken evaluation of the said data is excusable, the defendant misjudges the nature of the wrongful act or omission attributed to it, which is not to be found in a mistaken evaluation of the facts but in its general conduct which is shown clearly by the improper use made of Article 22, certain provisions of which, of a crucial nature, were ignored.

The Commission's assertion that supervisory organizations cannot, under a general principle common to the laws of the Member States, be made liable, except in the case of gross malfeasance is equally irrelevant. In fact, however the powers which Article 22 of Regulation No 19 confers on the Commission are described, the latter is required in respect of each protective measure

notified to it to conduct as exhaustive an examination as that required to be made by the Governments of the Member States and bears independent responsibility for the retention of a protective measure.

With regard to the argument that the rule of law which is infringed is not intended to protect the interests of the applicant, the said Article 22, together with the other provisions of Regulation No 19, is directed, according to the wording of the fourth recital in the preamble to the regulation, to ensuring appropriate support for agricultural markets during the transitional period on the one hand, and to allowing the progressive establishment of a single market by making possible the development of the free movement of goods on the other. Furthermore, the interests of the producers in the Member States and of free trade between these States are expressly mentioned in the preamble to the said regulation. It appears in particular from Article 18 that the exercise of freedom of trade between States is subject only to the general requirements laid down by its own provisions and those of subsequent regulations. Article 22 constitutes an exception to these general rules and consequently an infringement of that article must be regarded as an infringement of those rules and of the interests which they are intended to protect. The fact that these interests are of a general nature does not prevent their including the interests of individual undertakings such as the applicant which as cereal importers are parties engaged in intra-Community trade. Although the application of the rules of law in question is not in general capable of being of direct and individual concern to the said undertakings, that does not prevent the possibility that the protection of their interests may be—as in the present case it is in fact—intended by those rules of law. The defendant's argument that the rule of law contained in Article 22 of Regulation No 19 is not directed towards the protection of the interests of the applicant cannot therefore be accepted.

Since the liability of the Community has been recognized in principle, it is necessary to establish the facts of the alleged injury to which that liability relates.

In this connexion, it is necessary to distinguish two categories of injury. In the first place, after the refusal of the grant of import licences on 3 October 1963, the applicant made a part of the imports in question during the month of January, paying the German authorities the levy required for the quantity of maize purchased on 1 October in anticipation of the issue of the licences applied for. In the second place, in respect of the remainder of the quantities of maize purchased on 1 October, the applicant either repudiated the contracts against payment of a penalty or resold the maize to the supplier at

the price then ruling with reimbursement of the difference between the price then ruling and the original purchase price or sold the maize abroad.

As to the first category, as the applicant purchased the maize in anticipation of importation subject to a zero levy, its injury was caused by the necessity to import subject to the payment of a levy. However, the refusal to grant the import licences subject to a zero levy in respect of this transaction had no legal basis, as the decision of the Commission of 3 October had been annulled by the abovementioned judgment of 1 July 1965 and, furthermore, as, according to the documents provided by the applicant, the German protective measure had been declared illegal by the German courts for reasons based on German law. Consequently the charging of the levy, made in the name of and for the benefit of the Treasury of the Federal Republic of Germany, is thus shown to be contrary to both Community law and German law. In these circumstances, the question arises whether the damage alleged would be made good by the repayment of the sums improperly paid by way of levy.

During the oral procedure, the existence in the present case of the right to such repayment was put in doubt by the applicant. The Court cannot, however, rely on such a statement to accept the conclusive nature of the alleged damage. It is proper, therefore, to ask the applicant to prove that it has exhausted all methods of recourse both administrative and judicial under the relevant national law to obtain reimbursement of the sums improperly paid by way of levy. Only after production of such evidence would there be reason to consider whether any injury exists which the Community should make good.

It is thus appropriate to ask the applicant to produce the evidence indicated above.

It should, however, be stated at this stage that only the imports of maize purchased in reliance on the announcement of the issue of licences subject to a zero levy may be taken into account for the fixing of the damage for which the Community may be liable. It is appropriate therefore to ask the applicant to produce evidence that the quantities of maize imported in or near the month of January 1964, to which it refers, were purchased by contracts made on 1 October.

Because certain contracts were not concluded until after 2.15 p.m. on 1 October 1963, the defendant asserts that in those cases its liability is reduced by the fact that the applicant itself contributed to the cause of the alleged damage through lack of foresight. In fact, as from the time stated, the German authorities informed those concerned by posting up a notice of the

withdrawal of the zero levy, so that a diligent importer, it is alleged, could have been aware of the hazardous nature of import transactions for the month of January. Furthermore several importers inquired repeatedly from the competent German authorities whether the zero levy was still in force, which proves that the importers were aware of the abnormal nature of the situation.

It is not possible, however, to argue from the said requests for information that a diligent importer was obliged to keep himself informed of the situation at all times. It appears both from the wording of Article 17 of Regulation No 19 and from the account of the functioning of the common organization of the markets provided by the defendant that the levy announced at the beginning of the day normally remains applicable during the whole day. In these circumstances, the requirements of the production of proof either that the importer purchased the maize on 1 October 1963 before 2.15 p.m. or that he could not have been aware of the withdrawal of the zero levy, which moreover was illegal, is equivalent to a reversal of the burden of proof. As such a reversal is not justified, the defendant must be allowed to prove, where appropriate, that the purchases of maize were made with knowledge of the said withdrawal, the right to produce evidence to the contrary being reserved to the applicant.

As to the second category of injury mentioned above, the applicant alleges that it has suffered injury because of both the expense which it has had to bear in repudiating the said contracts or the losses suffered on resale as well as the loss of profit which it has suffered in respect of the quantities of maize purchased but not imported in consequence of the protective measure.

The penalties paid and the losses suffered on resale are the direct consequence, on the one hand, of the confidence of the applicant in the proper application of the Regulation No. 19 and, on the other hand, of the unforeseen factor constituted by the protective measure which was retained by the decision of the Commission of 3 October 1963. In purchasing the quantities of maize in question on 1 October 1963, the applicant legitimately relied upon the system of levies in force in order to enter into contractual obligations in respect of imports into the Federal Rebublic. It thus has the right to be reimbursed for the whole of the injury suffered through payment of penalties, unless the amount of such penalties was higher than necessary.

The applicant must thus be allowed to show that the contracts of purchase in question were made on 1 October 1963, the right to produce evidence that it acted in knowledge of the withdrawal which took place at 2.15 p.m. being reserved to the defendant.

The alleged injury in respect of the loss of profit is based on facts of an essentially speculative nature. In fact, it should be said first of all that the hasty lodging of an abnormally large number of applications for import licences on 1 October provides an indication that the persons concerned know that the decisions in force on 1 October 1963 offered unusual advantages. Furthermore, as the applicants for licences knew the French market and the actual level of prices ruling there, they were able to perceive the error committed by the Commission in the decision of 27 September 1963, fixing the free-at-frontier prices. Thus the applicant may be regarded as having been aware of the abnormal speculative nature of the transaction involved in its purchases of maize. By cancelling the transactions concerned, it avoided any commercial risk to itself inherent in importation into the Federal Republic. Consequently it is not justifiable to acknowledge its right to recover the whole profit which it would have been able to obtain if the transaction which had been started had been performed. Taking this into account, the injury resulting from loss of profit for which the Community must be regarded as being liable cannot equitably be evaluated at a sum exceeding 10% of that which the applicant would have paid by way of levy, it it had carried out the purchases made but cancelled.

However, the applicant has informed the Court that the injury alleged is the subject of two actions for damages, one against the Federal Republic of Germany before a German court and the other against the Community before the Court of Justice. It is necessary to avoid the applicant's being insufficiently or excessively compensated for the same damage by the different assessment of two different courts applying different rules of law. Before determining the damage for which the Community should be held liable, it is necessary for the national court to have the opportunity to give judgment on any liability on the part of the Federal Republic of Germany. This being the case, final judgment cannot be given before the applicant has produced the decision of the national court on this matter, which may be done independently of the evidence asked of the applicant to the effect that it has exhausted all methods of recourse for the recovery of the amounts improperly paid by way of levy. Furthermore, if it were established that such recovery was possible, this fact might have consequences bearing upon the calculation of the damages concerning the second category. However, the decisive nature of the said evidence required does not prevent the applicant from producing the other evidence previously indicated in the meantime.

However, with regard to the nature of the legal decisions to be produced, the applicant requested further that it should be stated whether on the one hand it would suffice to produce the decision in a test case or, on the other hand,

whether only judgments given by courts of last instance would be accepted as evidence.

However the Court must reserve the right to examine *in concreto* and having heard the parties the question whether the judgment given in a comparable case or the judgment given in the action brought by the Becher undertaking and having acquired the force of *res judicata* may in this case be considered as sufficient criteria with regard to the present dispute.

Costs

Costs must be reserved.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;
Upon hearing the parties;
Upon hearing the opinion of the Advocate-General;
Having regard to Article 215 of the Treaty establishing the European Economic Community;
Having regard to Regulation No 19 of the Council of the said Community dated 4 April 1962, especially Article 22;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

by way of interlocutory judgment, hereby :

1. **Orders the applicant to send to the Court the decisions given by the relevant courts of the Federal Republic of Germany concerning its action for damages against the Federal Republic;**

2. **Orders the applicant to send to the Court evidence in writing that it has exhausted all methods of recourse, both administrative and judicial, for obtaining reimbursement of the sums improperly paid to the Treasury of the Federal Republic of Germany by way of levy;**

3. Orders the applicant to produce before 31 March 1968 proof that on 1 October 1963 it made contracts for the purchase of maize on the French market;

4. Orders that the costs be reserved.

Lecourt Donner

Trabucchi Monaco Mertens de Wilmars

Delivered in open court in Luxembourg on 30 November 1967.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF MR ADVOCATE-GENERAL GAND DELIVERED ON 7 NOVEMBER 1967[1]

Mr President,
Members of the Court

The application made by Firma Becher is one of a number of cases which have arisen as a result of the decision of the Commission of the EEC of 3 October 1963 authorizing the Government of the Federal Republic of Germany to maintain until 4 October the protective measures which it had taken on the previous 1 October with a view to suspending the issue of import licences for maize.

The applicant, which is an importer of cereals with its registered office at Bremen, on 1 October 1963 lodged with the Einfuhr- und Vorratsstelle, the competent German organization, two applications for the issue of licences for the import in January 1964 of French maize at a rate of levy, fixed in advance, of 0 DM; these applications were rejected on 3 October.

Following the annulment by your judgment of 1 July 1965 of the decision of the Commission (Joined Cases 106 and 107/63, *Toepfer* and *Getreide-Import*, Rec. 1965, p. 525), the Becher undertaking made an application for damages against the Commission on the basis of the second paragraph of Article 215 of the EEC Treaty. The written procedure was not concluded until after your judgment was given on 14 July last (Joined Cases 5, 7 and 13 to 24/66, *Kampffmeyer*), deciding upon similar applications by other importers. The case is therefore to a large degree simplified and prejudged on certain points, but it appears unfortunately that your judgment decided certain questions only to give rise to others, since, as was seen in the oral procedure, the applicant requests that you should specify or even modify certain solutions which you then adopted. I shall therefore briefly recall the general principles of your judgment of 14 July last in order to see how they apply to the case of the Becher undertaking.

You decided in the first place that the Commission's decision validating the

1 — Translated from the French.