OPINION OF MR ADVOCATE-GENERAL TRABUCCHI DELIVERED ON 5 DECEMBER 1974 [1]

Mr President,
Members of the Court,

1. The subject of causality in general and legal causality in relation to damage in particular, and consequently the relation between the unlawful act and compensation, has always posed serious problems for legal writers and for the courts, both in relation to the definition, in the abstract, of the criteria to be applied, and in relation to the determination of causality in practice.

In relating cause to effect, for the purpose of determining which damage was caused directly, account must be taken of the possible co-existence of a number of motives for the action — not clearly distinguishable in the decision-making process — of the contributory action of the party suffering damage and, in particular, of the effect of the negative aspect of his behaviour in failing to limit the production of future damage. These are all factors which must be considered by the lawyer when resolving a problem of causality, a problem which becomes even more difficult when the dispute relates to the field of trade, where an element of speculation necessarily introduces criteria of expectation and of disappointment which are difficult to quantify. I would agree with the words of the poet who wrote *felix qui potuit rerum cognoscere causas.*

Nevertheless, I consider it my task in this second opinion on the same case to offer the Court, for the purposes of its inquiry, a synthesis of this complicated subject, by recalling the elements serving as the bases for an action in civil liability which must be decided in accordance with the general principles common to the legal systems of the Member States.

Discussion could however be limited even to an essential and, I would say, simplistic outline. If the Court, as I am led to suppose in view of its decision to re-open the hearing solely with regard to the question of the chain of causation between the Council's conduct and the damage, considered that the Council acted unlawfully in giving incomplete information, the damage suffered by the applicant could be the fact of having contracted in the belief that it had legally acquired a right to the full compensatory amount prescribed. At first sight, it would appear from the above that the compensation may consist in reparation of a specific nature, in other words payment to the applicant of the full compensatory amount which it could legitimately have expected. That which occurred later, acting as a possible break in the chain of causation, by the effect of the subsequent awareness of the true tenor of the system introduced by Article 55 of the Act of Accession, may constitute a factor limiting compensation to the preceding commitments, insofar as the applicant had the opportunity to avoid the damage connected with the performance and termination of the contracts in question.

2. I must however examine whether the simple approach adopted above corresponds to a more thorough appraisal of the legal position in this case.

The general framework of the system is clear. The compensatory amount was payable, under the Act of Accession, only up to a certain fixed sum on the occurrence of an event which actually happened, namely the fall of the amount of the levy below that prescribed for the said compensatory amount. The legal obligation of the Council was therefore

1 — Translated from the Italian.

only that flowing from that event. In addition to the Act of Accession, there is also however the notice given by the Council in the Resolution of 20 July 1972 of the provisions of the future implementing regulation.

What is the nature of the above statement made by the Council? It gives advance notice of the law, its principal aim being to clarify *a priori* an unknown fact, namely the size of the compensatory amount. The legal basis for the measure of which advance notice was given was already in the Act of Accession; precise details were added in the Resolution. Since compensation for the differences between prices in the new Member States and the common prices was a legal obligation, the Council's duty could be no other than to declare and give confirmation of the obligation in an act which, naturally, given its source, could not avoid being subject to the *condicio iuris* expressed in the well-known provisions of paragraph (6) of Article 55.

Given the nature of the act in question, the applicant's claim had to be confined within the limits of the above rule. The applicant however put forward another claim, the basis of which, as we know, is quite distinct: it is that the Council committed an unlawful act in that the statement in question contains information which is insufficiently clear and precise. The unlawfulness does not therefore consist in failure to keep the promise made, a promise which, in the way the applicant claims that it was understood, could not legally have been made or kept, but in the fact that it created a false feeling of confidence in those concerned.

Conduct contrary to that prescribed by law, the first component of an unlawful act, is said to consist in the breach of the legitimate confidence generated in dealers; *culpability* in the fact of having made the statement in July 1972 without due care; *damage* for dealers in the fact of having concluded the contracts for the sale of products in the United Kingdom in the belief that they would receive the full amount of the sum prescribed, a belief which proved vain because the differences between the prices which the sum was intended to compensate for (and this is the sole legal justification of the system of compensatory amounts) had in the meantime greatly diminished.

On the one hand, an unlawful assurance, on the other hand, a corresponding misplaced belief. Even in this first aspect, there exists a link to be assessed in the context of the general criteria of non-contractual liability.

We therefore find ourselves dealing once more with a subject, this time as a preliminary issue and in a more specific form, which I discussed in my first opinion.

It is unlawful for a person to give information if he does not respect the confidence which the dealer who conducts his business with normal prudence may place in that information. The said information — which, let us suppose, had to be given in full — constitutes an unlawful act if it was such as to create objectively a serious error with regard to the true situation. If there had existed an obligation to inform, third parties could, without doubt, have relied upon the information received even if it had been incomplete. But if no such obligation existed and it was merely a question of recognizing the desirability of giving information, then the position of the party receiving the information in question must also be considered; in particular, it is the latter's duty to consider the information received in the light of the system the implementation of which was announced in advance.

The basic rule of every legal system according to which *nemo censetur ignorare leges* must, however, give way in the case of incorrect information which, as an unlawful act, constitutes the basis of a separate claim. But there still remains the problem of resolving whether and, if so, how the said conduct of the Council was likely to mislead.

If the statement was not such as to engender a false feeling of confidence in the dealers for whom it was intended, in other words such as to induce in them a feeling of certainty, there can be no liability, since the essential unlawfulness is lacking. Similarly, there is no liability if it is conceivable that those receiving the information should have been aware of, or should at least have harboured doubts about the true situation. Liability — it is generally said — exists when the person to whom the statement is addressed relies, through no fault of his own, upon that which he has come to learn of. Such liability ceases when the person to whom the information was addressed in some way had a suspicion that that was not the true situation.

The above discussion shows how the very existence of the fact creating liability (false or incomplete information) is linked to the situation of the party who has been misled. Given that there is no liability when the party misled ought to have been aware of the true situation or was in some way aware of it, there may also be a valid presumption of knowledge or of ability to possess knowledge (the obligation to acquire knowledge of recent legislation) in the case of an experienced dealer; the result being that there is justification for the presumption that the party suffering damage did so only through his own negligent failure to rectify or to complete the information. We must therefore assume, in accordance with modern conceptions relating to non-contractual liability in the laws of Member States, that the victim's conduct in relation to false information has not been negligent, because it is only in that case, in other words in the absence of fault on the part of the person receiving the information, that the unlawful act, which consists precisely in the creation of a mistaken feeling of confidence, can be judged.

3. The type of question with which we are here confronted will obviously not be resolved through a mere examination of the terms used by the Council in its Resolution of 20 July 1972 or through examination of its recitals. It is true that the Resolution did not contain the direct commitment to pay, but this was logically implicit in the reference to the system. The content of the Resolution was directed, as I have said, above all to clarification of an unknown factor, namely indication of the size of the compensatory amount which would become payable in accordance with the normal state of the market which reflected a great difference between world prices, those prevailing in the United Kingdom, and those, a great deal higher, in the Community market. Furthermore, that same commitment for the Council was implicit in the phrase 'the compensatory amount applicable until 31 July 1973 shall be . . .' But if there was reference to the system adopted by the Act of Accession, the prudent dealer could discern in this a presumed reference to the 'raison d'être' of the whole system which was based on the imbalance of the markets. I recalled in my first opinion also the fact that the Compagnie Continentale France had reason to doubt its own interpretation of the alleged fixity of the compensatory amount on account of the exceptionally long period of time during which that general 'advance fixing' was to remain applicable.

The Court will decide if it wishes to take account of these and other factors which cast doubt upon the argument of the applicant regarding the existence of unlawfulness in the incomplete communication and the claim that a party knowing a great deal about the sector in question, and operating in accordance with the normal criteria of prudence and care, was misled.

The first question which must be resolved then, is the basic one concerning the existence of the unlawful act. Before the Council's conduct can cause it to incur liability, it must be considered capable of misleading a dealer of average size acting with due prudence and care, as decided in the

case-law of this Court (Judgment in Case No 36/62, *Aciéries du Temple*, [1963] ECR 289). But if the basis of an action in liability is the protection of legitimate confidence created by information furnished voluntarily by the Council, without any obligation on its part to do so, it is also necessary that there should be no reason for considering that in fact the dealer in question was in the position of having known or of having the duty to acquire knowledge of the true situation, including factors not contained in the partial information given. In this connexion, a certain importance can be attributed also to the fact, which had certainly not escaped the applicant's attention, that at the very time when the contracts of sale to purchasers in the United Kingdom were concluded, the state of the market in cereals had forced the Community authorities to suspend all refunds on exports of these products to third countries, including the United Kingdom. Even though it is true that the 'accession' compensatory amounts are legally quite different from export refunds, it is also true that, according to the specific provisions of Article 55 of the Act of Accession, they have the function (like that of 'refunds') of compensating for price differences in the different markets.

4. In any case, assuming the existence of the unlawful act constituted by false or inadequate information which was capable of misleading an undertaking endowed with the experience of the applicant at the time when it concluded the contracts linked to the damage complained of, it is then necessary to search for the chain of causation in the various components present, and in this connexion, it is not at all certain that the simplistic solution that the damage complained of necessarily corresponds to the failure to fulfil the promise, which could be regarded as linked to the information supplied, is the one which must be accepted.

Direct damages are those which derive from the unlawful act of the subject responsible and which do not depend on the intervention of other causes, whether positive or negative. As I have already mentioned, in this connexion the conduct or attitude of the victim is relevant in two respects:

(1) in relation to the very existence of the unlawful act, which is only considered as such where the false feeling of confidence was engendered in persons who are reasonably mindful of their duty to keep themselves informed of matters affecting them;

(2) in relation to negligence, which even the victim of false information may have shown by failing to limit the production of future damage.

As regards the first of the above points, I have already said that it is a question of whether there is or is not an unlawful act, and not a question of degree of liability. As regards the second point, the possible negligence of the victim operates, on the other hand, as a contributory cause, and may even be regarded as a factor breaking the chain of causation between the unlawful conduct and the damage. Consequently, if, as appears clear, at least from the time when the applicant sent a letter to the Office National Interprofessionel des Céréales on 12 October 1972, in other words a few days after the conclusion of the contracts for the sale of products in the United Kingdom, it had doubts concerning the fixity of the compensatory amount announced and had knowledge of the possible application of the limit under Article 55 (6) as a result of the abnormal increase in the world price of wheat, the knowledge thus demonstrated has the consequence that, at least from that moment, any initial feeling of confidence could no longer cover subsequent operations. The latter would assume in the new economic context an objectively speculative nature since the party concerned used, in con-

nexion with these subsequent operations, rights of advance fixing which could have served for the exports which it had undertaken to make to the United Kingdom. The chain of causation would be broken; and if the present proceedings continue as far as the assessment of damages, the Court will then have the task of establishing what may have been the importance of the decisions made when the exporting firm was by now fully aware of the true situation and it will have to consider whether the applicant preferred to use the export certificates, which gave it the right to receive a Community contribution even greater than the compensatory amount, for purposes other than that of fulfilling the previous commitments. The damage might in fact no longer be caused by an 'act against the law', because it does not derive from the breach of a legitimate confidence which no longer existed at the time when the circumstance occurred (new contract and use of the advance-fixing certificates) making it impossible for the applicant to avoid the damage. The excuse invoked by the applicant in this connexion, relating to alleged general difficulties of storage of the products in the United Kingdom, must at least be verified.

One certainly cannot accept the applicant's claim that account should be taken of its alleged hope that the protective measures provided for in the aforementioned provision would be applied in its case; the application of that provision was in fact left to the discretion of the Council and, in any case, could not have been made before the entry into force of the Act of Accession. The principle stated in the traditional maxim 'wo du deinen Glauben gelassen hast, da mußt du ihn suchen' must apply here.

5. Having resolved the fundamental point concerning the effect of the victim's conduct on the very existence of the unlawful act and on the production of damage deriving from it, the Court must still consider the main question of causality in order to assess the basis of the applicant's claim that, in substance, the damages are equivalent to the unpaid portion of the compensatory amount indicated in the Resolution of 20 July. It is a question, as I have said, of compensation in a specific form. We must not forget that when ascertaining the consequences of the non-contractual unlawful act we must think in terms of causality and not in terms of the promise made. If liability were in fact considered to derive from the failure to keep the promise made, the question would be reduced to the interpretation of the promise itself so as to determine whether it was made in absolute terms or whether, on the other hand, it was subject to the *condicio juris* of Article 55 (6). But the problem in respect of the compensation of damages is different. Consequently, I do not think that the problem can be considered in the manner proposed by the applicant, which interprets the Council Resolution as promising a fixed compensatory amount, indicating the system which the Council was presumed to have chosen in advance and as such not subject to any possible application of Article 55 (6). The damage to be compensated must be calculated in the context of all the facts so as to determine what influence the fact of having been wrongfully induced to take account of the incomplete or inaccurate declaration made by the Council had on the losses of which the applicant complains.

It still remains to resolve perhaps the most important point of whether the damage complained of may be regarded as resulting directly from the unlawful act, because only in such a case is the damage indemnifiable. The solution of the problem presupposes a difficult inquiry into the positive significance of the information given by the Resolution of 20 July 1972 in relation to the conclusion of the contracts made between the applicant and the British purchasers. It is necessary, in other words, to engage in the difficult assessment of what the contractual

position of the parties would have been, not only in the absence of any advance notice of compensatory amounts, but also if the said notice had been expressly made subject to the proviso of Article 55 (6). I can only say that either the contracts in question would have been concluded on the conditions which were, stipulated, or they would not have been concluded at all, because quite simply the price agreed in such deals corresponds to that obtainable in accordance with general economic principles and not in accordance with the assessment of risk in individual cases. Which of the two eventualities would have occurred it is impossible to determine because it is a question of a future unknown.

It is in fact difficult to state for certain that Continentale France concluded its contracts only because it trusted in the fixed nature of the compensatory amount without taking account of the effect which would result from possible changes in the world market. It can rather be presumed that if it had made no error in forecasting the short-term economic trends, in other words if it had foreseen such market upheaval, the contracts would not have been concluded because, despite the existence of the compensatory amount, the increase in the price of the product, even in the Community, could have had the effect of depriving the supplier firm of its profit. The damage, it is true, derives from the abnormal state, recalled on many occasions, of the world market, which — among other things — has triggered off the protective mechanism of Article 55 (6). Let us assume therefore that the firm made two errors when it concluded those contracts to sell in the United Kingdom in September 1972: the error of failing to foresee the tremendous rise in world prices and the error of failing to realize that the compensatory amount is not fixed. Even on the assumption that the second error may be regarded as all-embracing and therefore completely dominating the fact which caused the damage, we must bear in mind that the extent to which this cause was decisive is still hypothetical given the impossibility, which I referred to at the beginning of this opinion, of determining the individual and concrete factors of causality.

It is also for this reason that I do not consider it my duty to propose to you, even should you decide that the Council is liable, that the determination of the damage should correspond to the specific compensation which would consist in the award of a sum equal to the compensatory amount provided for in a general manner, without taking account of the real situation concerning the grant of compensatory amounts under Article 55 (6) of the Act of Accession. Since, in fact, as I have observed, in this non-contractual field, liability does not arise automatically from breach of a promise, but from the fact of having induced a false feeling of confidence, the indemnifiable damage does not necessarily correspond to the portion of the compensatory amount prescribed but not received.

The damage corresponds to the economic loss suffered by reason of the fact that the contracts were concluded on the basis of a feeling of confidence induced unlawfully. But since we cannot establish precisely on what contracts and on what contractual provisions the information given by the Council in the aforementioned Resolution had a decisive influence, in other words we cannot determine the chain of causation so as to ascertain the extent of the economic loss in respect of the contracts concluded on the basis of that feeling of confidence, it only remains for us to apply a criterion of fairness, in accordance with the practice generally followed in the Member States in cases where it is impossible to determine the exact amount of the damage actually caused by the author of the unlawful act. It must also be borne in mind that contractual 'chances' cannot be calculated at a maximum and consequently the judge will have to take

account not only of the unlawful nature of the incomplete information but also of the error in predicting economic trends, and thus of the risk which is necessarily inherent in every contract, even when it is not a question of contracts which are essentially speculative.

To sum up: if the Court feels it cannot follow, despite the additional observations I have developed today, my previous opinion that it has not been shown that the Council committed an unlawful act, and if moreover the Court is unable to hold that the conduct of the applicant undertaking was at least a contributory cause of the damage it sustained, the compensation for the damage judged to be the direct and immediate consequence of the Council's conduct must be calculated on a basis of fairness, taking account of all the facts and, *inter alia,* of the difference between the compensatory amount obtained and what it would have been if it had been fixed. The above refers, in any case, only to the contracts concluded before the applicant showed knowledge of the existence of a legal limit, and in respect of the performance of which the applicant could not have made use of the export certificates in its possession which would have enabled it to obtain, as refunds for the exports it made to the United Kingdom up to 31 January 1973, a contribution not lower than the compensatory amount originally hoped for.