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.

protective measures amounted a 'wrongful act or omission capable of giving rise to liability on the part of the Community'. On this point there cannot now be any dispute. It remained to be specified which factors of the injury alleged by the various applicants (loss suffered and loss of profits) arose from this liability and in what circumstances these losses could be regarded as established. You classified these factors in three categories as follows:

The first concerns the quantities purchased on 1 October 1963 and which, after the refusal of the licences on 3 October, were imported in January 1964 on the issue of other licences and against payment of a levy. The injury, you said, was caused by the necessity of paying the levy in order to be able to import. But here the ambiguity appears immediately which has never ceased to distinguish the respective roles of the States and of the Commission in the functioning of the common organization of the markets and which has repercussions on questions of liability. In fact, as the levy was collected in the name of and for the benefit of the Treasury of the Federal Republic and in this case was imposed 'contrary to both Community law and German law', you faced the question whether the damage alleged would be made good by the repayment of the sums 'improperly paid by way of levy'. During the oral procedure in the *Kampffmeyer* case, the applicants' advocates raised doubts as to the possibility of such repayment, probably because the payment of the levy was linked to the grant of import licences distinct from those which had been refused on 3 October 1963 and whose legality had never been questioned, but these doubts did not appear sufficient for you to accept the definitive character of the loss. Thus you requested the applicants to produce evidence of their attempts in Germany to obtain repayment of the sums paid by way of levy, reserving to yourselves the right to consider, after hearing such evidence—to the extent of which I must return—'whether any injury exists which the Community should make good'.

Moreover the importer must naturally prove that the quantities of maize imported by him during the month of January 1964 or thereabouts were actually purchased under contracts made on 1 October, the Commission being authorized on its part to prove that the purchases took place at a time when those concerned already knew of the withdrawal of the zero levy.

The second category of injury is the consequence of transactions entered into on 1 October 1963 on the French market, which, after the refusal of the grant of import licences, were terminated by the repudiation of the contracts made with the exporters. All the sums paid by way of penalty appeared to you to constitute an indemnifiable loss, unless the sums so paid were greater than necessary. As to the loss of profit claimed, you considered that, by reason of the abnormally speculative nature of the proposed transactions and because of the fact that those concerned, by cancelling the contracts, were protected from all commercial risk, the loss suffered under this head could not exceed 10% of that which they would have paid by way of levy if they had in fact made the imports.

But in order to prevent the alleged damage, of whatever kind, from being made good twice, and having regard to the fact that actions for damages had already been commenced against the Federal Republic before the German courts, you considered that you could not reach a final decision before the courts already seised had given judgment. You therefore ordered the applicants to send to you the decisions made by the 'relevant courts' of the Federal Republic.

There remains a third category of alleged injury. It concerns the case where the importers had not yet

purchased maize on the French market at the time of their application for import licences and consequently, by reason of the refusal of their applications, gave up the intended transactions. As these transactions were not completed, they appeared to you to lack 'any substantial character capable of giving rise to compensation for loss of profits'. Thus you wholly rejected the claims of the applicants on this point.

Let us now return to the case of the Becher undertaking.

On 1 October 1963 it applied for two licences for the import of a total quantity of 27 000 metric tons of maize and states that on the same day it made 13 contracts with various French firms for a corresponding tonnage. As a result of the refusal of its application by the Einfuhr- und Vorratsstelle, the contracts suffered varying fates.

1. Seven of them were performed, either by the maize actually being sold in the Federal Republic, or in respect of a quantity of 1 118 metric tons by being re-exported in the same form or after being processed into maizemeal. The applicant puts the losses suffered at 83 142 DM for the sales in Germany, and 29 562 DM for the re-exports.

2. One contract for 770 metric tons was ended by an agreement to repurchase. The undertaking made a contract with its vendor under which the latter would buy the maize back from it at a price per metric ton of 21.50 DM less than the sale price, and the undertaking paid the vendor a sum of 16 555 DM which corresponded to the difference between the two prices. The position thus was as if the contract had been cancelled and a penalty paid.

3. The five other contracts in respect of approximately 21 750 metric tons made with the Compagnie Algérienne de Meunerie were cancelled against compensation varying from 15 to 25 DM per metric ton, according to the case, and amounting in total to 474 500 DM. This sum, which does not yet appear to have been paid to the vendor, constitutes the loss suffered by the Becher undertaking and, according to it, is less than the loss which it would have suffered if the contracts had been performed.

To the sum of 603 760.50 DM, representing the actual loss suffered by it, the applicant adds a figure in respect of loss of profits amounting to 664 850 DM which it would have realized if the import licences for 27 000 metric tons at a zero levy had not been refused.

The solution at which one may arrive on the basis of the *Kampffmeyer* judgment is fairly simple:

1. In respect of the contracts which resulted in actual imports into the Federal Republic, it is for the Becher undertaking to attempt to obtain from the competent departments of that State repayment of the sums paid by way of levy before appearing again before you in the event of their being some injury which the Community should make good.

2. In all the other cases the indemnifiable loss is constituted on the one hand by the amount paid by way of penalty on terminating the transactions, on condition that this sum is not excessive, and on the other hand by a loss of profit corresponding at most to 10% of the sum paid by way of levy, if the import did in fact take place.

Not only the five contracts which were cancelled, but also the one which was ended by agreement come within this category, and there should also be included under this head—as the Commission admits—the quantities re-exported to third countries, subject to proof of loss on re-exportation.

Here again the Becher undertaking, which states that it has commenced proceedings before the competent German court against the Federal Republic, should be requested to communicate to you the decision given by that court, in order to avoid double compensation for the same loss.

This solution, which the applicant could

easily have imagined, gave rise in the oral procedure to a certain number of observations by the applicant to which I now turn.

In the first place it raises an objection of principle. Although this was not expressly stated in your judgment, the Becher undertaking deduces both from its grounds and from its operative part that you consider the liability of the Community to be subsidiary to that of the Federal Republic, and on this point it agrees with the Commission. It is the correctness of this outcome which it continues to contest as it did in its application; thus for the reasons which it set out at the time it asks you to 'review' it.

I myself, for reasons which I shall not repeat, maintained a point of view similar to that of Becher when you were dealing with the *Kampffmeyer* case; having said that, and although your recent judgment has the force of *res judicata* only between the parties, I do not consider that you can today alter the solution which you then adopted. Whatever my opinion on the validity of that solution, I think that no legal certainty is possible without a minimum of stability in case-law; it would in any case hardly be satisfactory for the same decision of the Commission to give rise to liability on the part of the Community in circumstances which vary with the pace at which the proceedings are conducted.

The other observations of the applicant refer to the requirements which you may ask it to satisfy before you adjudicate finally on its application, and it would like these requirements to be specified. Even if it is not always possible to reply in as complete a manner as the applicant would wish, these observations deserve serious consideration, all the more so because, as you know, the questions which it raises are relevant also to the parties in the *Kampffmeyer* case.

If you intend to ask the applicant to communicate to you the decision given by the competent courts of the Federal Republic of Germany on the action for damages which it has commenced against the latter, it replies first of all that the proceedings have been suspended until your own decision has been given and that in German law the court in which the case is being heard is not obliged to revoke its decision of suspension. It is a problem of pure internal law which it is not asked to decide, but to which there is no present solution. It is only in the event of the national court's persisting in its decision to suspend proceedings that you would have to consider the consequence which its attitude might have upon the case before you.

Another more serious question remains: will this decision of the court of first instance satisfy the requirements or will it be necessary to exhaust all levels of appeal? Without claiming to represent the Federal Republic, one can well imagine that, in the case of the Landgericht's holding it liable, its representatives would exhaust all means of appeal available to it in German law. But what if the court of first instance rejected the application? Would you consider yourselves satisfied by this decision alone? Would you be prepared to accept the relevance, the substance of the reasoning upon which it was based, which would be a question of pure German law? If this were the case, one would see the other party—that is to say, the Commission—called to discuss before you a judgment given in a court foreign to it. Its agent has in any event made you aware of his opinion without the least ambiguity: according to him it would be necessary to exhaust all means of appeal as far as the Federal Court before returning to you. That solution appears inevitable to me unless there comes a time when the defendant declares itself satisfied with a decision at first instance denying the liability of the Federal Republic. Let me add that

one could find oneself in an inextricable situation where, when you reject as insufficient a decision of a court of first instance, the period for bringing an appeal against the decision to the national court has expired.

Also in respect of the liability of the Federal Republic, the Becher undertaking asks you whether all the applicants must commence proceedings or whether it is enough to bring a test case. The replies, subject to the special characteristics of national law, appear to me to vary according to whether it is a question of the principle of this liability or—should this be accepted—of the amount of damages to be awarded. As regards liability, a test case taken to its conclusion might be sufficient since it could deal with questions of pure law which arise in an identical manner in all the cases. On the other hand, to establish the amount of damages would raise different questions according to the applicants (transactions made by each of them—purchase price—loss suffered—amount of penalties, etc.), which make it indispensable that each one should claim its rights before the court of first instance.

Finally, the Becher undertaking mentions a doubt which this time concerns the part of your judgment relating to repayment of the levy paid on imports actually made. It persists in its opinion that no means exist in law to obtain this repayment; at the very most it is prepared to take the administrative approach, although this does not appear to it likely to succeed. It asks you in any case to specify your thoughts on this aspect of the question which here again depends on pure German law.

However, if there is one point in your judgment which involves no ambiguity, it is certainly that. You have—in the grounds as well as in the operative part—asked the applicants to 'prove that they have *exhausted* all methods of recourse, both administrative and judicial, under the relevant national law' to obtain repayment of the amounts which you have said were 'improperly paid by way of levy'.

It necessarily follows that the Becher undertaking must turn to the competent administrative authorities of the Federal Republic—which it is not for me to define more precisely—in order to claim from them restitution of the amounts which it has paid, and if it does not obtain satisfaction, then to address itself to the national courts. Perhaps one or the other might have a different opinion from yours on the improper nature of the levy, and thus on the possibility of ordering its repayment; it is only when the decision on these matters has been communicated to you that you will have to consider whether or not there is any injury which the Community should make good.

I do not think that in this statement I have betrayed either the meaning of your judgment in the *Kampffmeyer* case or the consequences which it logically involves with regard to the continuation of the proceedings. It is for you to see whether, in the grounds of the judgment which you are about to give on the application of the Becher undertaking, it is necessary to give specific answers in reply to the requests for explanations which have been made to you. In any case the operative part of the judgment cannot be affected.

With the benefit of these observations and in accordance with your case-law, I am of the opinion that before giving judgment you should order that the Becher undertaking must:

1. Send to you the decision given by the competent court of the Federal

Republic of Germany in the action for damages which it has commenced against the Federal Republic;

2. Send to you 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. Produce to you before 1 March 1968 proof that on 1 October 1963 it made contracts for the purchase of maize on the French market.

Finally, I am of the opinion that the costs should be reserved.