THE COURT

hereby:

1. **Annuls the decision of the Commission of the European Economic Community of 3 October 1963, authorizing the Federal Republic of Germany to retain protective measures concerning the importation of maize, millet and sorghum.**

2. **Orders the defendant to bear the costs.**

Hammes Donner Lecourt

Delvaux Trabucchi Strauß Monaco

Delivered in open court in Luxembourg on 1 July 1965.

A. Van Houtte
Registrar

Ch. L. Hammes
President

OPINION OF MR ADVOCATE-GENERAL ROEMER DELIVERED ON 20 MAY 1965[1]

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Mr President,
Members of the Court,

For the facts of the case with which we are dealing today, I would refer you to my opinion delivered on 16 June 1964 and, in so far as new aspects have come to light since then, to the report at the hearing made by the Judge-Rapporteur.

The matter at issue is a decision of the Commission of 3 October 1963 (published in the Official Journal of 11 October 1963, page 2 479), stating that the protective measure adopted on 1 October 1963 by the Federal Republic of Germany in accordance with Article 22 of Regulation No 19 could be retained until 4 October 1963.

The applications lodged against this decision by Getreide-Import-Gesellschaft and by the firm Toepfer have given rise to written and oral procedures confined to the question of admissibility, in accordance with a request made by the Commission.

At the oral hearing on 16 June 1964, I made a thorough study of the subject-matter of the dispute. In the end my impression at that time was that it was not possible to take a valid decision on the admissibility of the applications without examining its subject-matter as a whole. In fact the problems of admissibility seemed to me to be connected with a number of arguments as to substance.

In consequence on 25 June 1964 the Court decided to reserve for the final judgment its decision on the objection of inadmissability raised by the Commission.

Since then the procedure has followed the normal course and has given rise to a profound written and oral discussion of all the disputed questions which the adoption of the protective measures taken by the Federal Republic of Germany, and the authorizing of them, have raised.

As we know, the Commission still thinks that the applications must be dismissed as inadmissible. It is only as an alternative that it claims that as to substance they must be dismissed as unfounded. On the other hand the applicants still claim that it is just as hard to throw doubt on the admissibility of the applications as to throw doubt on their soundness as to substance.

Legal consideration

I shall now pronounce my view of the facts for the second time, and shall first

of all examine the questions of admissibility which have been raised. This time I shall do so in the light of the supplementary explanations furnished by the parties since 16 June 1964.—But at the same time I wish to emphasize that, independently of the result to which my considerations on admissibility will lead, I shall also give my view as to the substance of the case. I think that I am under a duty to do so given that there is not yet any case-law as to admissibility, where this is tied up with the criterion of direct interest as it is here.

I—Admissibility of the applications

The method of presentation for the questions of admissibility has not undergone any change: since I am considering a decision addressed to a Member State, only two questions can be of interest:

— Is the contested decision of individual concern to the applicants?

— Is it of direct concern to them?

1. *Individual interest*

In my opinion of 16 June 1964, I came to the conclusion that it was necessary to *recognize* that the applicants were individually concerned because of the special circumstances of the present case. I shall refrain from repeating the reasons here.

During the further course of the proceedings, counsel for the Commission has added some new material on this point which makes it necessary for me to add some finishing touches to what I said before.

The Commission thinks it wrong to attach any special importance to the fixing, on 2 October 1963, of new free-at-frontier prices in the Federal Republic for imports of maize from France.

In its view and as a matter of law, this event has nothing to do with the protective measure adopted by the Federal Republic and authorized by itself. Having regard to the protective measure in question, the new free-at-frontier prices were a purely fortuitous change.

These propositions must sound odd to anyone who knows how the facts unfolded at Brussels, Frankfurt and Bonn, starting on 1 October 1963. The sequence of events makes it clear that there was objectively a close connexion between the various measures taken at national and supranational level. It could not be otherwise, seeing that they all follow from *the same cause*, the erroneous fixing of the free-at-frontier price for imports of maize from France. The Commission took the obvious course within its sphere of power: it altered the price which it had originally fixed. As for the state concerned, it did what it could, so it seems, to prevent any undesirable consequences by invoking Article 22 of Regulation No 19, and the Commission, in its turn, gave the necessary authorization. But even if the measures were not thus objectively linked, in my opinion it would be necessary to take account, when examining the right to take legal action, of the different legal situations existing on 1 October and during the following days. As regards the question of concern it is enough to state that on any objective grounds the position of an applicant in legal proceedings is markedly different from the position of other interested parties for he thus becomes distinguished as an individual in the sense of Article 173 of the Treaty. So I continue to think that, since the prices on 1 and 2 October 1963 were different, it was possible to ascertain a specific class of persons interested.

The Commission then argues that it is not possible to reduce the number of persons interested by ascertaining how many lodged requests for import

licences. In its view it is the *national* measures which concern the importers directly; when those measures were adopted it was not possible to ascertain which of the importers would be concerned because the scope of the measures partly included the future and because it was not known how long they would last.

I shall not follow the Commission on this point either. In reality the question of interest must be settled by reference to the *measure contested,* namely the authorization given by the Commission for the measure taken by the Federal Government. Now, at the time when this authorization was given, it was possible to ascertain the number of undertakings which had lodged requests for import licences. In my opinion these persons are concerned in a particular way because the lodging of the request goes hand in hand with certain compulsory financial charges and is usually followed by the conclusion of commercial contracts. To equate these persons, in the context of the question of interest, with those who could only be considered as potential importers seems to me to be untenable.

In these circumstances I do not see any reason for changing the point of view expressed in my opinion of 16 June 1964 concerning individual interest.— Thus the criterion cannot justify dismissing the applications.

2. *Direct interest*

As regards the question of direct interest, I said in principle in my previous opinion that there could be no direct interest when a Community measure can only make its legal effects felt with regard to nationals of the Community through the medium of *discretionary* acts adopted at national level. This is what happens when the protective clause provided for in Article 22 of Regulation No 19 is applied, in so far at all events as the Commission does not order the amendment or abrogation of it.

Likewise it matters not that the decision by the Commission to authorize the protective measure came after it had been taken by the State.

I still hold this view after having examined the questions of admissibility again. The applicants, who have a different opinion, base their view principally on an inaccurate analysis of the authorization given by the Commission; they think that the effect of this authorization was to give a definite confirmation of the measure taken at national level. In my view, however, even after the Commission has given its authorization, the Member State retains its complete freedom of action in the sense that it can revoke the protective measure which has been adopted. For example it can do so for reasons appertaining to national constitutional law, or when a further examination raises doubts as to the seriousness of the threat to the market. This freedom of action on the part of the State is the decisive element in the collaboration between the Commission and the national authorities and this is why the comparisons made by the applicants with national civil law (ratification of a measure taken by a person who had no authority to take it, ratification of declarations made by an unauthorized representative) are not relevant.

However, after the arguments which the applicants put forward relating to the Commission's request for a preliminary decision on the admissibility of the applications, it did not seem absolutely certain in this case that the various acts of the national and supranational authorities could be fitted into the legal framework which I have mentioned. A *conscious collaboration* has been mentioned, as have agreements between the authorities concerned, which means acts which go well beyond what the Commission considers as usual (and proper) collaboration between national and supranational authorities (for example with a view to a mutual exchange of

information). *This collaboration* could be explained by the pursuit of common but improper objectives, for example the rectification of an administrative error for which the two parties are responsible, and which, therefore, they both wish to eradicate. When looking at this type of collaboration, which makes mutual demands of a compulsory nature, it should be asked whether it is still right to talk of a discretionary power and a freedom of action on the part of the national authorities, and whether agreements which are *legally* or merely *politically* binding be involved, since in both cases the effect is the same for the nationals of Member States.

In my opinion the full and frank exposition by the Commission of what exactly happened as from 1 October 1963 makes it now possible to be clear on this point. From this we learn that after it was realized how far the fixing of a zero levy misrepresented the true price situation on 1 October 1963, the officials of the E.V.G., the Bundesernährungsministerium and the Commission communicated with each other numerous times by telephone and by telex. Likewise it cannot be denied that the officials of the Commission displayed some initiative in the sense that they made a suggestion to the officials of the Bundesernährungsministerium. However it is not possible to see more in these discussions than a proposition made on one side and the promise given on the other to see whether the application of the protective clause contained in Article 22 could possibly be used. In particular it is not possible to see in the discussions a promise given by the officials of the Commission that the Commission would confirm the application of the protective clause. There is nothing surprising in this because at the critical moment (a telephone conversation at 3.30 p.m.) the officials of the Commission's Directorate-General of Agriculture were still thinking of fixing a new free-at-frontier price for imports into the Federal Republic of maize coming from France, such price to take effect retroactively from 1 October 1963. This would have made it unnecessary to apply the protective clause. It was only after the protective measure in question had been adopted by the German authorities (it was announced to the 'Einfuhrstelle' by telephone before 3.30 p.m. and confirmed by telex at 4.05 p.m.) that the officials of the Directorate-General of Agriculture and, through them, the officials of the Bundesernährungsministerium learned that the practice was not to fix the free-at-frontier price retroactively because of objections raised by the legal department of the Commission. Finally it must not be forgotten that the discussions which certain officials of the Commission took part in did not constitute decisions and clearly did not have any binding effect. It is only the Commission, acting as a collegiate body, which has the power to take a decision such as the one contested here. The Commission alone can issue binding measures, whereas the activity of its officials is only in the nature of ground work and as such cannot bind the Commission.

In these circumstances the impression which one might have had at first that certain binding agreements had been reached between the national authorities and the Commission even before the protective clause had been applied cannot be confirmed. As I see it, therefore, the fact remains that a direct interest on the part of the applicants is lacking and that for this reason the applications must be dismissed as inadmissible.

To be fair I must admit that this conclusion could be described as extreme. I realize that it is within your power to make a different assessment of the factual elements and to arrive at a different result: for example the Court could consider the chronological order in which the various national and supranational measures followed one

another to be decisive. In this case the Court could hold that the authorizing by the Commission of a protective measure after it has been taken is itself a measure which is directly binding on the nationals of Member States, in so far as the Commission is certain that upon receiving the authorization the State will use it. While I am convinced that the facts of this case do not permit such an appraisal and deduction, I must allow for the possibility of a different interpretation and make the following supplementary remarks.

II — On the substance of the case

As regards the substance of the applications I shall distinguish several categories of submissions. A first category includes alleged infringements of procedural requirements; a second infringement of the Treaty (incorrect interpretation of Article 22 of Regulation No 19, non-fulfilment of the factual conditions required for its application); finally there is an alleged misuse of power by the Commission.

1. *Infringement of essential procedural requirements*

As regards the first complaint two preliminary remarks must be made straight away.

— The assertions put forward by the applicants include complaints which in my opinion fall without any possible doubt within the concept of infringement of the Treaty. I do not wish to go into any more detail on this here and I shall simply examine the corresponding submissions when I get to the complaint of breach of the Treaty.

— Under the heading 'Infringement of essential procedural requirements' the applicants have also raised complaints which relate to a failure by the authorities of the Federal Republic of Germany to observe certain rules of form and of procedure. They say that these rules should be examined in the light of national administrative and public law. In doing so the conclusion would be reached that in giving its authorization the Commission adopted as its own a State measure which, according to national law, is void.

On the contrary, when the system laid down by Regulation No 19 is looked at, it is certain that the Commission cannot have adopted *as its own* the measure taken by the German authorities. There was nothing else for it to do and it did nothing else but express its view on a national measure *in accordance with Community law*. The Court's duty to exercise control has analogous limits. Its function is limited to deciding whether the Commission has applied Community law, and it can only make a declaration of nullity if the requirements of that law have been infringed. Therefore in this case the following questions must be eliminated:

— Was the national protective measure in fact taken by the German Government or by other authorities who did not have capacity to act under German law? (As the Commission rightly stresses, it is enough for the Commission to observe that *notice* of the protective measure has been given to it by a competent national authority.)

— Was the protective measure taken in the appropriate legal form with respect to national law (namely in the form of a 'Rechtsverordnung')?

— Did the Federal Government give reasons for and publish the protective measure in due form?

— Did the Federal Government state the exact time of the entry into force of the protective measure and the exact time when it was notified to the Commission of the EEC?

If all these questions are subtracted from the subject matter of the case before the Court, the only complaint

which remains in the present context is that insufficient reasons were given for the contested decision.

The applicants point out in particular that recital 5 of the preamble to the decision only contains a repetition of the text of Article 22 (1) of Regulation No 19. The statement of reasons does not say how many requests for import licences had been lodged, or what was their total tonnage, and it does not make any comparison as to quantities. It does not even contain any information on the purchase prices of maize in France and the selling prices likely to be in force during the month of January 1964. All this means that it does not contain any fact about the nature and extent of the anticipated disturbance of the market. Finally it does not give the reasons for which less radical measures (allotment of quotas) were deemed inadequate.

In fact a reading of the statement of reasons gives, to say the least, the impression that it is extremely short. It is limited to stating that 'a very large number of requests' reached the E.V.St on 1 October 1963 so that it was to be feared that during the month of January 1964 there might be imported into the Federal Republic 'considerable quantities of maize' at prices 'markedly below the threshold price', in view of the fact that no levy of any amount was laid down for 1 October 1963. The suspension of the granting of import certificates might therefore appear as the most appropriate protective measure.

Taking these few imprecise reasons into account, it seems doubtful whether the Court can exercise its legal powers of review, although this is what the statement of reasons for a decision should render possible (see Case 24/62, Rec., 1963, p. 143). It may also be noted that the Court in Case 24/62 held it to be necessary to demand figures on the size of the production of wine suitable for the production of wine intended for distilling and on the trend of this production in the Community, because it was claimed that there was an excess of production inside the Community.

I must however admit that in the same judgment the Court emphasized that it is enough for the decision to explain the principle issues of law and of fact which are necessary for understanding the reasoning which has led the administrative authority to the decision. In following this line of thought the Court did not criticize the reasons given in Case 24/62, although these were limited, without giving figures, to general remarks on the price level which corresponded to the rates of the common customs tariff on fruit and on reasonable prices for other categories of fruit, etc. (Rec. 1963, pp. 315 et seq.).

There will perhaps be seen here a new trend in the case-law against overemphasizing the obligation to state reasons, particularly when decisions are taken during a procedure in which speed is essential (as is the case with Article 22 of Regulation No 19). However it may always be objected that even urgent measures must, like any others, be based on definite facts and that the *statement* of these facts in the reasons for a decision can scarcely be a hindrance to drawing it up.

In spite of some serious objections which I have just mentioned and the list of which I shall make complete by reminding you that the reasons given as to choice of means when the protective measure was adopted were not sufficient, I shall not suggest that the decision should be annulled for infringement of a procedural requirement, but I shall go on to examine the other submissions raised in the case.

2. Infringement of the Treaty

With the complaint of infringement of the Treaty there is submitted to us a series of objections which, for the sake of convenience, may be classified under three heads:

— First, it must be considered whether, from the legal point of view, the Commission correctly interpreted the *conditions required* for applying the protective measure laid down in Article 22.
— It will then be necessary to consider whether the conditions required for applying Article 22 were fulfilled *in fact*.
— Finally it will be appropriate to make a number of remarks on the choice of the means which are to be taken into account as possible protective measures, and on the limits on the scope of those means.

(a) Definition of the conditions required for the application of Article 22

(aa) Under Article 22 of Regulation No 19, if as a result of the adoption of measures concerned with the progressive establishment of a common organization of the market in cereals, the resulting imports should cause or threaten to cause serious disturbances to the said market in one or more Member States, which might endanger the objectives laid down in Article 39 of the Treaty, the Member State or States concerned may, during the transitional period, take the necessary protective measures as regards the importation of the products in question.

The applicants wish this provision to be strictly interpreted, in view of the fact that it is a provision for exceptional circumstances. In their opinion it must only be applied where there is a disaster.

However—the Commission has given a convincing demonstration of this—it will appear that this interpretation of the words 'serious disturbance' would in practice make Article 22 inapplicable.

We should proceed on the basis of the following considerations:

The disturbances must be due to *imports* and these imports must threaten to *jeopardize the objectives* laid down in Article 39 of the Treaty. Amongst these objectives, those enumerated in subparagraphs (d) and (e) (to assure the availability of supplies; to ensure that supplies reach consumers at reasonable prices) need not be taken into account, as the Commission rightly points out, for imports at low prices, far from making it less likely that these objectives will come about, tend rather to further their cause. Therefore the only objectives to be considered are the ones directed at stabilizing markets and ensuring a fair standard of living for the agricultural community *by means of reasonable production prices*.—On the other hand, in accordance with the system laid down by Regulation No 19, it is a fact that for the main kinds of cereals (including barley, in respect of which a disturbance was feared) the national intervention agencies *must* buy in national cereals when production prices fall below the level of intervention prices. The Commission rightly concludes that producers of these kinds of cereals can never run any other risk than that the prices might fall to the level of the intervention prices. Therefore it must be admitted that serious disturbances within the meaning of Article 22 exist where there is a threat of a slump in prices of this sort which might affect considerable quantities of cereals.

I think this opinion is correct and it cannot be undermined by the reference to Article 22 (5) and the attempt to base upon it an argument to the contrary for the other paragraphs of this provision. In fact, if it be admitted that, *after* the expiry of the transitional period, the need for the intervention agencies to make substantial purchases at a time of considerable imports from third countries constitutes a serious disturbance, this is *a fortiori* the case *during* the transitional period in the course of which there are to be expected from the agricultural community efforts towards adjustment linked with a num-

ber of financial burdens. In these circumstances it seems impossible to reserve the application of Article 22 only to cases of disaster. A lesser risk and a weaker disturbance—I say no more about this for the moment—must be sufficient.

(bb) Still dealing with the question of the legal interpretation of Article 22, the applicants ask if its application can be entertained for rectifying some side-effects of an erroneous decision made by the Commission (here the inaccurate fixing of the free-at-frontier price for French maize).

I think the Commission is right on this point also. The provision in Article 22, according to which the application of measures concerning the progressive establishment of a common organization of the market in cereals must have given rise to serious disturbances, is drafted in a completely general way. One can interpret it to include cases where the information given for the levy system is inaccurate because of mistakes made in the calculation of prices by the national or supranational authorities, which leads to an increase in imports at noticeably lower prices. As the Commission rightly points out, it is not impossible for such cases to occur, particularly in the complicated system of common organizations of the market. If the application of Article 22 were to be ruled out here it would not in fact be possible to succeed in giving enough protection to national agricultural markets which are only partly integrated at the present time. Therefore Article 22 can also be used where an error or a failing has occurred in the operation of the mechanisms of the market. This makes it unnecessary for me to consider whether such an error was given as a cause of possible disturbances in this case.

(b) Do the conditions required for applying Article 22 *in fact* exist?

Let us now consider what the *factual situation* looks like for applying the protective clause in this case.

I must confess that at this point I am encroaching on economic territory and from the outset it must be doubted whether the questions which arise can in the final analysis be resolved without the assistance of experts. At all events it is necessary to attempt to give an idea of the situation by means of the figures before us.

First of all I shall give myself the opportunity of reminding you once again of the decisive argument of the Commission. It declares that the importation at low prices of considerable quantities of maize (in excess of German needs) during the month of January 1964, for which the import licences were requested, brought with it a danger that supply would be greater than demand, and that the price of maize would fall. Therefore it was to be expected that consumption would be diverted from maize to barley, which would have resulted in a corresponding slump in the prices on the barley market. Such a fall would have meant substantial purchases of German barley by the intervention agencies.

(aa) Thus the first point at issue is whether imports of maize into the Federal Republic did in fact take place during the month of January 1964 at a price which, according to the information given by the Commission, was about 70 DM below the German threshold price for that month (434.50 DM, cf. Annex 2 to the Regulation amending the second 'cereals' implementing Regulation of 19 July 1963). This point includes the question whether these imports were made by means of the licences requested on 1 October 1963, by the applicants amongst others.

In support of its view the Commission relies on information furnished by the E.V.St on 1 October 1963; on some quotations, of which it became aware, for French maize c.i.f. Duisburg, made by some Hamburg importers on 30 September 1963 for consignment in

November and December 1963; on quotations for French maize by Hamburg importers starting on 8 October 1963 for consignment in December 1963; and on the arbitration award produced by the second applicant, made after a failure to perform a contract of sale, which includes similar figures.

As against this the applicants rely on their own agreements (offering to prove them) on prices, some of which were noticeably higher. They also rely on figures supplied by the Deutsches Getreidekontor (German cereals office) and also on the fact that, since there was a strong demand for French maize on 1 October 1963, a rise in prices was felt (to which the Commission replies by saying that there was a record harvest in France in 1963 and a surplus of French exports which was likely to lead to a fall in the price later on).

The arguments put forward during the case perhaps give the impression that as regards the amounts of maize concerned the prices stated by the Commission are at least not very wide of the mark. However, it does not seem to me to be possible to make an exact assessment of this disputed question, which is indeed an important one in this case. An expert's report on prices would be needed to elucidate this point. Nevertheless I shall not interrupt my examination here, and from now on I shall suppose, as the Commission has done, that the prices for maize imported in January 1964 would have been substantially below the German threshold price if the requests for import licences had been accepted.

(bb) The second point at issue is whether it was reasonable to take the view that if the imports of maize requested on 1 October 1963 had been authorized in January 1964 supply would exceed demand for maize in Germany. This means that quantities would have been involved likely to have an effect on the barley market.

The Commission's thinking starts with the normal demand for imported maize, which is between 80 000 and 90 000 metric tons per month. It compares these with the imports which in fact took place from July to September 1963 (419 000 metric tons) and to the fact that for the period from October to December 1963 import licences representing a total quantity of 133 000 metric tons were in existence. These facts as a whole made it seem probable that normal needs would be met until the end of the year 1963. According to the Commission, there must also be taken into account the facts that during the months October to December 1963 unused import licences were still in circulation and that the lodging of new requests for licences for this period had to be expected. All told, therefore, it had to be accepted that there would be a very heavy supply not only because of the 125 000 metric tons or so to be imported on the basis of the licences requested on 1 October 1963, but also because of supplementary imports of maize during the month of January 1964.

On the other hand the applicants think that it is wrong to start with an average figure for imports of between 80 000 and 90 000 metric tons per month, given that these figures are taken from a period (before the financial year 1961/1962) during which imports were still kept in check by quantitative restrictions at national level. They say that after this provision was repealed to make way for the Common Market a marked rise in imports was felt, which can be explained by the increase in the consumption of meat, particularly poultry, in the Federal Republic.

In my opinion it is not possible to dispute the fundamental validity of this objection. Therefore the Court should adhere to the import figures for the financial year 1961/1962 and the following ones. The tables produced for this purpose by the Commission show that the imports of maize during the course

of the financial year 1963/1964 were of the order of 1.7 million metric tons, which gives a monthly average of 140 000 metric tons. They also show that no harmful effect was felt on the market in home-produced barley during this time. The figures relating to the year 1964/1965 even show a monthly average of about 170 000 metric tons for imports of maize. For the financial year 1961/1962 the monthly averages are also noticeably higher than the figures put forward by the Commission (about 120 000 metric tons). All these figures make it possible to conclude first of all that the 125 000 metric tons of imports or thereabouts (in the official notice only 85 000 metric tons are mentioned) which could be anticipated for the month of January 1964 on the basis of the requests lodged on 1 October 1963 are not of an order of magnitude such as to justify the fears felt by the Commission.

There is a further point to be made. As the applicants stress, it is definitely not right simply to add to the licences requested on 1 October 1963 the imports normally made each month into the Federal Republic. In fact the situation on the market in cereals is very clear, thanks in particular to the monthly publication of the total of import licences requested, to information provided by the cereals exchange and to information from private sources. This makes it possible for importers to arrange their own transactions over a period of time and to bring them in line with the transactions of their competitors. It is to be supposed that that would also have been the case after the granting of the licences requested for the month of January 1964 because, according to the figures put forward by the Commission, the importers who lodged their requests on 1 October 1963 are responsible for about two thirds of the total imports of cereals into the Federal Republic. Financial common sense would have led them to retain the favourable commercial conditions, which were created by their obtaining licences free of duty on 1 October 1963, by limiting any supplementary imports they might make for the month of January 1964 to reasonable amounts. It may also be assumed that the pressure of supply would have been reduced, if necessary, by putting certain amounts into storage. This is not felt as an insufferable burden when favourable terms of buying in France can be used to the full.

All of this is authority, in my opinion, for being extremely doubtful about the correctness of the Commission's argument that the granting of the import licences requested on 1 October 1963 would have made likely a noticeable excess in the supply of maize in the Federal Republic during the month of January 1964.

(cc) But supposing the prognostications of the Commission to have been correct, it would then be necessary to examine whether dangerous repercussions on the *market in barley* in the Federal Republic could be feared, along with an appreciable reduction in prices for home-grown barley as a consequence.

The reply to this question depends in the first place on the greater or lesser interchangeability of maize and barley as feeding-stuffs. In principle it seems that this interchangeability cannot be called in question; even the applicants do not dispute it. It is shown in the proportions contained in cereal fodder and in feeding-stuffs, which vary perceptibly in the different countries of the Community, as the Commission has shown. If the figures quoted by the Commission at page 26 of its rejoinder are examined, it cannot be denied that in the Federal Republic the part played by maize in feeding-stuffs for livestock, as a whole, is much lower than it is in the neighbouring countries, Belgium and the Netherlands. From this it may be concluded that in the Federal Republic maize, in its capacity as a cereal for fodder, is indeed in a position where

it can to a large extent be used as a substitute for other kinds of fodder.

But on the other hand the applicants show clearly that too much weight should not be given to this view in the present case. They point out that when maize is used as a cereal for fodder it is usually processed, that is to say transformed into a mixed fodder. However, in fact, according to the applicants, relatively constant amounts go into the manufacture of fodder over a fairly long period of time, as the German law on fodder contains provisions to this effect.[1] Thus an unexpected short-term excess of maize could not bring about an appreciable decline in the proportion of barley in mixed fodder.

The significance of this as regards the view put forward by the Commission is that, even if imports of maize had increased considerably during the month of January 1964, the fear that the national market in barley would be affected by this increase could only be slight.

(dd) Finally this study would not be complete if it did not give some idea of the amounts of barley expected on the market of the Federal Republic of Germany in January 1964 for which there could at most be a risk that a substitute might be used instead.

The controversy on this point is less about quantities than about strains. The applicants claim that at that time of year the barley offered on the market is still mainly barley intended for the brewing of beer. It does not lend itself to the feeding of livestock or, at least, it is not used as such by reason of its price, and therefore to this extent it is not interchangeable with maize. The Commission thinks that on the contrary the barley offered on the market during the month of January is mainly winter barley (which means barley for fodder), and moreover that up to 50 per cent of summer barley, meaning barley intended for the brewing of beer, is itself also used for the feeding of livestock. It does not seem possible to resolve this question on the basis of the few facts which are to hand.

But this does not seem to be indispensable. Even if the Commission's figures be taken, it is not possible to accept the idea that the market in barley was under threat. The Commission only declares that a home-produced supply of about 300 000 metric tons of barley was still anticipated on 1 January 1964. It follows that only a fraction of this tonnage and not the whole of it would have been offered on the market *in* January 1964 (perhaps about 40 000 metric tons, a figure which the applicants consider to be correct, taking into account the monthly reports of the Bundesernährungsministerium). Moreover, if one takes into account (as the applicants have put forward without being contradicted) that the production of home-grown barley is not sufficient to meet German needs but that it is necessary to have recourse to substantial imports (about 400 000 metric tons per year), a fact which tends to produce a rise in the price of barley, and that therefore the imports of maize in January 1964 would have put pressure on the market not only in home-grown barley but also in imported barley, there then results, taking account of the fact that the total sales of home-grown barley are about 2 million metric tons, a 'threatened' portion in respect of which there could be no question of a 'serious disturbance to the market' within the meaning of Article 22.

Let me sum up the factual points.

Even if in the present state of the dispute it is not possible to come to a conclusion on the basis of precise figures, nevertheless the worth of the

1 — Law of 22 December 1926, text published in the BGBl., III, 1963, page 43.

assessment made by the Commission raises so large a number of objections that the application of the protective clause found in Article 22 must be considered as unjustified for reasons relating to the facts. It would at least appear impossible to *approve* it on the basis of the information to hand. Thus if the Court were not to share my point of view on the factual elements, an expert's report would appear to be necessary.

(c) In view of these results I feel at liberty to go over the other points of dispute in the case very rapidly.

(aa) The fact that the Commission did not invite the Member State benefiting from the authorization given to it to enter into negotiations with the exporting state concerned cannot be used as a means of raising objections directed at the legality of the contested decision. The second subparagraph of Article 22 (2) does indeed provide that a Member State which applies protective measures must be prepared to enter into negotiations immediately so as to try to make temporary arrangements which will save the exporters from excessive or avoidable losses. However, the terms of this provision impose at most an obligation on the Member States, and, in truth, it is an obligation which only exists in certain circumstances and with a view to reducing the effects of a protective measure.

In my opinion it is not possible to say that in this case the Commission must act in an almost automatic way. I think that such a statement is all the less tenable when it is certain in fact that neither the exporters nor the Member State of which they are nationals have lodged complaints against the refusal of the Federal Republic to negotiate.

(bb) Again, contrary to the opinion of the applicants, I have nothing in principle against imports' being suspended in the context of Article 22 (1) of Regulation No 19 (which is what happened on 1 October 1963 towards 3 p.m.), nor have I anything against this measure's being given a certain retroactive effect having regard to the date on which the national measure was adopted. This opinion is not affected by the third subparagraph of Article 22 (2) under which the Commission shall take its decision bearing in mind the importance of not increasing the level of protection between Member States, because this provision clearly refers not to the standard rules laid down in Regulation No 19, but to national systems applied before it came into force (let me say by the way that the former German market organizaton for cereals, through its system of sluice-gate prices and quotas, resulted in a higher degree of protection than that achieved in this case by applying the protective clause). My opinion is not contradicted by Article 22 (5) either. This paragraph only envisages a suspension of the grant of import licences in cases where disturbances of the market of a particular kind have arisen after the expiry of the transitional period by reason of imports from third countries. This is because this provision is clearly not intended to establish *for general purposes* particular rules for imports from third countries. It does no more than make it clear that after the expiry of the transitional period protective measures will no longer be available except in relation to third countries. Finally, in so far as Article 18 of Regulation No 19 provides that the imposition of quantitative restrictions or measures having equivalent effect as regards trade between Member States is incompatible with the application of the system of levies within the Community, it does not contradict my opinion. In fact Article 18 governs the normal case,

whereas the protective clause in Article 22 applies when there is a crisis.

Nevertheless I think that measures of such a radical and sweeping nature as calling a halt to imports on a retroactive basis must be limited to extreme cases in which every other measure appears ineffective. After everything I have said on the conditions of fact for applying Article 22, it definitely seems that the present case cannot be described as an emergency situation.

(cc) Having said this, I have now come to the complaint that the Commission violated the principle of proportionality when it authorized the German protective measure. As the applicants rightly point out this principle follows from the words of Article 22 (1) on 'necessary' protective measures, and from the general precept that exceptions from a normal case should always be limited to what is strictly necessary.

To tell the truth I do not see how the observance of this principle in this case had necessarily to lead to averting the supposed threat to the market in maize and in barley in January 1964 by means of agreements between the Einfuhr- und Vorratsstelle and the importers on the maintenance of a given sale price. This threat was inferred in the first place from the fact that no levy was to be made for the import licences requested on 1 October 1963. Agreements of this kind are in fact an unusual way of proceeding from the point of view of administrative practice. Moreover, the effective guarantee that they will be kept, upon which their preventive value ultimately depends, could give rise to difficulties.

However, according to the view which we are able to form of the economic situation, one cannot rule out the possibility that other measures, less radical than a halt to imports, such as, for example, sharing out the import licences applied for, or purchases of maize by the Vorratsstelle would have been sufficient to prevent the risk that the market might be disturbed.

Thus it is possible to see an additional reason for annulling the Commission's decision in the choice of means adopted for applying the protective measure and in the definition of its scope. I have limited myself to giving a brief view of this here.

3. *Misuse of powers*

After all that, it only remains to say a word about the complaint of misuse of powers.

In my opinion this complaint cannot be supported in so far as it is argued that the Commission wished to cover up a fault on the part of the German administrative departments which are said to have wrongly interpreted the decision of the Commission fixing the free-at-frontier price from I to 6 October 1963. As we have learned during the proceedings, the German authorities did not commit such a mistake. On the contrary the dash appearing in the decision of the Commission as regards imports of maize from France in fact means an exemption from levy, and not a refusal to grant import licences exempt from levy.

Furthermore the proceedings have not succeeded in corroborating the idea that in adopting its decision the Commission had ulterior motives in mind — for example, defending the interests of the German revenue authorities, avoiding the proper rectification of an error or protecting itself against some action by the German authorities. The existence of such an intention could only be presumed if the conditions required for applying the protective clause were *obviously* not present, a proposition for which the arguments put forward do not allow any support.

For this reason this submission cannot be relevant.

III — Summary and conclusion

Finally let me sum up:

In my opinion even a thorough discussion of the subject-matter of the dispute cannot lead to holding that the contested measure is of direct concern to applicants. For this reason I propose that their cases be dismissed as inadmissible. Such is my main conclusion.

Should the Court not follow me on this point, the applicants should be upheld as to substance, since the conditions required for the adoption of protective measures were not present. This matter would at least have to be elucidated by means of an expert's report before it would be possible to give judgment *in favour of the Commission.*

Since my main conclusion is that the applications must be dismissed as inadmissible, the applicants should bear the costs.

ORDER OF THE COURT
25 JUNE 1964[1]

In Joined Cases

106/63

ALFRED TOEPFER, a limited partnership, whose registered office is at Hamburg, represented by August Schultz, its special commercial agent,

and 107/63

GETREIDE-IMPORT GESELLSCHAFT, a limited company, whose registered office is at Duisburg, represented by its managers Wilhelm Specht and Wilhelm Breder, assisted by Walter Hempel of the Hamburg Bar and Mr Redeker of the Bonn Bar (for Case 107/63 only), both with an address for service in Luxembourg at the Chambers of Georges Reuter, avocat-avoué, 7 avenue de l'Arsenal,

applicants,

v

1 — Language of the Case: German.