OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 9 DECEMBER 1975 [1]

Mr President,
Members of the Court,

To counteract rising prices on the domestic market the Italian Government on 24 July 1973 issued Decree-law No 427 which on 4 August 1973 became Law No 496. As a result the prices of producers, wholesalers and retailers of certain important foods, including pasta products from durum wheat, were temporarily frozen at the level at which they were on 16 July 1973 and increases were allowed only in December 1973 and September 1974. On the other hand the said Law provided that the Italian State intervention agency for agricultural products, the AIMA, could with ministerial consent intervene to control the Italian cereal market by purchases, storing and sale, the conditions for the sale on the domestic market being determined by an interministerial committee.

In application of these provisions the AIMA purchases on the world market as from September 1973 considerable quantities of durum wheat at an average price of Lit. 18 500 per 50 kg. The greater part of this durum wheat was sold with the consent of the Interministerial Committee in various stages between September 1973 and April 1975 to Italian manufacturers of semolina and pasta. The prices lay between Lit. 11 000, 13 000 and 13 600 per 50 kg, whereas the price on the Italian market at the period in question lay between Lit. 11 500, 18 500 or even 20 000 per 50 kg.

The sales by the AIMA brought about a sudden fall in the price of the remaining stocks of durum wheat held by operators on the Italian market during the period from January 1974 to January 1975, particularly in Foggia which is the most important market centre in Italy for the durum wheat trade; this fall was so sharp that at certain times durum wheat was not even quoted.

The plaintiff in the main action, Mr Carmine Russo, a durum wheat producer in the commune of Castelluccio dei Sauri submits that he could aim at obtaining a price of only Lit. 17 000 per quintal in January 1975 for 50 quintals of durum wheat, although under the system of the common organization of the market he was entitled — and what is more had the right — to expect a price of about Lit. 18 500 per quintal, which the combined effect of the market and Community mechanisms would have produced, if in the meantime the AIMA had not intervened. He therefore brought an action against the AIMA before the Pretore in Bovino under Article 2043 of the Italian Civil Code for compensation for the damage which he had suffered and which he assessed at Lit. 75 000.

By an order dated 2 May 1975 the Pretore stayed the proceedings and referred to the Court of Justice under Article 177 of the EEC Treaty the following questions:

(1) Does the existence of a common organization of the market in cereals allow the Member States to adopt unilateral measures which, through commercial operations in fact carried out by the intervention agency established for the implementation of Regulation No 120/67, result in an alteration of the price-formation machinery laid down in Community provisions and in a distortion of intra-Community trade?

(2) Do the purchase of a quantity of durum wheat by an intervention agency of a Member State on the

1 — Translated from the German.

world market at a given price level and its subsequent resale within a Member State at a lower price than the purchase price and substantially lower than the intervention price, have the effect of a subsidy on the importation of the product in question (in this case durum wheat)?

(3) If the provisions of Regulation No 120/67 of the Council and the detailed rules for their application are directly applicable within the Italian system, do they create for traders in this sector a right that there shall be no disturbance of the normal operation of the machinery provided for by the common organization of the market with regard to the formation of prices — a right which the national courts must directly protect?

(4) If affirmative replies are given to the foregoing questions the Court is asked to rule whether the abovementioned intervention by the Member State is to be considered as an illegal action and consequently constitutes an infringement of the legal position accorded by Community sales to private traders;

(5) If an affirmative reply is given to the foregoing question, does there exist in Community law a principle allowing private persons occupying the legal position described in the provisions of Regulation No 120/67 to be completely and in every way exempt from the harmful pecuniary consequences resulting from the unlawful action of the Member State, in particular as regards the intervention agency?

My opinion on these questions is as follows:

I — The first two questions by the court making the reference are concerned with the compatibility with Community rules of measures of the kind adopted by the Italian Government.

1. It must first of all be remembered that in view of the disturbances in the summer of 1973 on the common market and in particular on the Italian market the Community authorities did not remain inactive.

Although the common organizations of the market were designed to deal with surpluses, the Community authorities are not nevertheless incapable of acting if they are confronted with a shortage.

They first of all used the normal means provided for dealing with market disturbances (Regulation No 2591/69 of the Council of 18 December 1969, OJ, English Special Edition, 1969 (II), p. 571; Regulation No 1968/73 of the Council of 19 July 1973, OJ 1973, L 201, p. 10) such as suspension of the refunds fixed previously, reduction of the period of validity of the export licences as well as cancellation of any refund.

From 1 August 1973 the German, French and Belgian intervention agencies pursuant to Regulation No 2104/73 (OJ L 214 of 2. 8. 1973, p. 2), with the financial support of the Community, placed at the disposal of the AIMA, upon special conditions, 200 000 metric tons of *soft wheat* intended solely for the manufacture of foodstuffs to be supplied to the population concerned. This wheat was then sold through open invitations to tender at the intervention price plus 1·5 u. a.

Then at the request of the French Republic the Commission adopted on 4 August 1973 protective measures applicable to *durum wheat* exported outside the Community (OJ L 210 of 7. 8. 1973, p. 25). With effect from this date no more export licences were granted for this product.

On 14 August 1973 the Commission fixed by Regulation No 2219/73 the levies to be paid for the export of *soft wheat* (OJ L 227 15 August 1973, p. 19).

In addition, at the request of the Italian Republic the Commission on 29 August

1973 issued protective measures applicable to *durum wheat flour,* groats and meal from durum wheat exported from Italy (OJ L 243 of 31. 8. 1973, p. 44): with effect from this date no more licences from Italy were granted in respect of exports from Italy.

The following recital in the latter regulation is particularly instructive.

'Whereas these processed products (of durum wheat) are used (in particular in Italy) in the manufacture of pasta products (macaroni, spaghetti and similar products) for human consumption . . .

Whereas, furthermore, the difference between prices ruling in Italy and prices ruling on the world market is still such as to encourage the export of durum wheat flour, groats and meal from Italy'

Finally, again at the request of the Italian Republic, the Commission issued on 20 September 1973 safeguard measures for the export of *soft wheat,* meal, flour and groats of Italian origin out of the Community. After this date no more export licences were granted in respect of any of these products in so far as they originated in Italy.

After conditions on the world market had become more normal again an import levy was reintroduced.

The safeguard measures relating to the export of *soft wheat,* meal, flour and groats were repealed with effect from 26 November 1974 (Commission Decision of 26 November 1974, OJ L 343 of 21. 12. 1974, p. 11). Finally the safeguard measures relating to the export of *durum wheat* orignating in the Community and also durum wheat meals, flour and groats of Italian origin were repealed with effect from 9 April 1975 (Commission Decision of 9 April 1975, OJ L 89 of 10. 4. 1975, p. 28).

To sum up it may be said that, if the Commission has always refused expressly to grant a subsidy for the import of durum wheat into Italy and was no less firm in its refusal to introduce a countervailing charge requested by the French processing industry, the reason was that in its view the common organization of the market in cereals provides a complete system of protective measures which offers an effective way of dealing with disturbances of the market and also because it believed that it had exhausted all the available methods of intervening provided for by the Community rules.

2. The Italian Government took the view that this parcel of measures was insufficient; during the whole of this period, that is to say, from autumn 1973 to spring 1975, it therefore reinforced the Community measures with national measures.

Since it could not be ruled out — at any rate in theory — that sales of durum wheat at a reduced price through the AIMA were likely to affect the volume and price of exports of Italian pasta products to the other Member States, the Italian Government also adopted certain measures to prevent the quantities sold by the AIMA at reduced prices from being used for purposes other than manufacture of pasta products for the home market.

The problem was discussed several times by the Management Committee for Cereals, and in particular in 9 October 1973 during a meeting of the Special Committee on Agriculture, and the Commission also engaged in cooperation with the competent departments of the Italian Government in a thorough examination of the problem. After the Italian Government at the beginning of 1975 decided to stop sales of durum wheat at reduced prices to Italian manufacturers of pasta products the Commission appears to have shelved the matter but 'left open the question of what view it would take of each of such new measures adopted by the Italian

Government' (answer of 28 July 1975 to written question No 170/75 of Mr de Keersmaeker of 6 June 1975).

I should like to make the following observations on the interpretation which is requested of the Court.

According to a well-established line of cases, of which the judgment of the Court of 23 January 1975 in the case of Galli ([1975] ECR 47) is only a continuation, Member States can no longer intervene in sectors where there is a common organization of the market by adopting unilateral provisions which are an unnecessary repetition of Community rules or even run counter to them.

This applies to the producer and trade prices of durum wheat and durum wheat meal.

The AIMA's selling price was not only below the Italian market price and the Community target price, which moreover only had a theoretical importance, but also below the intervention price.

Although the selling price for durum wheat in the possession of the Italian intervention agency had to correspond to the price on the nearest local market and could in no circumstances be lower than the intervention price applying on this market (Article 3 of the Regulation of the Commission of 27 February 1970, OJ L 47 of 28. 2. 1970, p. 49), the AIMA's selling price was much lower than this minimum price, which amounted in December 1974 to Lit. 591 plus a monthly increase of Lit 383.

In fact the AIMA, by abandoning the role assigned to it under the Community rules destroyed the market, just like a private undertaking, by what can only be described as dumping.

The whole purpose of the Italian rules was to make durum wheat available to consumers at a price lower than the price resulting from normal market forces. By altering the structure of the selling price of the product in question it interfered *directly* with the Community rules. Had it not been for this intervention there might have been someone prepared to buy Mr Russo's durum wheat at more than Lit. 17 000 per 100 kg.

The common organization of the market in durum wheat, which is provided for by Article 40 (2) of the Treaty and was established by Regulation No 120/67, empowers the Community institutions entrusted with the task of running it to adopt the necessary measures to deal with price rises on the Italian market and we have seen that these powers have been exercised by them. These powers override any concurrent powers vested in the Member States.

If concurrent powers of the kind at issue in this case were permitted, that would be tantamount to retaining or reviving an national organization of the market, which by definition has been replaced by a common organization (Article 43 (3) of the Treaty).

Having regard to the interpretation which has been requested it is not necessary to compare the AIMA's measures with the provisions relating to aids (Article 92 to 94 of the Treaty). All that need be done is to point out that they amount to a direct intervention on the durum wheat market which was intended to alter and in fact succeeded in altering price formation in a system of competition, which it was the aim of the Treaty to protect.

II — The last three questions of the Pretore in Bovino are whether there is a principle of Community law according to which individuals can rely on the direct effect of Community regulations so that, of a Member State infringes these regulations, they are 'wholly exempt' from any adverse pecuniary consequences arising out of the conduct of the Member State which is alleged to constitute a breach of duty on the part of that State.

The Court has already had occasion to make certain observations on the conclusions which the national court and the individuals concerned must draw from such a situation.

The Court held (Judgment of 4 April 1968, Case 34/67, *Lück* v *Hauptzollamt Köln-Rheinau* [1968] ECR 251) that Community law 'does not restrict the powers of the competent national courts to apply from among the various procedures available under national law those which are appropriate for the purpose of protecting the individual rights conferred by Community law'. For this reason whenever national law is inconsistent with Community law, the national court must refrain from applying the provisions of national law. In contentious administrative proceedings the court must not apply conflicting national law: the Italian Consiglie dello Stato confirmed this principle in its Decision of 25 September 1974 relating to the milk sector and in doing so even anticipated the Galli judgment.

But what happens when *liability* has been alleged — either before the ordinary courts or the administrative courts — for damage arising out of the application of these provisions which are incompatible with Community law? I believe that — as a general rule — this issue is one for the national courts which must, on the basis of the general obligations imposed upon Member States in Article 5 of the Treaty as regards their national legal order, draw the consequences flowing from their State's membership of the Community.

The Court has held in many cases that individual Member States must adopt the procedural provisions which are necessary for the simultaneous and uniform application of Community law in all Member States. It decided as a preliminary issue in its judgment of 7 February 1973 (Case 39/72, *Commission* v *Italy* [1973] ECR 112) that 'in the face of both a delay in the performance of an obligation and a definite refusal, a judgment by the Court under *Articles 169 and 171* of the Treaty may be of substantive interest as establishing the basis of a responsibility that a Member State *can* incur as a result of its default, as regards other Member States, the Community or *private parties*'.

The idea expressed in this judgment stems logically from the principle that Community law is supreme and directly applicable. It is true that, except in those cases where a direct application is made to the Court to give a ruling on individual rights arising under Community law, it is for the national court in accordance with his national legal system, to assist in the enforcement of those rights. If, however, it is desired to avoid the risk of unequal treatment of individual persons under the national legal system which applies to them, it is necessary to work out principles, as the Court has already done on various occasions, upon which a uniform and as effective as possible a method of enforcing individual rights under Community law can be established.

Therefore I think I can state that there is a principle of Community law according to which the authorities and in particular the courts of Member States are under a duty to safeguard the interests of individuals affected by any breach of provisions of Community law, which establish individual rights, by giving these persons direct and immediate protection (cf; Judgment of 19 December 1968 in Case 13/68, *S.p.A. Salgoil* v *Italian Ministry for Foreign Trade* ([1968] ECR 453). In such circumstances, when the other prerequisites under the particular national law are present, a claim for damages may lie against the Member State which has not fulfilled its obligations under the Treaty.

III — To sum up I therefore submit that the questions referred by the Pretore in Bovino be answered as follows:

1. The existence of a common organization of the market in cereals precludes the adoption by a Member State of unilateral measures which lead to an alteration of the rules on prices provided for by the organization of the market.

2. The provisions of Regulation No 120/67 of the Council and the provisions adopted in implementation of that regulation on the subject of prices, create individual rights, in particular for producers.

3. The liability of a Member State for the consequences flowing from an infringement of Community law also arises out of the obligation to provide effective protection of these rights, provided that the other prerequisites under national law are present.