In Case 52/76

Reference to the Court under Article 177 of the EEC Treaty by the Pretura di Cittadella for a preliminary ruling in the action pending before that Court between

LUIGI BENEDETTI

and

MUNARI F.LLI S.A.S.

on the interpretation of the provisions of Regulations No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ English Special Edition 1967, p. 33), No 132/67/EEC of the Council of 13 June 1967 laying down general rules for intervention on the market in cereals (OJ English Special Edition 1967, p. 73) and No 376/70/EEC of the Commission of 27 February 1970 laying down the procedure and conditions for the disposal of cereals held by intervention agencies (OJ English Special Edition 1970 (I), p. 126).

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, Presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

A — Regulation No 120/67/EEC of the Council of 13 June 1967 (OJ English Special Edition 1967, p. 33) established the common organization of the market in cereals (See currently Regulation (EEC) No 2727/75 of the Council, of 29 October 1975, OJ L 281 of 1. 11. 1975, p. 1). Article 7 of that regulation provides:

'1. Throughout the marketing year the intervention agencies designated by Member States shall be obliged to buy in cereals mentioned in Article 4 which are offered to them and have been harvested in the Community, provided that the offers comply with conditions, in particular in respect of quality and quantity, to be determined in accordance with paragraph 5.

2. The intervention agencies shall buy in at the intervention price ruling for the market centre at which the cereal is offered, under conditions determined in accordance with paragraphs 4 and 5. If the quality of the cereal is different from the standard quality for which the intervention price had been fixed, the intervention price shall be adjusted in accordance with scales of price increases and reductions. These scales may also include special option price increases in respect of barley of brewery quality and, in certain regions, in respect of rye of bread-making quality.

3. Under conditions to be laid down in accordance with paragraphs 4 and 5, the intervention agencies:
   — shall offer for sale, for export to third countries or for supply to the internal market, the product bought in under the provisions of paragraph 1;
   — may likewise offer for sale for the same purpose common wheat and also rye of bread-making quality in respect of which the special price increase has been granted, after having rendered them unfit for human consumption by denaturing.

   They may also grant a denaturing premium for common wheat.

4. The Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission, shall adopt general rules governing intervention and denaturing.

5. Detailed rules for the application of this Article shall be adopted in accordance with the procedure laid down in Article 26, in particular as regards:
   — the minimum quality and quantity required for intervention in respect of each cereal;
   — the scales of price increases and reductions applicable to intervention;
   — the procedures and conditions for taking-over by the intervention agencies;
   — the procedures and conditions for disposal of produce by the intervention agencies;
   — the conditions for granting denaturing premiums and the amount thereof.'

On the basis of the abovementioned paragraph 4, the Council adopted Regulation No 132/67/EEC of 13 June 1967 laying down general rules for intervention on the market in cereals (OJ English Special Edition 1967, p. 73) (Currently Regulation (EEC) No 2738/75 of the Council of 29 October 1975, OJ L 281 of 1. 11. 1975, p. 49) Article 3 of which states:

'1. Cereals held by the intervention agency shall be disposed of by invitation to tender:
   (a) with a view to their being put back on the market on the basis of price conditions which are determined before the beginning of the marketing year, and are such as will not cause a deterioration of the market;
   (b) with a view to export on the basis of price conditions to be

determined case by case according to market trends and requirements.

2. The terms of the invitation to tender shall ensure equality of access and treatment to all persons concerned irrespective of the place of their establishment within the Community.
3. If the tenders submitted do not reach the actual market value, the invitation to tender shall be cancelled.'

On the basis of Article 7(5) of Regulation No 120/67/EEC the Commission adopted Regulation No 376/70 of 27 February 1970 laying down the procedure and conditions for the disposal of cereals held by intervention agencies (OJ English Special Edition 1970 (I), p. 126). This regulation was supplemented by Regulation (EEC) No 935/70 of the Commission which adds the following paragraph to Article 3 of Regulation No 376/70:

'In exceptional cases and at the request of a Member State, it may be decided in accordance with the procedure laid down in Article 26 of Regulation No 120/67/EEC that the intervention agency of that Member State should be authorized to restrict the invitation to tender to use for specified purposes.

In this case, a tender shall not be valid unless the tenderer undertakes to use the cereals solely for the purpose specified in the invitation to tender.

The competent authority of the Member State shall verify that the cereals are so used.'

B — Luigi Benedetti, the owner of a flour mill, brought an action before the Pretura di Cittadella against the undertaking Munari F.lli s.a.s. to obtain damages in respect of loss which he claimed to have suffered as a result of sales of certain quantities of flour, carried out by the latter undertaking, at a price below the market price.

After entering an appearance Munari did not dispute the facts alleged, but imputed all liability for any loss to the AIMA (Azienda di Stato per gli interventi sul mercato agricolo) (State Corporation for Intervention on the Agricultural Market) on the ground that the AIMA sold common wheat at a price below the market price.

By an order of 27 April 1976, the Pretura di Cittadella authorized the institution of proceedings against the AIMA and decided to stay the proceedings and to ask the Court of Justice of the European Communities for a preliminary ruling on the following questions, pursuant to Article 177 of the EEC Treaty:

1. Does Community legislation on the common market in cereals authorize individual intervention agencies, and in particular the AIMA, to take a unilateral decision regarding the sale of the agricultural products and, in particular, of the wheat which they hold, by methods other than the system of tenders and invitations to tender provided for under Article 3 of Regulation No 132/67/EEC and by Regulation No 376/70/EEC?
   In any event, does such conduct involve a breach of the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the Treaty of Rome?
2. Does Community legislation on the common market in cereals authorize individual intervention agencies and, in particular, the AIMA, to take a unilateral decision regarding the sale of the products, and in particular, of the wheat which they hold, at prices other than those provided for under Article 3 of Regulation No 376/70/EEC?
   In any event, does such conduct involve a breach of the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the Treaty of Rome?
3. Does the conduct of an interventiom agency in availing itself of finance from institutions of the State to

purchase cereals on conditions other than those provided for by Community agricultural legislation in the sector concerned and in subsequently reselling them at prices lower than the minima laid down by Regulation No 376/70/EEC constitute State aid to undertakings within the meaning of Articles 92 to 94 of the EEC Treaty and Article 22 of Regulation No 120/67/EEC?
In any event, does such conduct involve a breach of the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the Treaty of Rome?

4. Does an undertaking endowed with substantial financial resources, which enable it to operate on the market without taking account of the actions and reactions of competitors, constitute an undertaking in a dominant position within the meaning of Articles 86 and 90 of the Treaty and of Regulation No 26/62/EEC, even when such undertaking is an intervention agency within the meaning of Regulation No 120/67/EEC?
5. Again, within the meaning of Article 90 of the Treaty, does the conduct of an undertaking which infringes a Community rule designed to avoid distortions of competition within the territory of the Community constitute abuse of a dominant position?
6. If the reply to Questions 1 and 2 is in the negative, and to Questions 3, 4 and 5 is in the affirmative, is the intervention agency obliged to compensate for the damage which results from its conduct in breach of the Community legislation involved in the foregoing questions?
7. What force does the interpretation placed by the Court of Justice Community law have for the court dealing with the substance of the case? In other words, is the 'ruling' of the Court of Justice binding on the court dealing with the substance of the case in the same way as a court dealing with the substance of a case is bound by a 'point of law' laid down by the Corte di Cassazione?

Subsequently, the 'Federazione Industriali del Veneto', the 'Comitato di Molini Emiliano-Romagnoli', the 'Comitato di Molini Lombardi' and the 'Comitato di Molini Piemontesi' intervened in the case before the Pretura di Cittadella in support of the plaintiff's argument.

The order for reference was lodged at the Court Registry on 25 June 1976.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were submitted by the plaintiff and the interveners in the main action, represented by Giovanni Maria Ubertazzi and Fausto Capelli, Advocates of Milan, by the Government of the Italian Republic, represented by Ambassador Adolfo Maresca, assisted by Arturo Marzano, Avvocato dello Stato and by the Commission of the European Communities, represented by its Legal Advisor Cesare Maestripieri, acting as Agent.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General, the Court decided to open the oral procedure without any preparatory enquiry.

However, the parties to the main action, the Italian Government and the Commission were requested by the Court to provide details of the quantities of cereals offered at reduced prices by the AIMA as well as of the precise methods or conditions for the disposal of the cereals in dispute.

II — Summary of the written observations submitted to the Court

The plaintiff in the main action and the interveners state that the disputed

activities of the AIMA involving the purchase of cereals and the sale thereof to processing undertakings come within the framework of the Community rules on agriculture. Article 38 of the Treaty indeed refers to trade in agricultural products, and the basic Regulation No 120/67/EEC states that the common organization of the market in cereals shall comprise a trading system.

The cereals sector was organized as a single market, subject in its entirety to the economic policy measures and the regulations adopted by the Community institutions. The principles set forth in the case-law of the Court of Justice, in particular in the judgment of 30 January 1974 in Case 159/73 *Hannoversche Zucker* v *Hauptzollamt Hannover* [1974] ECR 121, are designed to prohibit the rules for an agricultural market from being corrected or completed by any internal rules, except in exercise of powers delegated by the Community institutions. Likewise, when Community institutions have authority to administer the market under consideration, that fact in itself excludes any parallel power of administering the market on the part of the Member States. This exclusive jurisdiction of the Community institutions also extends to measures concerning the conjunctural policy, as emerges from the judgment delivered on 24 October 1973 in Case 9/73 *Schlüter* v *Hauptzollamt Lörrach* [1973] ECR 1135 in regard to compensatory amounts, as well as from the judgment of 23 January 1975 in Case 31/74 *Galli* [1975] ECR 47.

Even where the economy of a Member State is in special circumstances, anti-conjunctural interventions should be taken by the Community institutions taking into account not only the special situations in the Member State concerned but also the interest of the organized agricultural sector as a whole.

Indeed, any unilateral decision or operation by a Member State disturbs the delicate balance of interests set up by the Community rules.

In the present case, the effect of the intervention of the AIMA is to disturb competition. That intervention is contrary to the objectives of Community economic policy and has negative effects on the free movement of goods. Furthermore, the operations under consideration are contrary to the Community system of competition: considerable quantities of cereals are sold at prices which are not the result of typical market factors, but which are the result solely of a decision leaving those factors aside and taking into account certain aims of a political nature.

Finally, the activities of the AIMA are incompatible with the Community rules on aid: the wheat was distributed at a preferential price to certain processing undertakings in the flour sector to the detriment of other competing undertakings.

The first question

A simple examination of the rules in this area is enough to lead one to the conclusion that the intervention agency has not the least opportunity to evade the obligations imposed upon it by Community legislation. Furthermore, in the judgment delivered in Case 34/70, *Syndicat National du Commerce Exterieur des Céréales and others* v *Office National Interprofessionel des Céréales and Minister for Agriculture* [1970] ECR 1233, the Court has already laid down the very narrow limits allowed to the intervention agencies even where Community legislation grants a certain measure of discretion to the administrative authorities of the Member States. The Court stated that the Member States were not empowered to impose national interpretations liable to compromise the application of Community legislation.

In the present case, the Community legislation applicable does not leave the least margin of discretion to the intervention agencies. The fundamental

aim pursued by that legislation is to prevent discrimination between Community traders (see the last recital of Regulation No 132/67, '... cereals held by intervention agencies should be offered without discriminating between buyers established in the Community ...', as well as Article 3 (2) of the same regulation). The disputed disposals of common wheat were made exclusively to flour mills situated in the province of Padua, but operating on the whole of the Italian market. The disposals are unlawful for that reason alone.

However, the AIMA could have reserved certain quantities of wheat for a definite use, in favour of particular undertakings, by applying the Community provisions in a proper manner (see Regulation No 935/70 quoted above). However, as the AIMA did not seek authorization through the Community institutions, the Italian administration infringed the Community legislation. The discrimination perpetrated operates not only against Community competitors, but also and above all against Italian undertakings in the same sector.

As to the second part of the first question, it is patent that failure to observe the provisions of Community agricultural law automatically entails the infringement of the second subparagraph of Article 40 (3) of the EEC Treaty. It cannot be maintained, by way of objection to this conclusion, that these provisions concern only the activity of the Community institutions: if, in a sector where only the Community institutions have jurisdiction, it is not open to those institutions to adopt any rules contrary to the prohibition on discrimination, *a fortiori* the same course of action cannot be acknowledged to be open to the Member States.

The second question

The selling price must be not less than the market price and, according to Article 3 of Regulation No 376/70/EEC, '... may not, in any circumstances, be lower than the intervention price'.

In the present case, wheat was made available to millers in the province of Padua at Lit 8 200 per 100 kg, whereas the lowest of the intervention prices for Italy was Lit 10 588 per 100 kg. It is patent that the AIMA infringed *in toto* the Community legislation applicable; and the same conclusions would be reached, if one sought to establish the exact prices at which the AIMA should have sold the wheat (under the provisions of Regulation Nos 132/67/EEC and 376/70/EEC): at all events, the AIMA could not have sold the wheat at the price less than Lit 10 726 per 100 kg.

The only answer which can be given to this question is that it is not open to the intervention agency to put the cereals which it holds on the market at a price lower than the minimum price fixed by Community legislation.

As regards the second part of the question, the answer is largely similar to that given to the first question. It should also be added that, in this case, the discrimination also affects agricultural undertakings. Indeed, by putting considerable quantities of wheat on the market at prices lower than the intervention prices, the AIMA was competing with Italian farmers, who were themselves suppliers of the flour mills to which the wheat was sold at preferential prices; on this last point, the facts of the present case appear similar to those of Case 60/75 *Russo* v *AIMA* [1976] ECR 45.

The third question

Even accepting that the first two questions enable the present case to be disposed of, the third question is of very great importance. It seems clear that the intervention in dispute constitutes a patent infringement of Community legislation irrespective of the description

which may be applied to the agency which made that intervention: the same piece of conduct can constitute an infringement of Community provisions contained in different sets of rules adopted to protect different interests.

In the present case, not only the law on agriculture, but also the legislation on aid must be applied, since the agricultural legislation itself provides for the application of the legislation on aid within the framework of the organization of the market (cf. Article 22 of Regulation No 120/67/EEC). Quite apart from the fact that the aid granted in this instance could not in any case be authorized by the Community institutions (criteria laid down in Article 92 of the EEC Treaty), the operations in dispute must be considered as unlawful in the light of the case-law of the Court concerning Article 93 of the EEC Treaty. A precise framework can be traced by means of the interpretation given by the Court in its judgments delivered in Cases 120/73 *Lorenz* v *Germany,* 121/73 *Markmann* v *Germany,* 122/73 *Nordsee* v *Germany* and 141/73 *Lohrey* v *Germany* [1973] ECR 1471, 1495, 1511 and 1527. In particular, the Commission must be notified immediately of every new system of aid. As from the date of notification, the Commission has two months in which to examine the compatibility of the aid with EEC legislation (involving if necessary the contentious procedure). The Member State cannot put the envisaged aid into effect before the expiry of this period.

In consequence of the direct applicability of these provisions, individuals are entitled to bring an action before the courts: (a) to obtain a declaration of the illegality of aids granted in breach of the rules referred to; (b) to seek the suspension of that grant; and (c) to obtain compensation for damage suffered.

In the present case, since the Commission was not previously notified of the proposed aid, the operations of the AIMA must be considered as entirely illegal.

In this context as well, it is necessary to see whether there is any incompatibility with the second subparagraph of Article 40 (3) of the Treaty: since the purpose of all the Community legislation is to enable trade to follow a normal course within the framework of the agricultural legislation, all provisions should comply with the principle of non-discrimination.

The fourth and fifth questions

Having been established to perform the functions and carry on the activity of an intervention agency as laid down by the Community regulations, the AIMA can be described as an undertaking within the meaning of Articles 85, 86 and 90 of the Treaty and Article 1 of Regulation No 26/62.

By virtue of its terms of reference, the State undertaking carries on its activities on a professional and not merely episodic or occasional basis. It has all the characteristics of an undertaking, under both Community law and national law. This observation is not contradicted by the fact that the AIMA is also an intervention agency, or by the fact that sometimes it carries on its activity for no particular pecuniary gain. The aim of pecuniary gain does not appear to constitute an essential part of the concept of an undertaking within the meaning of the Community rules on competition (cf. the Commission's decision of 25 June 1969 — JO L 168 of 10. 7. 1969, p. 22). Similarly in internal law, it is enough for an organization to be described as an undertaking if it carries on an objectively commercial activity on a professional basis and according to the criteria of profitability.

Finally, both the Community legislation on agriculture and the Italian legal order protect in many ways the principle of profitability in management and the AIMA's interest in making a profit in carrying on its institutional activities.

The AIMA constitutes an undertaking having a dominant position within the meaning of Articles 86 and 90 of the Treaty and Article 1 of Regulation No 26 of 4 April 1962 (OJ Special Edition 1959-1962, p. 129). For undertakings to be described as being in a dominant position, it may be enough for them to have 'the power to behave independently without taking into account, to any substantial extent, their competitors, purchasers and suppliers' (see: the EEC Commission's Decision of 17. 12. 1975, 76/353/EEC, *Chiquita,* OJ L 95 of 9. 4. 1976, p. 1). A dominant position can be obtained, first of all, by the holding of substantial financial resources. It can, furthermore, be the reflection of a monopoly in law or in fact or of an oligopolistic position. However, an undertaking can possess a dominant position, even when it does not occupy a large part of the market (see for example the Commission's Decision of 19. 12. 1974, 75/75/EEC, *General Motors Continental,* OJ L 29 of 3. 2. 1975, p. 14).

As regards this case, the State undertaking is endowed with substantial financial resources. The special position of the AIMA on the cereals market has subsequently been reinforced and consolidated by Community regulations. The facts stated are enough to enable the AIMA to determine its conduct on the Italian market in an absolutely independent way; therefore it can be described as an undertaking having a dominant position.

One example of infringement of the rules on competition can be based on Article 86 (c) of the EEC Treaty which is aimed at protecting a definite competition structure in the Community economy. To use the terminology of the national court *a quo,* this first instance of abuse therefore consists in infringing Community rules designed to avoid distortions of competition in the sector at issue.

The fifth question, posing the problem in more general terms, should be answered in the affirmative: once it is accepted that the infringement of the different rules directed at protecting the competition structure of the common market constitutes an abuse of a dominant position, the abuse occurs every time that a rule directed at guaranteeing competition is infringed.

It should be specified that the conduct described above implies an unlawful action within the meaning of Article 86 of the Treaty only when such behaviour is made possible precisely by the dominant position of the undertaking and by the results of using that position.

Finally, the secondary Community legislation mentioned in the first three questions is directed at protecting the competition structure of the common market, which means that the infringement of that legislation implies (if the conditions are fulfilled) an abuse of a dominant position.

The conduct of the AIMA in selling agricultural products by methods other than those provided for by Regulations No 132/67/EEC and No 376/70/EEC constitutes an instance of abuse of a dominant position, especially if it is borne in mind that that conduct was made possible only by the dominant position and by the availability of practically unlimited financial resources derived from State financing.

The intervention agencies should be classified as public undertakings within the meaning of Article 90 (1) of the EEC Treaty. Therefore the rules on competition apply and lay down standards for classifying the conduct of the AIMA. On the contrary, these agencies cannot be described as 'undertakings entrusted with the operation of services of general economic interest' within the meaning of Article 90 (2) of the Treaty. This provision can apply only when the State has 'entrusted'

the operation of a service to a definite undertaking and when that particular task is determined and wholly governed by national law.

The sixth question

The direct applicability of the Community rule gives rise to rights for individuals. Therefore the right to damages for infringement of Community legislation is merely a corollary of the argument developed above.

The seventh question

There can be inferred from the EEC Treaty an answer to the effect that the national court must apply Community law as the Court of Justice has interpreted it. To that end, the national court must, if necessary, refrain from applying any inconsistent internal measure.

First of all Article 177 of the Treaty and its place in the system rule out any possibility of the Court's assuming a consultative role. That article gives the Court jurisdiction to 'give preliminary rulings'. In the absence of any explicit indication to the contrary, the activity of the Court should be understood solely as a jurisdictional activity.

The authority of the Court's decision is confirmed in Article 5 of the EEC Treaty. When dealing with a Community rule which the Court of Justice declares immediately applicable, the national court is obliged to abstain from applying inconsistent internal legislation. This obligation is similar to the obligation which would apply to the Italian court making the reference following a judgment on final appeal laying down a 'point of law'.

The only case in which it would be possible not to follow the judgment of the Court of Justice would be where, *after* the judgment of the Court of Justice, the national court finds that it can settle the case without applying Community law at all. At all events, it cannot be accepted that the court *a quo* is able to make its obligation to apply Community law (as prescribed to it by the Court of Justice) subject to a judgment of the constitutional court explicitly ordering it not to apply the inconsistent internal law.

The Government of the Italian Republic first of all criticizes the procedure followed in the main action, and observes that proceedings for a preliminary ruling were begun without giving a hearing to one of the parties to the action.

The questions referred by the national court are outside the *thema decidendum* of the action — which makes interlocutory proceedings in respect of them superfluous — and they start from a mistaken point of view. It is clear that the parties to the action intend to place the questions referred in the framework of the approach adopted by the Court of Justice in its judgments in Cases 31/74 and 60/75 (cited above). The Italian Government disputes this way of approaching the problem in the present case, but it considers it expedient however to examine the said case-law.

The absolutely negative statements of principle contained in the judgment in Case 31/74 seem to have been attenuated to a certain extent in the judgment in Case 60/75. In particular, the power of Member States which was ruled out *a priori* in the first judgment was practically accepted in the second in so far as it does not affect the objectives and the working of the common organization of the agricultural market. Therefore any question on the substance of the case comes back to an examination of the lawfulness or unlawfulness of the manner in which the State concerned exercised its power.

The Court's approach is based on an assertion of the complete and self-sufficient nature of the common organization of the market, on the

inadmissibility of national interventions not expressly authorized by Community legislation, and in particular on the rules set out in Articles 19, 20 and 27 of Regulation No 120/67.

First of all, it must be pointed out that the Member States are by their nature sovereign, whereas, under the second subparagraph of Article 4 (1) of the EEC Treaty, 'each institution shall act within the limits of the powers conferred upon it by this Treaty'. Therefore it is a question not so much of examining whether the Community institutions can be deemed to have authority to take such steps.

The terms of Articles 19 and 20 of Regulation No 120 make it clear that, in accordance with the rationale and the aims of the system, these provisions are directed at disturbances concerning Community territory in its entirety. The limited scope of these provisions is confirmed by the measures laid down in the Council regulations defining the general rules applicable in the cereals sector in the event of disturbances. These measures apply in all of the territory of the Community and at all events are absolutely unsuited to relieving localized shortages and to guaranteeing the supplies required by a single Member State (or by a part of such State). Indeed, a supply difficulty which concerns only one of the Member States or which concerns a product the consumption of which is particularly high in a single Member State cannot adequately be resolved at the Community level. It should be accepted that it is open to a Member State (pursuant to its budgetary and monetary jurisdiction) to adopt such measures as are necessary to remedy a harmful situation limited to its own national territory. At all events, and without having to apply Article 103 of the EEC Treaty, such interventions should be acknowledged to be lawful, at least in the case of disturbances due to causes different from those envisaged in Community legislation.

In seeking an answer to the present questions referred for a preliminary ruling, reference cannot be made to the principle set forth in the judgment in Case 60/75, since the *thema decidendum* of the main action cannot *a priori* be reduced to an infringement of Community legislation on the methods for the disposal of products held by intervention agencies.

Indeed it is clear that intervention agencies cannot dispose of products, which they hold in their capacity as such, by methods and at prices which are different from those laid down by Community legislation, so that the first part of each of the first two questions referred patently demands an answer in the negative.

As regards the second part of each of these questions it should however be stated that the rule set out in the second subparagraph of Article 40 (3) of the EEC Treaty is directed at the Community legislature, and not at the Member States or at the intervention agencies. However, an answer in these terms would not be germane to the reaching of a decision in the main action.

First of all, it must be pointed out that, in addition to its work as an intervention agency, the AIMA, which is an entity separate from the State and which has an autonomous legal personality, fulfils an autonomous and different supplementary function of a public law nature, which is completely independent of its role within the framework of the common organization of the agricultural markets.

Furthermore, account should be taken of the fact that the question in dispute concerns trade in common wheat flour, in respect of which there is no Community legislation controlling the internal market. Therefore individuals engaged in the manufacture of or trade in flour cannot avail themselves of any situation protected by Community legislation.

The Italian Government stresses that when acting as an intervention agency the AIMA scrupulously observes the relevant Community rules. However, the interventions which form the subject-matter of the main action come within the framework of the performance of an autonomous and separate function having objects which are in the public interest and involving the allocation of the wheat bought and sold in pursuit of these different objects. Thus the problem in this case turns at the most on the question whether the functioning of the common organization of the market is liable to be affected by the measures which a non-profit making agency governed by public law takes in order to carry out the allocation of batches of wheat, within the limits, according to the methods and in accordance with the directives of the government authorities having jurisdiction, with the sole aim of containing the retail price of bread in favour of the poorest categories of consumers. At all events, the question should be answered in the negative.

The Italian Government states that what is involved is conditional disposals of goods acquired for that specific purpose, carried out at political price on the basis of provisions adopted by the public authorities, those disposals being subject to the obligation on the part of the recipients to pass on the flour obtained at fixed price only to bakers holding individual permits (issued by the Prefect), those bakers being bound to use the flour to produce, at a political price, the bread ordinarily bought by the poorest categories of consumers. Moreover the considerable public interest of such interventions is acknowledged by the Community institutions, which have taken several quite similar steps themselves. Furthermore, pursuant the Council Decision of 18 May 1976 (OJ L 136 of 25. 5. 1976, p. 9), the AIMA, in its capacity as an intervention agency, transferred to the Italian Government 100 000 tonnes of common wheat which it (the AIMA) was holding. This wheat was intended for milling with a view to its being made into ordinary bread which could be bought by the most under-privileged consumers.

If the disposals carried out by the AIMA were to be deemed liable to compromise the objectives or the functioning of the common organization of the market, the same conclusion would follow for the similar measures taken by the Community institutions. It would also follow from such a supposition that the lawfulness of legal proceedings and claims for damages against the Community institutions would have to be acknowledged, in particular in respect of the disposals of common wheat decided by the Council. The very absurdity of these consequences shows that the interventions referred cannot be declared to be prohibited by Community legislation or incompatible therewith.

As regards the situation of individuals, the Italian Government refers to the abovementioned judgment in Case 60/75, in which the Court confirms the necessity of drawing a distinction, in respect of directly applicable provisions, between those provisions which are capable of conferring rights on individuals and those which are not.

At all events, in the present case turning on trade in a product which does not fall under any Community legislation controlling the internal market, it is not possible to point to any provision by which an individual could claim to be directly protected, and it is not possible to see how it could be alleged that the rights of an individual have been infringed or that an individual has been prejudiced.

At all events, the argument developed above renders superfluous a detailed examination of the other questions referred.

However, as regards the third question, it should be noted that the interventions in

question do not have the characteristics of possibly unlawful aid to flour mills. First, the limited amounts of the product disposed of and the exceptional nature of the disposals exclude *a priori* the possibility of their having any effect on competition, secondly the flour mills derive no advantage from the lower price of this wheat (fixed selling price for the flour), and finally the disposals by the AIMA constitute a subsidy to the benefit of the most under-privileged consumers and hence a form of aid expressly authorized by Article 92 (2) (a) of the EEC Treaty.

As regards the fourth and fifth questions, the reference to Articles 86 and 90 is also irrelevant to the main action, since one cannot speak of a dominant position or of an abuse of a dominant position when considering an institutional activity carried on exclusively for the promotion of the public interest and patently not for any pecuniary gain.

The sixth question turns on a problem already examined and substantially decided by the Court in the judgment in Case 60/75. In that judgment the Court ruled: 'if an individual producer has suffered damage as a result of the intervention of the Member State in violation of Community law it will be for the State, as regards the injured party, to take the consequences upon itself in the context of provisions of national law relating to the liability of the State'.

The principle laid down by the Court is indeed justified, since a mere statement of principle to the effect that a uniform criterion is required would prove ineffectual in practice by reason of the diversity of the national legal orders.

The last question concerning the effectiveness and the binding force, for the court dealing with the substance of the case, of the interpretation given by the Court of Justice in the context of its exclusive jurisdiction unquestionably calls for an affirmative answer.

As to the first and second questions, the *Commission* observes first that the ultimate destination of the cereals bought in by intervention agencies (see Article 7 (3) of Regulation No 120/67/EEC) is of great importance to the Community, since the disposal of those cereals forms part of the running of the market and since the financial consequences of such disposals are borne entirely by Community finances.

The Commission considers that a reading of the relevant provisions (Article 7 (3) of Regulation No 120/67/EEC; Article 3 of Regulation No 132/67/EEC and Regulation No 376/70/EEC) should suffice to answer the first and second of the questions referred in the negative. Indeed, the disposal by methods other than those laid down by Community legislation of cereals bought in under Article 7 (1) of Regulation No 120/67/EEC contravenes the express provisions of Article 7 (3) of the said regulation. The mandatory nature of the relevant rules is further specified by Article 4 of Regulation No 132/67/EEC which provides:

'The Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission, may establish a selling procedure other than that laid down in Article 3, if special circumstances require'.

Even in the absence of such limitative expressions, all forms or conditions other than those laid down by Community legislation and unilaterally decided upon by intervention agencies must be prohibited if it is desired to avoid depriving the Community regulations of their mandatory normative content and reducing them to the level of mere recommendations.

This conclusion makes examination of the second part of the question superfluous. However, the Commission adds the following observations:

The obligation to carry out invitations to tender is also aimed at ensuring equal treatment for all buyers; use of other procedures could be (depending on the circumstances of the case) a source of discrimination. The principle of non-discrimination defined in Article 40 of the Treaty binds not only the Community legislative authorities, but also the Member States in the exercise of the powers which are entrusted to them in the context of the common agricultural policy. If it is once established that the methods of disposal used by an intervention agency constitute an infringement of specific Community provisions, the consideration that the same conduct likewise constitutes an infringement of the prohibition of discrimination (second subparagraph of Article 40 (3) of the Treaty) is of little importance.

The third question

The Commission points out that it is not proved that the AIMA availed itself 'of finance from institutions of the State to purchase cereals on conditions other than those provided for by Community agricultural legislation in the sector concerned'.

At all events, the statement of facts appearing in the summons makes it possible to start from the hypothesis that a national agency has sold at a price lower than the intervention price the cereals offered to it for intervention. Such a transaction involves a financial loss for that agency and therefore constitutes an aid. In assessing the extent to which the measures in dispute are compatible with the provisions of Article 92 of the EEC Treaty, account should be taken of the objectives of those measures as they can be deduced from the documents on the case. It is probable that the purpose of those measures was to enable bakeries to sell their bread at the price fixed by the State.

If the fact of having granted certain flour mills an advantage which was refused to others adversely affects competition, it remains to be considered whether that fact affected intra-Community trade. However, in order to verify the latter point, details would be required which are in possession of the Italian authorities and which the Commission has not yet been able to obtain. Therefore it is not possible to pronounce a definitive judgment on the extent to which the Italian measures are compatible with Article 92 *et seq.* of the EEC Treaty.

The fourth and fifth questions

Article 90 (1) obviously cannot create obligations wider than those flowing from the Treaty provisions to which it refers. In particular that provision does not prohibit Member States from granting special or exclusive rights to certain undertakings provided that in carrying out their task those undertakings remain subject to the prohibitions of discrimination (see the judgment of the Court in Case 155/73 *Sacchi* [1974] ECR 409). The same prohibitions apply in the case of an undertaking entrusted with the operation of services of general economic interest regarding its conduct, in so far as it is not proved that those prohibitions are incompatible with the performance of its tasks. The Court has already ruled that 'even within the framework of Article 90 the prohibitions of Article 86 have a direct effect and confer on interested parties rights which national courts must safeguard' *(Sacchi).*

In regard to the legal nature of the AIMA, the Commission states that the AIMA is the largest of the intervention agencies in Italy, established by Law No 303 of 13 May 1966. It is an autonomous State undertaking, having its own legal personality. Its first activity was to carry out interventions in the cereals sector, and it was subsequently instructed to carry out interventions in other agricultural sectors.

As far as activities within the framework of Community legislation are concerned,

it is doubtful whether an intervention agency can be considered as a public undertaking. Indeed, it is accepted that organizations which put into effect a mandatory State intervention in the economy must be excluded from that concept. But, even if the AIMA was considered as an undertaking within the meaning of Article 90 of the Treaty, it would be of little importance to determine, in the abstract, whether the measure taken by the State or the conduct of the undertaking can be examined from the point of view of their conformity with Article 90 when such measures or such conduct have already been imputed to the State and acknowledged as constituting an infringement of an obligation enacted by another Community provision.

Accordingly, the Commission considers the examination of the fourth and fifth questions superfluous in view of the answer given to the first two questions.

The sixth question

The issue raised in this question was raised in relation to producers of durum wheat in Case 60/75 (supra). In that case the Court dissociated the finding of an infringement of Community legislation from the compensation which individuals can claim from the defaulting State for damage suffered.

The question now is to determine whether a person carrying on business in the flour-milling sector can base a claim for compensation from the State for the damage which he may have suffered upon the finding of the infringement of Community law.

Referring to its observations submitted in Case 60/75, the Commission states that the system of price formation resulting from the common organization as a whole by definition protects all traders whether they be buyers or sellers of cereals. From this it must be concluded that the rules regarding the common organization of the market confer upon individuals a right that Member States must abstain from adopting measures of the kind applied by the AIMA. In the present case this conclusion applies in favour of those who are likely to buy common wheat from the intervention agency and who were injured by the infringement of the Community provisions. Thus in such a case, it is possible to contemplate an action for compensation against the State in accordance with the provisions of internal law relating to the liability of the public administrative authorities.

The seventh question

The conclusion that the judgment of the Court of Justice is binding on the court dealing with the substance of the case and making the reference can be drawn merely from the literal interpretation of Article 177 ('the Court of Justice shall have jurisdiction to *give [...] rulings* ...', as from the opinion mentioned in the second subparagraph of Article 228 (1)). Furthermore, the object of Article 177 is to ensure the necessary uniform interpretation of Community law. This conclusion is confirmed by the case-law of the Court (Case 29/68 *Milch-, Fett- und Eier-Kontor* v *Hauptzollamt Saarbrücken* [1969] ECR 165), by the views expressed by the Advocates-General (for example Joined Cases 28-30/62 *Da Costa* [1963] ECR 31) as well as by the text-book writers.

Finally, the allusion made by the national court to the judgment of the Corte di Cassazione is an interesting suggestion but is not absolutely correct. On this point the Commission refers to the report of Consigliere Saya 'Rapporti fra Corte di Giustizia europea e Autorità giudiziaria italiana in ordine alla vincolatività dei principi di diritto stabiliti dalla Corte di Giustizia', in Consiglio Superiore della Magistratura, Quaderni di incontri di Studio, 2nd year, No 2, January 1976, pages 108-109.

The Commission proposes that the questions referred be answered as follows:

(a) The action of a Member State in reselling on the Community market common wheat bought at the intervention price, at a price lower than the intervention price and by methods other than those provided for by the relevant Community legislation, is incompatible with the common organization of the market.

(b) The rules regarding the common organization of the market confer upon individuals a right by virtue of which Member States must abstain from adopting measures of the kind referred to above. Should the damage caused to the trader be the result of activity by the Member State contrary to Community law, that State, as regards the injured party, is liable to answer for it in the context of the provisions of national law relating to the liability of the State.

(c) A preliminary ruling by the Court of Justice is binding on national court as regards the interpretation of the Treaty or of any other Community measure and as regards the assessment of the validity of such measure.

III — Oral procedure

The plaintiff and the interveners in the main action, the Government of the Italian Republic and the Commission of the European Communities presented oral argument at the hearing on 24 November 1976.

The Advocate-General presented his opinion at the hearing on 15 December 1976.

Law

1 By an order of 27 April 1976, lodged at the Registry of the Court on 25 June 1976, the Pretura di Cittadella referred to the Court under Article 177 of the EEC Treaty a series of questions essentially concerning the conduct of the Azienda di Stato per gli interventi sul mercato agricolo (AIMA) (State Cooperative for Intervention on the Agricultural Market) in relation to various provisions of Community law.

2/3 These questions are raised within the framework of an action between the flour-milling undertaking Luigi Benedetti, the plaintiff in the main action, and the undertaking Munari F.lli, for damages in respect of loss which is said to have been suffered by the former as a result of unfair competition on the part of the latter undertaking in selling certain quantities of flour at a price below the market price. The defendant in the main action did not dispute these sales, but imputed all liability for any loss to the AIMA on the ground that the AIMA sold the defendant common wheat at prices below the market price.

4 By the beforementioned order of 27 April 1976, the Pretura authorized the institution of proceedings against the AIMA, and at the same time, thus without waiting for the explanations of the AIMA, referred the abovementioned questions to the Court of Justice for a preliminary ruling.

5 The first and second questions ask whether the Community legislation on the market in cereals authorizes intervention agencies, and in particular the AIMA, to take the unilateral decisions which according to the questions are said to have been taken, and whether such conduct constitutes a breach of the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the Treaty.

6 The third question asks whether the alleged conduct of the AIMA constitutes a State aid within the meaning of Articles 92 to 94 of the Treaty and Article 22 of Regulation No 120/67/EEC of the Council of 13 June 1967, on the common organization of the market in cereals (OJ English Special Edition 1967, p. 33).

7 The fourth and fifth questions ask whether an undertaking endowed with substantial financial resources, which enable it to operate on the market without taking account of the actions and reactions of competitors, constitutes an undertaking in a dominant position within the meaning of Articles 86 and 90 of the Treaty and of Regulation No 26/62/EEC, of 4 April 1962 (OJ English Special Edition 1959-1962, p. 129) — even if that undertaking is an intervention agency — and whether certain conduct on the part of such an undertaking constitutes abuse of a dominant position.

8 The sixth question is subject to questions one and two being answered in the negative and questions three, four and five in the affirmative and it asks whether the intervention agency is obliged to compensate for damage resulting from its conduct.

9 Finally, the seventh question concerns the force of the interpretation given by the Court of Justice.

10 In the absence of accurate information relating to the nature of the alleged activities of the AIMA and the way in which they were carried out, it must be

stated that, having to limit itself in the exercise of the powers conferred by Article 177 to giving an interpretation of the provisions of Community law, the Court cannot itself assess or classify those activities or the provisions of national law relating thereto.

11 Moreover, although the additional information which the Court requested from the Italian Government, the AIMA and the Commission in order the better to understand the terms of the questions referred to it does not remove all doubt as to the compatibility with Community law of the AIMA's conduct, none the less that information does not confirm in certain essentials the presentation of that conduct which, as appears from the documents on the case, was adopted by the national court from the allegations of parties to the main action.

12 Finally, in view of the fact that it is not for the Court to assess the relevance of the questions referred under Article 177 to the reaching of a decision in the main action, it is all the more necessary to adhere to the reservation referred to above as those questions concern the conduct of a natural or legal person who was not yet a party to the action and who was not given an opportunity to state his case.

The first and second questions

13 Under these circumstances, the first and second questions should be answered by recalling an earlier decision of the Court. In the judgment of 22 January 1976, given in Case 60/75 *Russo* v *AIMA* [1976] ECR 45, it was held that 'The provisions of Regulation No 120/67 of 13 June 1967 on the common organization of the market in cereals must be interpreted to mean that:

(a) The action of a Member State in purchasing durum wheat on the world market and subsequently reselling it on the Community market at a price lower than the target price is incompatible with the common organization of the markets;

(b) Under Community rules an individual producer may claim that he should not be prevented from obtaining a price approximating to the target price and in any event not lower than the intervention price;

(c) If an individual producer has suffered damage as a result of the intervention of a Member State in violation of Community law it will be for the State, as regards the injured party, to take the consequences upon itself in the context of the provisions of national law relating to the liability of the State.'

14 In connexion with recalling this decision, the attention of the national court should first of all be drawn to the fact that the order for reference and the documents on the case do not provide details which enable the question to be decided whether the conduct of the AIMA which is in question must be classified as 'selling on the Community market'. In particular, the concept cited might not apply if it were proved that in the event what was concerned was the distribution of cereals, authorized in some way by the Community authorities, to a limited circle of flour millers.

15 Secondly, it should be recalled, as was stated in the judgment cited, that since Regulation No 120/67 was intended to shield the development of agricultural production (a concept which does not necessarily include subsequent stages, from bread-making to consumption) from fluctuations in world prices and thereby to ensure a fair standard of living for the agricultural community, interventions by a Member State to arrest the rise in prices of certain foodstuffs made from cereals (at consumer level) are not incompatible with the common organization of the market in so far as they do not jeopardize the objectives or the operation of that organization.

16 Having regard to the absence of details and of detailed findings on matters of fact, the first and second questions should be answered by repeating the first part of the section of the judgment of 22 January 1976 quoted above down to the letter (b).

The third question

17 This question asks whether the conduct of an intervention agency 'in availing itself of finance from institutions of the State' to purchase cereals on conditions other than those provided for by Community legislation and in subsequently reselling them at prices lower than the minima laid down constitutes a State aid to undertakings within the meaning of Articles 92 to 94 of the Treaty and Article 22 of Regulation No 120/67/EEC.

18 Under Article 92 of the Treaty, any State aid which distorts or threatens to distort competition by favouring certain undertakings is incompatible with the common market, 'in so far as it affects trade between Member States'.

19 In the absence of details on the effects to the conduct referred to in the question, it should therefore be answered by recalling the quoted restriction

upon the prohibition laid down by Article 92 (1) and the derogation from that prohibition provided in Article 92 (2).

The fourth and fifth questions

20 As to these questions, which are summarized above, neither the questions themselves nor the documents on the case enable it to be ascertained whether the undertaking referred to in these questions is a public undertaking, within the meaning of Article 90 (1) of the Treaty, or an undertaking entrusted with the operation of services of general economic interest, within the meaning of Article 90 (2).

21 However, this distinction is essential for the purpose of assessing the extent to which the rules of the Treaty on competition are applicable.

22 Owing to this lack of precision, these questions cannot effectively be answered.

The sixth question

23 Since this question is subject to questions one and two being answered in the negative and questions three, four and five in the affirmative, it has by reason of the foregoing considerations lost its purpose.

The seventh question

24 This question asks what force the interpretation placed by the Court of Justice on Community law has for the court dealing with the substance of the case, and whether the 'ruling' of the Court of Justice is binding on that court in the same way as that court is bound by a 'point of law' laid down by the Corte di Cassazione.

25 Within the framework of proceedings under Article 177, it is not for the Court of Justice to interpret national law and assess its effects. Therefore, within that framework, it cannot make a comparison of any kind whatsoever between the effects of the decisions of the national courts and the effects of its own decisions.

26 Under Article 177 the Court of Justice has jurisdiction to 'give (...) rulings' concerning the interpretation 'of this Treaty' and that 'of acts of the institutions of the Community'. It follows that the purpose of a preliminary ruling is to decide a question of law and that that ruling is binding on the national court as to the interpretation of the Community provisions and acts in question.

27 Therefore the question referred should be answered in those terms.

Costs

28 The costs incurred by the Government of the Italian Republic and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, costs are a matter for that court.

On those grounds,

THE COURT

in answer to the questions referred to it by the Pretura di Cittadella by an order of 27 April 1976, hereby rules:

1. **The provisions of Regulation No 120/67 of 13 June 1967 on the common organization of the market in cereals must be interpreted as meaning that the action of a Member State in purchasing wheat on the world market and subsequently reselling it on the Community market at a lower price than the target price is incompatible with the common organization of the market.**

2. **In providing that any aid granted by a Member State or through State resources shall be incompatible with the common market, Article 92 (1) specifies that this prohibition applies only 'in so far as it (the aid) affects trade between Member States' and save as otherwise provided in the Treaty, in particular in the exceptions laid down by Article 92 (2).**

3. The purpose of a preliminary ruling by the Court is to decide a question of law, and that ruling is binding on the national court as to the interpretation of the Community provisions and acts in question.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 2 February 1977.

A. Van Houtte — Registrar

H. Kutscher — President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 15 DECEMBER 1976 [1]

Mr President,
Members of the Court,

By order dated 27 April 1976 the Pretura di Cittadella referred questions for a preliminary ruling relating on the one hand to the powers of the national intervention agencies in the context of the common organization of the market for cereals and on the other hand to the prohibition on discrimination in the second paragraph of Article 40 (3), the provisions on aids in Articles 92 to 94 and to Articles 86 and 90 of the EEC Treaty. The questions are as follows:

'1. Does Community legislation on the common market in cereals authorize individual intervention agencies and, in particular, the AIMA, to take a unilateral decision regarding the sale of the agricultural products and, in particular, of the wheat which they hold, by methods other than the system of tenders and invitations to tender provided for under Article 3 of Regulation No 132/67/EEC and by Regulation No 376/70/EEC?
In any event, does such action involve a breach of the prohibition of discrimination contained in the second subparagraph of Article 40 (3) of the Treaty of Rome?
2. Does Community legislation on the common market in cereals authorize individual intervention agencies and, in particular, the AIMA, to take a unilateral decision regarding the sale of the products, and in particular, of the wheat which they hold, at prices other than those provided for under

1 — Translated from the German.