OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 28 NOVEMBER 1984

My Lords,

This is an application made by 25 French associations or cooperatives of potato-producers for the following forms of relief: (1) a declaration that the Community is liable in damages pursuant to the second sentence of Article 215 of the EEC Treaty by reason of the Commission's wrongful failure to act; (2) an order that the Community pay to the applicants 5 million French francs; (3) an order that an expert be appointed to assess the loss suffered by the applicants; (4) an order leaving it to the applicants to fix the definitive amount due by way of compensation after the production of the expert's report; and (5) an order that the defendant pay the costs.

Six of the original 25 applicants failed to submit copies of their statutes or documents conferring authority on counsel to appear for them as they were required to do under Article 37 (5) of the Rules of Procedure, and their applications were accordingly declared inadmissible by an Order of 10 July 1984. The action is carried on by the 19 remaining associations.

The basis of the claim is that in the summer of 1983, large quantities of new potatoes were exported from Greece particularly to the United Kingdom and to the Federal Republic of Germany at very low prices. This seriously affected the market and prevented French producers from selling their new potatoes on the British and German markets at economic prices. As a result the applicants say that the growers were obliged to destroy many of their potatoes and that the applicants lost substantial profits, either by selling at low prices or by not being able to sell at all. It is contended that the Greek producers could only sell so cheaply because they received subsidies from the Greek Government contrary to Community law. The Commission should have taken steps to stop them under one or other of the ways open to it. The Commission deliberately failed to do so, in breach of Article 155 of the EEC Treaty, which requires the Commission to ensure that the provisions of the Treaty are applied, and in breach of its duty to ensure that the principle of equality is observed. Accordingly the Commission is liable in damages to make good the loss suffered by the applicants.

The Commission replies that even though quantities of Greek new potatoes were imported into the United Kingdom and into Germany, they constitute a small percentage of the total imports to those countries and of the total of Community production. The fall in price which occurred was only for a short period in respect of limited quantities and was due to other market forces, in particular to the existence at the beginning of the new potato season of large stocks of ware potatoes from the

1982/1983 season; moreover at the relevant time, Italian potatoes sold at lower prices or similar prices to Greek potatoes which were not in any event of the highest quality. The Commission challenges the applicants' calculations as to the Greek producers' costs and margins. It contends that traders may sell at a loss for a short period rather than not sell at all, that the Greek Government denies that aids were given and says that there existed no national market organisation or internal rules having equivalent effect which affected the competitive position of similar production in another Member State.

Many of the events and facts relied on in this case were considered in Case 114/83 *Société d'Initiatives et de Coopération Agricoles,* Kerisnel, Saint-Pol-de-Léon, *and Société Interprofessionnelle des Producteurs et Expéditeurs de Fruits, Légumes, Bulbes et Fleurs d'Ille-et-Vilaine* v *Commission* (judgment given on 5. 7. 1984) in which the applicants unsuccessfully sought leave to intervene. They are summarized in the Court's judgment and in my Opinion in that case, to which I refer. In the circumstances I do not think that it is necessary to set them out in detail in the present case.

The question has been raised as to whether the action is admissible. It appears that the applicants are producers' associations who receive the produce of their members and sell it, as owners, on the wholesale market. They allege that the fall in prices of new potatoes prevented them from obtaining what would have been due if there had been fair competition on the market and that they have therefore suffered a loss. At paragraph 5 of its judgment in *Kerisnel* the Court held: "It cannot be denied that the applicants are entitled to bring an action for compensation, in so far as the action is based on the loss suffered by them in their capacity of dealers in new potatoes." The present applicants seem to me to be in the same position. It follows that the present application is admissible in so far as the action is based on the loss suffered by the applicants as dealers in new potatoes.

In judging the allegation of culpable failure to act, it has to be established whether the Commission was under an obligation to take any measures. The applicants cite six provisions under which they claim the Commission should have taken action. These provisions were also invoked in Case 114/83 *Kerisnel,* and the judgment in that case (which was delivered after the close of the written procedure but before the hearing in the present case) allows the first five of them to be disposed of shortly.

First, the applicants rely on Article 130 of the Greek Act of Accession, which empowers the Commission to authorise the adoption of protective measures on application by a Member State. The Commission did consider requests by the French and British Governments to authorize protective measures, and it rejected both of them, finding that Greek potatoes had not seriously disturbed the market in either country. In paragraph 20 of its decision in *Kerisnel* the Court held that by refusing to authorize the application of protective measures the Commission did not exceed the limits of the margin of discretion accorded to it

for the assessment of economic data. The evidence in the present case, even though some further material is relied on, does not seem to me to justify any other conclusion and I would reject this argument.

Secondly, the applicants rely on Article 131 of the Greek Act of Accession, which requires the Commission to issue recommendations if it finds that dumping is being practised "before the expiry of the period of application of the transitional measures laid down under this Act for each case". In paragraph 25 of its decision in *Kerisnel*, the Court held that this provision did not apply to new potatoes since no transitional measure was laid down for them. This again concludes the point in favour of the Commission.

Thirdly, the applicants rely on Article 3 of Regulation No 17/62, which empowers the Commission to require undertakings to bring infringements of Article 85 of the EEC Treaty to an end. At paragraphs 21-24 of its decision in *Kerisnel*, the Court found that no evidence of an agreement contrary to Article 85 was available to the Commission at the relevant time and that the Commission could not be criticized for failing to adopt any decision under Article 3 of Regulation No 17/62. The position, in my view, is the same in the present case.

Fourthly, the applicants seek to rely on Article 2 (3) of Regulation No 26/62, which relates to the application of Article 85 (1) of the EEC Treaty to agreements in the agricultural sector. The Court does not mention this provision in its judgment in *Kerisnel*, but the Court's finding that there was no evidence of the existence of agreements incompatible with Article 85 of the Treaty means that even if the Commission had found that agreements existed which were not exempted from Article 85 by Article 2 paragraph 1 of the regulation, such finding would be of no assistance to the applicants.

Fifthly, the applicants invoke Article 93 (2) of the EEC Treaty concerning State aids. This is of no assistance to the applicants either. Article 4 of Council Regulation No 26/62 does not apply Article 93 (2) to agricultural products and there is no other provision made pursuant to Article 42 of the EEC Treaty which applies this article to new potatoes, which are not the subject of a common organization of the market.

The sixth and last provision which is relied on is Article 46 of the EEC Treaty. This article, upon which the applicants' oral argument concentrated, provides: "Where in a Member State a product is subject to a national market organization or to internal rules having equivalent effect which affect the competitive position of similar production in another Member State, a countervailing charge shall be applied by Member States to imports of this product coming from the Member State where such organization or rules exist, unless that State applies a countervailing charge on export. The Commission shall fix the amount of these charges at the level

required to redress the balance; it may also authorize other measures, the conditions and details of which it shall determine."

When proceedings were commenced in the present case there were still some doubts as to whether Article 46 applied after the end of the transitional period. During the course of the written procedure, the Court on 21 February 1984 delivered its judgment in Case 337/82 *St. Nikolaus Brennerei und Likörfabrik* v *Hauptzollamt Krefeld*, which made it clear that Article 46 can be applied after the end of the transitional period to products (such as new potatoes) which are not yet subject to a common organization of the market.

The question next arises whether Article 46 only comes into play if there is an application by a Member State. The Court did not rule on this point in its judgment in *Kerisnel*. Article 46 does not expressly make the exercise of the Commission's powers dependent on an application being made but, as I said in my Opinion in *Kerisnel*, it seems to me that this is implied by the wording of Article 46. It states that the countervailing charge "shall be applied by Member States" and that the Commission "shall fix" the amount of the charge, from which it follows that the Member States must apply to the Commission for it to fix the charge they wish to apply. In the absence of such application, no countervailing charge could be applied because the Member States cannot fix its amount unilaterally. If this interpretation is correct, the Commission was not bound to act because it was not asked by a Member State to apply Article 46.

Counsel for the Commission said, however, that in the events leading up to the present case the Commission did not take a formalistic approach and, when it received the requests for protective measures under Article 130 of the Greek Act of Accession, it also examined the possibility of action under Article 46 of the EEC Treaty. The same factors which decided it against the application of protective measures under Article 130 of the Greek Act of Accession also led it to consider that Article 46 of the EEC Treaty was not applicable. This approach finds support in the judgment in *Kerisnel*, particularly at paragraph 29 where, after referring back to its detailed analysis of the market conditions relevant for the adoption of protective measures, the Court concluded that the balance of competition with which Article 46 is concerned did not appear to be so jeopardised as to justify the introduction of countervailing charges under that article.

The Court held at paragraph 16 of its decision in *Kerisnel* that the Commission was justified in concluding that, even if their price was below that of competing products, the Greek potatoes, by reason of their small quantities, could not have given rise to a general downward movement during the period up to 20 June 1983 (the date of the British Government's request for protective measures). For the period after 20 June 1983, the Court held (at paragraphs 18 and 20 of its decision) that the Commission was entitled to take the view that, even if a drop in prices could be foreseen, it could not be attributed to the relatively limited quantities of imports of Greek potatoes. This analysis covers the British market but not the German market, on which the Court has

had less evidence. Nevertheless, on the evidence available, similar considerations appear to apply to the German market. Thus the Commission's contention that the difficult marketing conditions for new potatoes in 1983 were primarily due to the large stocks of ware potatoes from the previous autumn, is borne out by the trend of prices on the Munich market. The Commission has produced figures showing that when Greek new potatoes first came on to the Munich market on 26 May 1983, new potatoes from Naples (which have the largest share of the German market) had already been falling sharply in price since 12 May 1983, dropping from DM 78 to DM 44. Furthermore the Commission has also produced figures according to which Greek exports of new potatoes accounted for 5% of German imports and 12.6% of British imports in 1983. If it is correct to hold that the quantities imported from Greece were too small to upset the British market, where they accounted for 12.6% of imports, the same would appear to apply *a fortiori* to the German market, where they accounted for only 5% of imports.

For this reason, in addition to the reasons I gave in my Opinion in *Kerisnel*, it seems to me that, if resort to Article 46 does not require an application to be made first by a Member State, it has not been shown that the Commission was obliged to fix a countervailing charge under Article 46.

In my view, it has accordingly not been shown here that the Commission was under any obligation to adopt measures under any of the provisions relied on by the applicants; on the evidence available and arguments adduced in this case, there was no wrongful failure to act on which the applicants can rely to support their claim for damages.

Accordingly it is my opinion that the action should be dismissed and that the applicants should be ordered to pay the Commission's costs.