OPINION OF ADVOCATE GENERAL POIARES MADURO delivered on 7 September 2006 [1]

1. It is clear from settled case-law that the Community's non-contractual liability is dependent on the coincidence of three cumulative conditions, namely unlawful conduct on the part of the Community, actual and certain damage and a causal link between the unlawful conduct and the damage alleged. [2]

The present appeal concerns the way in which the reality of the damage caused to recipients of Community aid can be assessed where the Commission enjoys a degree of discretion in fixing the amount of that aid.

I — Background to the appeal

A — *Law and facts*

2. By a judgment of 17 March 2005 in Case T-285/03 *Agraz and Others* v *Commission* [2005] ECR II-1063 ('the judgment under appeal'), the Court of First Instance of the European Communities dismissed the action to establish liability brought by companies in the tomato sector on the grounds that, although the Commission of the European Communities had engaged in unlawful conduct of such a kind as to involve the liability of the Community by applying the Community system of production aid, the damage alleged by the applicants was not certain.

3. Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organisation of the markets in processed fruit and vegetable products (OJ 1996 L 297, p. 29, 'the basic regulation') introduces a system of production aid for processed tomato products. Under Article 2 of that regulation that aid is granted to processors who have paid producers a price not less than the minimum price laid down by the Commission.

1 — Original language: Portuguese.

2 — See, in particular, Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 9, and Case T-99/98 *Hameico Stuttgart and Others* v *Council and Commission* [2003] ECR II-2195, paragraph 67.

4. The amount of the aid is fixed in accordance with Article 4 of the basic regulation, in the version applicable to the present case:

'1. The production aid may not exceed the difference between the minimum price paid to the producer in the Community and the price of the raw material in the main producing and exporting third countries.

2. The amount of production aid shall be so fixed as to enable the Community product to be disposed of within the limit set in paragraph 1. In establishing the amount of the aid, without prejudice to the application of Article 5, account shall be taken in particular of:

(a) the difference between the price of the raw material in the Community and that obtaining in the major competing third countries;

(b) the amount of the aid fixed or calculated before the reduction provided for in paragraph 10, if applicable, for the previous marketing year;

and

(c) where Community production of a product accounts for a substantial share of the market, trends in the volume of external trade and in the prices obtaining in such trade, where the latter criterion results in a reduction in the amount of the aid.'

5. In order to fix the aid in the processed fruit and vegetable sector for the 2000/01 marketing year the Commission requested the main non-member tomato-producing countries, the United States, Israel, Turkey and for the first time China, to provide it with the necessary information. As the Chinese authorities did not reply to that request the Commission took into account in that calculation only the prices obtaining in the other three countries.

6. On 12 July 2000 the Commission adopted Regulation (EC) No 1519/2000 setting for the 2000/01 marketing year the minimum price and the amount of production aid for processed tomato products (OJ 2000 L 174,

p. 29). The amount of the production aid was fixed at EUR 17.178 per 100 kg of tomato concentrates with a dry weight content of 28% or more but less than 30%. That amount represents a 20.54% reduction in relation to the preceding year.

7. Following the adoption of that regulation, delegations and associations representing producers of processed tomato products from Spain, France, Greece, Italy and Portugal challenged the failure to take the price of Chinese tomatoes into account in fixing the amount of the aid. The Organisation européenne des industries de la conserve de tomates ('the OEICT') and the Associação Portuguesa dos Industriais de Tomate submitted a number of requests to the Commission to adjust the amount of the aid granted. In their view, if Chinese prices, which are significantly lower than those obtaining in the producer countries taken into consideration by the Commission, were taken into account this would lead to an increase in the aid. One of those requests was accompanied by a copy of a contract containing the price paid to a Chinese producer for tomatoes. The Commission, however, stated that it was unable to amend the amount of the aid on the basis of the price specified in a single contract when the Chinese authorities had not confirmed the average price of tomatoes produced in their country.

8. In autumn 2001 the Spanish and Portuguese authorities informed the Commission of the average price for tomatoes paid in marketing years 1999 and 2000 to producers in the province of Xinjiang, who represent approximately 88% of the total Chinese processed tomato production.

9. However, in January 2002 the Commission informed the OEICT that it did not consider it necessary to revise Regulation No 1519/2000 since the amount of the aid had been fixed in conformity with Articles 3 and 4 of the basic regulation. It also stated that it did not appear that the Community tomato industry would suffer as a result of the level of aid fixed since a record processing level had been reached during the 2000/01 marketing year.

B — *The proceedings and the judgment under appeal*

10. On 18 August 2003, some one hundred companies of Spanish, Italian, Greek, French and Portuguese origin operating in the processed tomato products sector lodged at the Registry of the Court of First Instance an action seeking an order that the Commission should compensate them for the damage they had suffered as a result of the method of calculating the production aid provided for by Regulation No 1519/2000.

11. In the judgment under appeal the Court of First Instance found that Regulation No 1519/2000 is unlawful on two counts. First, it is unlawful because of the Commission's failure to take any further action after sending the letter to the Chinese authorities on 4 February asking them about the average price of tomatoes in the 1999/2000 marketing year. That lack of action constituted, in the view of the Court, a serious breach of the principles of a duty of care and of sound administration. Secondly, it is unlawful because Regulation No 1519/2000 takes no account of the Chinese tomato prices in calculating the amount of aid for Community producers of processed tomato products. In the view of the Court, this amounts to failure to comply with the mandatory conditions laid down in the basic regulation, which is capable of engaging the non-contractual liability of the Community.

12. The Court of First Instance dismissed the application, however, finding that the condition that the damage incurred as a result of unlawful conduct must be actual and certain was not satisfied. In paragraphs 72 to 77 of the judgment under appeal the Court held:

'72 The applicants evaluate their loss at the precise difference between the amount of the aid fixed in Regulation No 1519/2000 and that which would have been applied had the Commission taken the Chinese prices into consideration.

73 First of all, it is appropriate to observe that the Chinese prices on which the applicants base their argument are those which they obtained through the Spanish diplomatic services in Beijing. The relevant price was the average price for tomatoes paid to producers in the province of Xinjiang, representing, according to the applicants, approximately 88% of Chinese production of processed tomatoes. Those figures are disputed by the Commission, in that they represent a low average. Nor was the Commission in a position to ascertain whether they were consistent with the provisions of the basic regulation. When evaluating a complex economic situation, the Commission's discretion also applies to the finding of the basic facts ...

74 As the basic regulation confers on the Commission a certain discretion in fixing the amount of the aid, it is impossible to determine with certainty what the impact on the amount of the aid would have been had the price paid to Chinese tomato producers been taken into account. Article 4(1) does not provide that the production aid must be equal to the difference between the minimum price paid to the producer in the Community and the price of the raw material in the main producing and exporting third countries. It merely fixes an upper limit.

75 In that regard, it should be observed that the fact that the Commission may in the past have fixed the amount of the aid at a level which precisely reflected the difference

between the minimum amount paid to the producer in the Community and the price of the raw material in the main producing and exporting third countries did not in any way require it to maintain the aid at that level. It would even be contrary to the letter and purpose of the basic regulation for the Commission not to take account of developments in the situation of international markets and possibly thereby make the disposal of the Community product more difficult.

76 The applicants cannot therefore rely on a right to a maximum aid equivalent to the difference between the minimum price paid to the producer in the Community and the price of the raw material in the main third countries after the Chinese prices had been taken into account.

77 Accordingly, the damage calculated by the applicants and set out in the table in Annex A.27 to the application cannot be certain.'

13. It is on this part of the judgment that the appellants now focus their criticisms. In the appeal they have brought before the Court of Justice they claim that the Court of First Instance was wrong in finding that the damage was not certain. They are therefore seeking a fresh ruling from the Court of Justice and a declaration that the conditions are satisfied in this case for the Community to incur non-contractual liability. As regards granting the appellants the balance of the production aid which should have been paid to them, they propose that the Court should rule on this point or refer the assessment of the damage sustained back to the Court of First Instance.

II — Analysis of the appeal

14. The appellants rely on four pleas in support of their appeal. The first alleges an error of law in describing the damage as not being certain. The three other pleas concern errors allegedly committed by the Court of First Instance in the conduct of the proceedings and dealing with the case at first instance. By their second plea the appellants criticise the Court of First Instance for breaching the *inter partes* principle and the right to be heard. By their third plea they plead distortion of the forms of order sought by the applicants at first instance. The final plea alleges disregard by the Court of First Instance of its duty to adjudicate and decide on the amount of the damage after establishing the unlawfulness of the Commission's conduct.

15. The first plea is divided, into two parts in the appellants' analysis. First, the appellants maintain that the judgment under appeal is based on a failure to have regard to

Community case-law and the principles established by the national judicial orders in relation to non-contractual liability in so far as the Court of First Instance wrongly confused the existence of certain damage with the calculation of the amount of the damage. Second, the Court of First Instance erred, in relation to the recognition of the appellants' right to compensation, by failing to draw the necessary consequences from its findings in relation to the unlawfulness of the Commission's conduct.

16. The appellants' analysis requires a preliminary remark. It appears to be argued in that analysis that the unlawfulness of the Commission's conduct established by the Court of First Instance should automatically have resulted in the latter declaring that the Community was non-contractually liable. That analysis appears to suggest that any unlawfulness that involves Community liability should give rise to a right to compensation. That is not the case, however. Even supposing that unlawfulness of that nature were established, it would still be necessary to determine whether the other two conditions for bringing Community liability into play were met. [3] There are proven irregularities that do not cause damage for which reparation may be granted. This applies, in particular, where the damage alleged is deemed to be 'potential' [4] or to have no causal link to the unlawfulness complained of. [5]

17. In the present case, the failure of the action for damages before the Court of First Instance is due to the lack of certainty of the alleged damage. Community liability must be ruled out where the institution in question enjoys a measure of discretion so that it cannot be shown with certainty that the unlawful conduct has influenced the decision taken. It is that hypothesis which should now be considered.

A — *The error of assessment in the judgment under appeal*

18. There is a case in which it is easy to understand that unlawful conduct, leading to clear and predictable consequences, does not give rise to actual and certain damage. We should recognise that it might be shown that,

3 — See to that effect Case 26/74 *Roquette frères* v *Commission* [1976] ECR 677, paragraph 22.

4 — See, in the context of the ECSC Treaty, Case 10/55 *Mirossevich* v *High Authority* [1954–56] ECR 333 and Case 23/59 *FERAM* v *High Authority* [1959] ECR 245; in the context of the EC Treaty, Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer and Others* v *Commission* [1967] ECR 245 and Joined Cases 56/74 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, paragraph 6.

5 — See, in particular, Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle and Others* v *Council and Commission* [1981] ECR 3211, paragraph 51, and Case T-7/96 *Perillo* v *Commission* [1997] ECR II-1061, paragraphs 41 to 46.

even without the unlawfulness established, the same act should have been adopted, either because the unlawfulness, since it is purely formal or procedural, does not affect the content of that act, [6] or because the institution concerned must in any event, under a mandatory duty, adopt such an act. In such cases, although the error exists it is permissible to consider that no damage has been established. In fact, it seems to me fair not to grant reparation for the consequences of an unlawful act which should in any case have been adopted in essentially the same terms.

19. The present situation is completely different. In this case the Commission has in essence merely stated before the Court of First Instance, and again before the Court of Justice, that by virtue of the discretion it enjoys the possibility cannot be excluded that the aid granted might have been the same as that provided for in Regulation No 1519/2000. It argues that its unlawful conduct cannot therefore be regarded as having caused damage for which reparation may be granted. In my view, there are two reasons which counter this analysis.

20. The first is clear from the case-law of the Court of Justice. It may be, of course, that the fact that the Commission has been granted discretion justifies the hypothetical nature of any damage. Where an applicant for a post or a tenderer for a contract is excluded from entitlement to compete due to an error on the part of the Community, a court generally refuses to compensate for the *loss of opportunity* which results from this for the person concerned. The reason for this is that the person concerned cannot count on any right or legitimate expectation that he will obtain the post or contract in question. [7] In that case, as the Commission has a large area of discretion for awarding the post or the contract, material damage resulting from loss of the profits which would have resulted from obtaining the post or contract appears too uncertain to be deemed to be damage for which reparation may be granted. However, that case-law is applicable only in strictly limited cases of lost opportunities. Except in such cases, the principle is that the fact that the institution in question has been granted discretion does not preclude a finding of reparable damage. [8] In the present case, the appellants are pleading *loss of earnings* as a result of the unlawful grant of aid to which they consider they are entitled. What is at issue is not the discretion which the Commission would have been able to exercise if the unlawful conduct had not taken place but the result of the actual exercise of that discretion. In that case, as the Court has held on a number of occasions, it is necessary simply to ensure that the damage alleged does not go beyond the bounds of the risks inherent in the activities in the sector concerned. [9]

6 — In Case 27/76 *United Brands* v *Commission* [1978] ECR 207, paragraph 286, the Court held in that regard, in the case of a complaint that the Commission's approach in the conduct of competition proceedings was biased, that 'there is nothing on the Court's file to justify the presumption that the contested decision would not have been adopted or would have been different had it not been for these disputed statements which are in themselves regrettable'.

7 — See in particular Case T-13/96 *TEAM* v *Commission* [1998] ECR II-4073, paragraph 76; Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403, paragraph 51; Case T-160/03 *AFCon Management Consultants and Others* v *Commission* [2005] ECR II-981, paragraph 112; and Case T-309/03 *Camós Grau* v *Commission* [2006] ECR II-1173, paragraph 149.

8 — See, in particular, Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraphs 21 and 42.

9 — See to that effect Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 11, and Case 59/83 *Biovilac* v *European Economic Community* [1984] ECR 4057, paragraph 28.

21. The second reason concerns the system. To accept that the discretion of the institution concerned could be involved as a criterion for assessing the reality of damage creates a risk of depriving the action to establish non-contractual liability of a large part of its effect. There would be every reason to fear that the institution challenged would merely demonstrate *generally* a certain amount of freedom of action in order to show that that freedom could have been used productively in order to reach the same outcome as the outcome that caused the alleged damage. This extension of the bases for freedom from liability is all the more unacceptable since an action to establish liability based on Article 288 EC may be used by individuals who, due to the strict conditions for admissibility of the action for annulment provided for by Article 230 EC, have no opportunity to challenge directly the measure which originated the damage they claim to have suffered. It should be remembered in that regard that the Court of Justice has already had occasion to state that 'such actions must be examined in the light of the whole system of legal protection for the individual established by the Treaty'. [10]

22. In those circumstances, the fact that in the case in question and with regard to the fixing of the amount of production aid, the Commission had a certain amount of discretion is not in itself sufficient to deny the certainty of the damage caused by a breach of the rules relating to the method of calculating that aid. The Court of First Instance failed to have regard to the fact that, in this case, it is also important to establish that in circumstances where the irregularity complained of has not been committed the Commission should have maintained the aid at the same level. By basing its analysis on the general acknowledgement that the institution concerned has a certain amount of discretion, without taking care to establish definitely that the irregularity found has had no influence on the solution adopted, I consider the Court of First Instance erred in law.

23. This does not mean, however, that the fact that an institution enjoys discretion is without relevance as regards consideration of an action to establish non-contractual liability on the part of the Community. It is clearly important, but it is important for other reasons. It comes into play first of all in connection with the first condition for incurring liability. Case-law requires that the decisive test in order to establish that there has been a sufficiently serious breach of a rule of law designed to confer rights on individuals is whether the Community institution concerned has manifestly and gravely disregarded the limits on its discretion. [11] It is thus essential at this stage to determine the discretion available to the institution concerned. [12] This is the task which the Court of

10 — Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 27.

11 — See Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 54.

12 — See, to that effect, Case C-198/03 P *Commission* v *CEVA and Pfizer* [2005] ECR I-6357, paragraph 66.

First Instance undertook in paragraphs 42 to 47 of the judgment under appeal. [13]

24. Next, it may also be appropriate to take into account the extent and position of that discretion in the context of the evaluation of the amount of the damage. Thus it is true that although the Commission has a certain amount of discretion in this matter as regards establishing basic facts and fixing the amount of the aid, the appellants could not legitimately expect in any event to obtain the maximum amount of aid, equal to the difference between the minimum price paid to a producer in the Community and the price of the raw material in the main third countries after Chinese prices had been taken into account. This is the sense of the analysis carried out by the Court of First Instance in paragraphs 73 to 76 of the judgment under appeal. In this case, the origin of the damage lies solely in the loss of the amount of aid to which the appellants would have been entitled if the error concerning taking Chinese prices into account had not been committed; however, the corrective factors which the Commission would then have been entitled to apply in order to adjust the amount of the aid would have to have been taken into account. [14]

25. Such an analysis, however, should have been reserved for determining the *extent* of the alleged damage. It cannot enter into consideration in the context of an assessment of the *reality* of the damage. The judgment under appeal contains a certain amount of confusion between these two questions, which are different in nature. The fact that the precise impact of the error committed is difficult to establish because of the different items of information the Commission was at liberty to take into account seems to me to be undeniable. However, that mainly concerns the consideration of the scope of the damage sustained. It was necessary first of all to establish whether damage really existed, that is to say, whether the breach of the rules for calculating the aid had a negative effect on the appellants' situation.

26. It is necessary in an action to establish liability to draw a clear distinction between ascertaining the existence of damage and determining the exact scope of that damage as regards the situation of the persons concerned. Of course, it is possible for damage to prove in practice to be of very limited extent. However, in order for actual and certain damage to be demonstrated, it need only be found that its occurrence is neither purely hypothetical nor solely potential, and that it should give rise to loss that can be assessed. Damage that is certain is not damage that can be precisely calculated; it is damage which must normally result from the conduct of the institution being proceeded against and which may be assessed from the economic point of view. Moreover, it is settled case-law that Article 288 EC 'does not prevent the Court from being asked to

13 — See, for comparison with the judgment under appeal, Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 89.

14 — See point 31 of this Opinion.

declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed'. [15]

B — *Correct description of the damage*

27. It follows from the above that the Court of First Instance must be regarded as having erred in its assessment of whether the damage was certain. That error may lead to the judgment under appeal being set aside unless the operative part appears well founded on other legal grounds. [16] It is therefore necessary to ascertain whether, in the light of the analysis made in the judgment under appeal and the evidence contained in the file, the Court of First Instance was justified in reaching such a conclusion.

28. At first sight, this case is somewhat similar to an earlier case, in which the Court of Justice was moved to dismiss an action to establish liability on the grounds that the alleged losses had not been proven.

29. In *Lesieur Cotelle and Others* v *Commission*, [17] colza seed processors claimed that, as a result of the abolition of monetary compensatory amounts, they had suffered a reduction in the price of their products which was not offset by the aid to which they considered they were entitled. The Court stated that it interpreted the applicants' arguments as meaning in particular that, 'they were misled by the introduction of the system of compensatory amounts into obtaining supplies of seeds of Community origin and requesting corresponding advance fixing of the subsidies, on the assumption that it would be made particularly difficult for them to purchase seed on the world market because of the duty to pay the compensatory amounts; ... because that assumption proved to be mistaken as soon as the compensatory amounts in question were abolished, in the meanwhile they lost the opportunity of obtaining supplies more cheaply on the world market, this being damage for which they consider the Community liable'. [18] In the view of the Court, however, the losses thus claimed were not clearly established. On one hand, the anticipated aid was not directly linked to the existence of the system that was called in question. The introduction of the system of compensatory amounts was not directly intended to protect Community producers but to prevent disturbances in intra-Community trade. [19] On the other hand, it was not clear that the processors would suffer a

15 — Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49, paragraph 14.

16 — See to that effect Case C-30/91 P *Lestelle* v *Commission* [1992] ECR I-3755, paragraph 28.

17 — Joined Cases 67/75 to 85/75 [1976] ECR 391.

18 — Paragraph 20.

19 — Paragraphs 26 and 27.

reduction in the price of their products. On the contrary, the Court held that 'the repeated statement of the [Commission] that the price level in the common market remained unaltered after that abolition has not been seriously contested'. [20]

30. Although it appears to lend itself to a similar interpretation of the arguments of the parties, the present case is based on completely different circumstances. On one hand, the purpose of the system of aid which is alleged to have been wrongly applied in this case is indeed to assist production of certain processed products that 'are of particular importance in the Mediterranean regions of the Community', by protecting it from international competition where production prices are considerably lower. [21] On the other hand, it does not appear to be seriously open to dispute in the present case that the Commission's error of calculation had a negative impact on the appellants' situation. This results, in my view, from two factors clearly established in the analysis carried out by the Court of First Instance.

31. First, it is clear from the basic regulation that the amount of the prices paid to producers in third countries is a fundamental and essential factor in calculating aid. [22] To that effect, the Court of First Instance held, in paragraph 57 of the judgment under appeal, that 'the Commission *was therefore required* to take the Chinese price into account' in calculating the aid to be granted for the year in question. [23] Second, it is clear from the judgment under appeal that a consequence of the Commission's error was that the raw material prices of the main producing countries was overestimated. [24] That price forms part of the basic criterion for calculating the amount of aid, as laid down in Article 4(2)(a) of the basic regulation. The increase in that price leads to a reduction in the difference between the cost of the raw material in the Community and the cost of the raw material of the main competing third countries, and hence a reduction in the actual basis of the amount of the aid. It cannot be excluded, naturally, that a base that has been correctly calculated may also be adjusted on the basis of other criteria, in particular on the basis of the reduction coefficient provided for in Article 4(2)(c). However, it is clear that an erroneous application, in the way indicated, of the basic criterion can, in principle, only have a negative effect on the final determination of the amount of aid.

32. According to consistent case-law, it is for the applicant to provide the Community court with evidence in order to prove the reality and extent of the damage it claims to have suffered. [25] In the present case the appellants have clearly established that determining the correct price of the raw

20 — Paragraph 19.

21 — Second recital in the preamble to the basic regulation.

22 — Fourth recital in the preamble to the basic regulation.

23 — Emphasis added.

24 — The Court of First Instance notes in paragraph 67 of the judgment under appeal that the Commission accepts that if the price of the Chinese raw material had been taken into account that might initially have led to an appreciable reduction in the estimated price of the raw material in the main producing and exporting third countries.

25 — See to that effect Case C-401/96 P *Somaco* v *Commission* [1998] ECR I-2587, paragraph 71.

material should lead to increasing the amount of the aid received. It was therefore for the Commission to demonstrate that, in the circumstances of the present case and in view of all the information at its disposal, that expectation was unjustified. It could not merely maintain, as was the case according to what is stated in paragraph 67 of the judgment under appeal, that by virtue of the discretion afforded it, an increase in aid was not certain. It needed also to establish that maintaining the aid at the level fixed in the contested regulation was compatible with the correct application of the criteria laid down in Article 4(2) of the basic regulation. It appears, however, that such an analysis has not been made in the present case.

33. It follows therefore that the alleged damage should have been considered to be actual and certain.

C — *The Commission's objection*

34. The Commission claims, however, that the damage will only really be demonstrated if it can be established that the objective of the aid, as it results from Article 4(2) of the basic regulation, namely to enable the Community product to be disposed of, has not been achieved. In its view, everything points to the fact that the amount fixed in Regulation No 1519/2000 enabled that objective to be met.

35. That objection can be interpreted in two different ways. Whichever interpretation is adopted, it should be rejected.

36. It seems first of all that the Commission intends by this to challenge the very principle of putting its liability in issue. It seems to consider that the unlawful conduct for which it is criticised did not have any decisive influence on the result of its action, which, it asserts, complied with the objective assigned it in the basic regulation. If that is the meaning of its objection, for that objection to be successful the defendant should have lodged a cross-appeal challenging the assessment of the lawfulness of its conduct by the Court of First Instance. In the absence of such a step, the analysis by the Court of First Instance concluding that unlawful conduct exists that may incur the Community's non-contractual liability must be taken as being final and not open to challenge. The objection is therefore inadmissible.

37. However, the Commission also maintains in that plea that the fact that Community production was in fact disposed of during the marketing year in question, in

accordance with the objective laid down in the basic regulation, demonstrates that Regulation No 1519/2000 did not cause any damage for which reparation might be granted. It quotes in that regard a letter sent to the appellants by the Director-General for Agriculture, dated 7 January 2003, in which he stated: 'I note *a posteriori* that the aid was fixed at a level that does not appear to have penalised the sector. During the 2000/01 marketing year the Community tomato industry achieved a record level of processing for the second year running'.

38. In order to further illustrate the flaw contained in that argument, it is necessary to give a brief summary of the complex organisation set up by the Community in this sector. That organisation is based on a protective mechanism and a system of dual contracts. The protective mechanism is provided for in the basic regulation. It provides that a minimum price to be paid to tomato producers is to be fixed before the beginning of each marketing year, which is normally in the month of July. At the same time, aid is granted to tomato processors who have paid the producers a price that is at least equal to the minimum price. The amount of that price is fixed in such a way that it makes it possible to 'compensate for the difference between the prices paid to producers in the Community and prices paid in third countries'. [26] That mechanism is contained in the system of contracts provided for in Commission Regulation (EC) No 504/97 of 19 March 1997 laying down detailed rules for the application of Regulation No 2201/96. [27] Under that system, 'preliminary' contracts are concluded between tomato processors and tomato producers even before the planting period. The purpose of the system is 'to encourage producers to take account of the real needs of the processing industry and to adjust their areas planted in consequence'. [28] It is important to note that such contracts relate to quantities without indicating the price to be paid. [29] It is only after the minimum price and the production aid have been fixed that 'processing' contracts including the price to be paid are signed on the basis of the earlier contracts. [30]

39. This brief description shows that disposal of Community production relies mainly on the confidence placed by processors in the proper application of the aid mechanisms laid down by the Community. Processors are encouraged, under the system of preliminary contracts, to undertake to dispose of Community production in consideration for aid even before they know the amount of the minimum price and the amount of aid. At the time of making that undertaking, of course, there is no guarantee that the aid will cover all the commercial risks inherent in the operation of purchasing tomatoes in the Community. However, processors must at least have some assurance that the aid will be fixed under lawful conditions, in accordance with the criteria laid down in Article 4(2) of the basic

26 — Fourth recital in the preamble to the basic regulation.

27 — OJ 1997 L 78, p. 14.

28 — Seventh recital in the preamble to Regulation No 504/97.

29 — Article 6(2) of Regulation No 504/97.

30 — Article 7 of Regulation No 504/97.

regulation. By applying the system of aid unlawfully, the Commission contributed to reimposing on the appellants some of the economic risk which they should not have been exposed to by virtue of the system introduced by the Community.

40. That is why it seems to me that the defendant is wrong to rely on compliance with an objective which the appellants are required to meet with the guarantee that they will receive aid if the basic regulation is properly applied. The Commission cannot rely on a result which it has itself placed in jeopardy through improper application of the criteria imposed on it in order to reach it, a result which in any event it could not predict at the time the unlawful conduct complained of was engaged in. This objection is therefore totally unfounded.

III — Outcome of the analysis

41. The appellants' first plea should be declared well founded, and hence the judgment under appeal should be set aside in part. Since the other pleas are directed against the same part of the judgment under appeal, it is not necessary to consider them.

42. Under the first paragraph of Article 61 of the Statute of the Court of Justice, if the appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may then itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

43. As the Court of First Instance did not have the opportunity to assess whether the third condition for the Community to incur liability, the causal link between the unlawful conduct complained of and the reality of the damage, was met, or to rule on the exact nature and extent of the damage suffered by the appellants, the proceedings are not in a state to permit judgment. It is necessary for the Court of First Instance to have sovereign jurisdiction in order to carry out these investigations, which involve complex assessments of facts and data, and to give judgment, if appropriate, on whether the parties should be invited to seek agreement on the amount of compensation for the damage caused. The case should therefore be referred back to the Court of First Instance and the costs reserved.

IV — Conclusion

44. It is clear from all the above considerations that the Court of First Instance erred in law in ruling that the alleged damage was not certain. I therefore propose that the Court of Justice should:

— set aside the judgment of the Court of First Instance of the European Communities of 17 March 2005 in Case T-285/03 *Agraz and Others* v *Commission*, and

— refer the case back to the Court of First Instance.