OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 16 January 1992 *

Mr President,
Members of the Court,

1. In this action based on Article 178 and the second paragraph of Article 215 of the EEC Treaty, Industrie- en Handelsonderneming Vreugdenhil BV (hereinafter referred to as 'Vreugdenhil') seeks compensation for the damage allegedly caused to it by the Commission.

2. The case arises out of the difficulties encountered by Vreugdenhil in reimporting a consignment of 211 275 kg of milk into the Community under the arrangements for 'returned' goods, that is to say free of import duties. The Court has already had to deal with those difficulties in the context of a reference for a preliminary ruling, on which it gave judgment on 29 June 1989. [1]

3. In that judgment, the Court held that the arrangements for 'returned' goods

'were introduced by Council Regulation (EEC) No 754/76 of 25 March 1976 on the customs treatment applicable to goods returned to the customs territory of the Community (...), which permits the reimportation into the Community, free of import duties, of goods which have previously been exported from that territory.

Article 2(1) of that regulation, as applicable at the material time, provides that goods which, at the time of their exportation from the customs territory of the Community, were the subject of customs export formalities with a view to obtaining refunds and other amounts granted on exportation within the framework of the common agricultural policy, could not be considered to be returned goods.

In addition, Commission Regulation (EEC) No 1687/76, which was adopted under the enabling provisions contained in the basic regulation on the common organization of agricultural markets, lays down measures for verifying the use and destination of products from intervention. This regulation was supplemented by Commission Regulation (EEC) No 45/84 through the addition of Article 13a providing that goods from intervention for which a security has been lodged are to be treated as goods for which the customs formalities for obtaining export refunds have been completed. Consequently, those goods are, in principle, excluded from the arrangements for returned goods provided for in Article 2(1)

* Original language: French.

1 — Case 22/88 Vreugdenhil and Another v Minister van Landbouw en Visserij [1989] ECR 2049.

of Council Regulation No 54/76; in special circumstances, however, those arrangements may be applied to them, provided that the security lodged is forfeited or, if it has already been released, an equivalent amount is paid.'

The Court further stated:

'The consignment of milk powder involved in the main proceedings, which came from the stocks held by the intervention agency in the Federal Republic of Germany, had been exported to Jordan pursuant to Commission Regulation (EEC) No 3295/84 of 23 November 1984 on the supply of various lots of skimmed-milk powder as food aid (...). On its arrival in Aqaba, the shipment could no longer be used as food aid because of mould and damaged packaging.

Vreugdenhil then purchased the consignment, first sending it back to the Federal Republic of Germany and then to the Netherlands, where the milk powder was placed in store with Van der Kolk. The two undertakings requested the Netherlands customs authorities in Amersfoort for authorization to re-import the lot in question under the arrangements for returned goods.

By two decisions of 5 and 8 January 1987 the Inspector of Customs and Excise in Amersfoort, on behalf of the competent minister, refused that request and required Van der Kolk to pay an import levy of HFL 848 374.80. The reasons stated for the two decisions were in particular that by virtue of Article 13a of Regulation No 1687/76 the goods in question, coming from intervention, could not be considered to be returned goods within the meaning of Article 2 of Regulation No 754/76 unless an amount equivalent to the security released when they were re-imported was paid. Since no such amount had been paid, the exemption from customs duties for returned goods could not be applied.

Vreugdenhil and Van der Kolk brought an action for the annulment of those decisions before the College van Beroep voor het Bedrijfsleven. They claimed in particular that Article 13a, inserted in Regulation No 1687/76 by Regulation No 45/84, was invalid on the ground that the Commission did not have the power to derogate from the provisions of Council Regulation No 754/76.

The national court decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

"Is Article 13a of Commission Regulation (EEC) No 1687/76, inserted in that regulation by Commission Regulation No 45/84, valid?"' [2]

4. In answer to that question the Court held that Article 13a was invalid on the ground that the Commission could not derive a power to adopt such a provision from its powers of implementation in agricultural matters since the measure in question concerned the arrangements for returned goods and thus customs law, a field exhaustively covered by Council legislation. [3]

2 — Paragraphs 3 to 10.

3 — See paragraphs 21 to 25.

5. As stated in the application, on 29 May 1990 the President of the College van Beroep voor het Bedrijfsleven (Administrative Court of Last Instance in matters of trade and industry) ordered the Netherlands authorities to reimburse the abovementioned levy of HFL 848 374.80. On 15 June 1990 Vreugdenhil requested the Commission to reimburse certain costs entailed by the obligation to pay the levy in issue: first the cost of obtaining a bank guarantee because the Netherlands authorities had agreed to await the outcome of the court proceedings before collecting the levy, provided that Vreugdenhil paid interest on the amount of the levy at the statutory rate applicable in the Netherlands and obtained a bank guarantee and secondly the amount of the interest which it would have received if the amount of the levy had remained in its possession between 7 July 1988 when, in view of the cost of the bank guarantee and the interest to be paid over, Vreugdenhil decided to pay the levy and 25 June 1990 when the levy was reimbursed. It also claimed the expenses of arguing its case before the College van Beroep voor het Bedrijfsleven and the Court of Justice. By letter of 17 July 1990, the Commission refused to acknowledge any responsibility for the alleged damage.

6. The Commission raises an objection of inadmissibility on the ground that the applicant has not shown that proceedings before the national courts could not have provided redress for the alleged damage. In its rejoinder, the Commission raises a second objection of inadmissibility based on the absence of any proof that Vreugdenhil did not pass on to its customer, its insurer or the intervention agency the risk that reimportation might be impossible.

7. The second of those objections may be rejected immediately. That argument concerns, in fact, the actual existence of the damage which Vreugdenhil claims to have suffered and is thus a plea on the substance of the case. Even regarded as a plea on the substance, it appears to be entirely inadmissible inasmuch as the Commission introduced it only in the rejoinder, contrary to Article 42(2) of the Rules of Procedure, and Vreugdenhil was thus unable to answer it in the course of the written procedure. I therefore propose that it should be dismissed immediately.

8. The first objection of inadmissibility refers to the Court's case-law according to which:

'Where an individual considers that he has been injured by the application of a Community legislative measure that he considers illegal, he may, when the implementation of the measure is left to the national authorities, contest the validity of the measure, when it is implemented, before a national court in an action against the national authorities. That court may, or even must, as provided for in Article 177, refer the question of the validity of the Community measure in dispute to the Court of Justice. However, the existence of such a means of redress will be capable of ensuring the effective protection of the individuals concerned only if it may result in making good the alleged damage'. [4]

9. In the Court's case-law, thus, the admissibility of an action for

4 — Case 281/82 Unifrex v Commission and Council [1984] ECR 1969, paragraph 11; see also Case 96/71 Haegeman v Commission [1972] ECR 1005; Case 133/79 Sucrimex v Commission [1980] ECR 1299; and Case 217/81 Interagra v Commission [1982] ECR 2233.

non-contractual liability depends on whether or not the plaintiff could obtain full compensation for the damage in the national courts. [5]

10. Vreugdenhil did first seek redress before the national courts, and the Court of Justice was requested to give a preliminary ruling on the validity of Article 13a of the abovementioned regulation. That procedure made it possible to make good the greater part of the damage which Vreugdenhil considers itself to have suffered. But what the applicant is seeking in the present case is compensation for the 'ancillary' damage. The compensation sought, it must be borne in mind, is for damage which arose partly out of the obligation under which the plaintiff found itself to pay money to third parties, namely the bank which granted the guarantee and the lawyers who looked after the plaintiff's interests, and partly out of the loss of income due to the absence from its assets of a sum wrongly paid to the national authorities.

11. The Court has already referred those difficulties back to be settled by the national courts.

12. In *Roquette* v *Commission,* [6] a case in which the applicant had already obtained a preliminary ruling [7] declaring the charging of monetary compensatory amounts on certain products inconsistent with the basic Council regulation and the amounts wrongly charged had been reimbursed pursuant to a judgment of the Tribunal d'Instance (Local Court), Lille, the Court of Justice held that the part of the application which was based on the second paragraph of Article 215 of the EEC Treaty was inadmissible because:

'Disputes in connection with the reimbursement of amounts collected for the Community are (...) a matter for the national courts and must be settled by them under national law in so far as no provisions of Community law are relevant.

In the absence of provisions of Community law on this point, it is currently for the national authorities, in the case of reimbursement of dues improperly collected, to settle *all ancillary questions relating to such reimbursement, such as any payment of interest.*' [8]

13. However, the Court did in that judgment consider the substance of the question whether the Community might be liable in respect of the separate damage which the applicant claimed to have suffered as a result of adverse effects on conditions of competition. [9]

14. Thus, for the purpose of determining whether the admissibility of an action for damages is dependent on the prior exhaustion of the rights of action available

5 — For a consideration by legal writers, see Joliet, R. *Le droit institutionnel des Communautés européennes, le contentieux,* Liège, 1981, p. 250; Waelbroeck, M., Louis, J.-V., Vignes, D., Dewost, J.-L. and Vandersanden, G. in Mégret, J. *Le droit de la Communauté économique européenne,* Book I, Vol. 10, 1983, p. 280; Vandersanden, G. and Barav, A. *Contentieux communautaire,* Bruylant, Brussels, 1977, p. 316; Boulouis, J. and Chevallier, R.-M. *Grands arrêts de la Cour de justice des Communautés européennes,* Book I, 5th ed., 1991, p. 412 et seq.; Rideau, J. and Charrier, J.-L. *Code de procédures européennes,* Litec, 1990, p. 180.

6 — Case 26/74 Roquette v Commission [1976] ECR 677.

7 — Case 34/74 Roquette v France [1974] ECR 1217.

8 — Paragraphs 11 and 12, emphasis added.

9 — Paragraphs 15 to 25; see in this regard Joliet, R., op. cit., pp. 254 and 255.

under national law, a distinction is drawn in the case-law between damage which is ancillary to the reimbursement of sums improperly collected and damage which is unconnected therewith. Only claims for compensation for the latter may be brought before the Court of Justice.

15. That approach is coherent. If economic operators are to bring proceedings before the national courts against acts of the authorities of the Member States implementing Community measures which they consider to be unlawful, then the national courts must also have jurisdiction to determine questions ancillary to the recovery of amounts wrongly paid over. To decide otherwise would be to oblige the economic operators concerned to separate their actions and bring not only proceedings before the national court in order to obtain, following a preliminary ruling declaring the relevant measure void, recovery of the amounts improperly collected but also an action for non-contractual liability before the Court of Justice in order to seek compensation for ancillary damage. That would give rise to complications both for litigants and for the Court itself which would have to rule, for ancillary questions, on the principle of the liability of the Community when the mere fact that the measure in issue was void was enough to enable the national court to award compensation for the principal damage. Moreover, as the Court's case-law now stands, the conditions under which the Community may incur non-contractual liability are different from those under which a Community measure may be declared void. There is no need, therefore, to belabour the utility of having all questions ancillary to the recovery of the amounts improperly collected dealt with by the national courts, following a preliminary ruling from the Court of Justice on the validity of the Community measure in issue.

16. Admittedly, in so far as some of that ancillary damage is often incurred as a result of the economic operator's obligation to pay money not to the national authorities *but to third parties* — a bank, for instance, or a firm of lawyers — the approach taken in the Court's case-law is bound in my view to lead the national courts to order the State to pay additional amounts in such cases, and not merely to reimburse those which have been improperly collected.

17. In *Roquette* v *Commission*, the Court referred the questions ancillary to the reimbursement, in particular that of the payment of interest, back to the national court on the ground that it was clear from the provisions on the Communities' own resources that

'the national authorities must ensure on behalf of the Community and in accordance with the provisions of Community law that a certain number of dues, including the monetary compensatory amounts, are collected'. [10]

In my opinion, therefore, that decision must be interpreted not only as entailing the jurisdiction of the national courts to order the national authorities to pay amounts other than those wrongly paid but also as conferring the right on the State concerned to claim such amounts back from the Community, since the State only administers the system of the Communities' own resources 'on behalf of the Community'. Although that difficulty does not appear

10 — Paragraph 9.

ever to have been settled by the Court, I consider it only natural that the Community should bear the financial consequences, since the compensation is for ancillary damage incurred as a result of the illegality of the relevant Community measure. National courts will no doubt be reluctant, and in my view rightly so, to make an order against the Member State concerned if it has not committed any wrongful act or omission, unless it is certain that the order is made against the State acting 'on behalf of the Community' and that it will be reimbursed the amounts paid out in that respect.

18. If the Commission were to decide to refuse to take responsibility for that ancillary compensation, that decision could in any event be challenged before this Court by the Member State concerned seeking a declaration that the decision was void.

19. I cannot overstress the importance of specifying that consequence in the judgment in this case in order to avoid the difficulties with which I shall deal below and which derive from the need of national courts sometimes to interpret the law in a field marked by 'apparently contradictory' [11] decisions.

20. Let us apply those principles to the facts in the present case. The admissibility of the claim for interest on the amount of the levy wrongly paid is unquestionably dependent on the prior exhaustion of the rights of action available under national law, since such a claim was explicitly stated in *Roquette* v *Commission* to be an ancillary question. The same is true, in my opinion, of the cost of obtaining a bank guarantee, reimbursement of which is also claimed. As stated above, the Netherlands authorities had allowed Vreugdenhil not to pay the levy immediately, provided that it obtained a bank guarantee and paid interest at the statutory rate applicable in the Netherlands. After a time, Vreugdenhil considered that it would cost less to pay the levy even without awaiting the outcome of the reference for a preliminary ruling. The interest paid to the Netherlands authorities was reimbursed pursuant to the judgment of the College van Beroep voor het Bedrijfsleven. Vreugdenhil still had to bear the costs of the bank guarantee. In my opinion, a claim for the reimbursement of those costs is of the same kind as that for the interest on the amount of the levy wrongly paid. The sole purpose of the bank guarantee was to enable Vreugdenhil not to pay the levy immediately and thus to retain the corresponding amount in its assets.

21. Finally, as regards the cost of arguing its case to the Netherlands and German customs authorities, and then before the College van Beroep voor het Bedrijfsleven and the Court of Justice, it may be pointed out that in many Member States the remuneration of counsel or agents forms part of the costs of court proceedings. [12] Vreugdenhil's claim was allowed by the College van Beroep voor het Bedrijfsleven and, contrary to what was stated in error at the hearing, the Netherlands authorities were ordered to pay HFL 41 000 in respect of costs, in particular the costs of the

11 — Waelbroeck, Louis and Vandersanden, op. cit., p. 279.

12 — Article 73 of the Rules of Procedure of the Court of Justice makes the same provision.

reference for a preliminary ruling and the fees and travelling expenses of Vreugdenhil's lawyers. There is nevertheless some doubt whether those sums completely cover the expenditure incurred by Vreugdenhil. Even if that order were insufficient to cover that actual expenditure, it would appear difficult to deny that they fall within the category of ancillary damage. If the Court rules on the amount of damages, it will be necessary to determine whether at least partial compensation has not already been obtained in this regard.

22. The expenditure involved in the discussions with the Netherlands and German customs authorities appears to be of the kind which an economic operator carrying out frequent import and export transactions will incur as an integral part of his business activity and therefore cannot, in my opinion, be regarded as damage.

23. The damage for which Vreugdenhil seeks compensation in the present action must therefore be regarded as ancillary to the reimbursement of the levy wrongly paid.

24. It is common ground that import levies on agricultural products form part of the Community's own resources. In collecting the levy in issue, therefore, the Netherlands authorities were only acting on behalf of the Community. The applicant should therefore have sought compensation before the Netherlands courts for any damage ancillary to the recovery of the amounts improperly collected. It did not do so, so the present action should, on the face of it, be declared inadmissible in accordance with the decision in *Roquette* v *Commission*.

25. The applicant maintains that an action on that count before the Netherlands courts would have been inappropriate since the College van Beroep voor het Bedrijfsleven has ruled that the Netherlands State cannot be held liable when it has done no more than implement an unlawful Community measure.[13] That case-law, the applicant states, is based on the Court's judgment in *Asteris* v *Greece*.[14]

26. In that judgment it was held that, since the Court had in a previous judgment ruled that the Community bore responsibility for the unlawfulness of the Community measure in issue, a national authority which merely implemented that measure could not be held liable on the same grounds.[15]

27. The situation in the present case is, however, different. In *Asteris*, the Court had already, by two judgments delivered on the same day,[16] declared the Commission Regulation in issue void and dismissed the action for non-contractual liability on the ground that the unlawful nature of the measure found in the first judgment

'cannot be regarded as constituting a serious breach of a superior rule of law or as manifest and grave disregard by the Commission of the limits on its powers'.[17]

13 — Judgment of 12 July 1989, Krohn v Hoofdproduktschap voor Akkerbouwprodukten.

14 — Joined Cases 106 to 120/87 Asteris v Greece [1988] ECR 5515.

15 — See paragraphs 17 to 19.

16 — Case 192/83 Greece v Commission [1985] ECR 2791 and Joined Cases 194 to 206/83 Asteris v Commission [1985] ECR 2815.

17 — Paragraph 23.

The issue in that case was the method of calculating the coefficients for determining the amount of production aids and, as Advocate General Sir Gordon Slynn pointed out:

'It has rightly not been suggested that these proceedings could only be brought before a national court against a Greek intervention body. If the calculation of the aids is found to be unlawful, it is not for the national intervention body to recalculate them according to the proper methods. This can only be done by the Commission following a decision of this Court.' [18]

28. Therefore, the annulment of the contested regulation by the judgment in Case 192/83 [19] could not make good the damage suffered by the applicants since it required the Commission to adopt a new system for calculating the aid in question; [20] in the meanwhile, the applicants had to be content with the lower amount of aid which they had been granted. Consequently, to apply a distinction advocated by legal writers, [21] which in my opinion appears to be a faithful reflection of the Court's case-law, the applicants in *Asteris* could not obtain redress before the national courts because they were claiming benefits which the Community legislation had unlawfully failed to grant them; in the present case, however, as in *Roquette* v *Commission*, the rights of action under national law made it possible to obtain compensation for the damage suffered by recovery of the amounts wrongly paid over.

29. Let It should also be noted that in *Asteris* the applicants were pleading the liability of the Greek State in order to seek compensation before the national courts *for the same damage* as that for which compensation had been sought in an action against the Community, already brought and dismissed, for non-contractual liability. Here, however, the Court has not yet taken any decision as to the non-contractual liability of the Community since that is the very question with which these proceedings are concerned. The *Asteris* judgment is merely a specific application of the general principle of *non bis in idem*. National authorities having acted on behalf of the Community may not be held liable where the Court has already ruled that the Community was responsible for the unlawfulness of the measure but that the conditions under which it could be held liable were not present.

30. It was no doubt the extreme subtlety of the Court's interpretation which, wrongly it would appear, led the College van Beroep voor het Bedrijfsleven to consider, on the basis of the ruling in *Asteris*, that Vreugdenhil could not be awarded any compensation for the alleged ancillary damage.

31. Regardless of how that case-law is assessed, it must in my view nevertheless be borne in mind that a claim for compensation for the abovementioned ancillary damage before the Netherlands courts was doomed to failure as the applicable national law now stands. Vreugdenhil cannot be criticized for

18 — At p. 2817.

19 — Cited above.

20 — Case 192/83, paragraph 36.

21 — In particular Joliet, R., op. cit., pp. 250 to 258; Waelbroeck, Louis and Vandersanden, op. cit., p. 279; Rideau, J. and Charrier, J.-L., op. cit., pp. 184 to 186.

not having brought an action on that count before the College van Beroep voor het Bedrijfsleven. As I stressed in my Opinion in *Roquette Frères* v *Commission*, [22]

'Where the remedies available under national law do not afford the trader concerned effective protection of his rights, the objection of the availability of a parallel remedy cannot be countenanced, precisely because no parallel proceedings are in fact pending'. [23]

32. It may admittedly be objected that it was for Vreugdenhil to challenge the aforementioned case-law of the College van Beroep voor het Bedrijfsleven and request that court to seek a preliminary ruling from the Court of Justice on whether Community law should be interpreted as requiring national courts to settle questions ancillary to the recovery of sums improperly charged. In *Roquette* v *Commission* the Tribunal d'Instance refused to award interest on the ground that the sums improperly collected by the French authorities had been immediately transferred to the Community budget. [24]Roquette had not appealed against that decision and the Court of Justice therefore declared that head of claim for non-contractual liability inadmissible in the action brought before it.

33. I do not suggest that the Court should do the same in the present case. Two arguments, in my view, appear to militate in favour of declaring the action admissible. First, Vreugdenhil was faced with the settled case-law of the national courts whereas, even in French law, [25] it would appear to have been possible to appeal against the judgment of the Tribunal d'Instance. While Roquette could therefore justifiably be criticized for not having lodged an appeal against that judgment, such criticism would not appear to be appropriate in the present case. Moreover, it may be inferred from the fact that an action for non-contractual liability is regarded by legal writers [26] as alternative to the rights of action under national law that when a State *which has acted on behalf of the Community* can no longer be held liable, then it is for the Community to bear that liability. The requirement that the rights of action under national law must first be exhausted, which has been criticized by some writers, [27] has as its corollary, in my opinion, an obligation that the Community must 'stand surety' in case compensation cannot be obtained before the national courts for damage arising out of the unlawfulness of a Community measure, for any reason *for which the plaintiff is not responsible.* If a claim for compensation for ancillary damage is dismissed because of conduct ascribable to the plaintiff — if insufficient evidence is produced, for instance — then any action for non-contractual liability before this Court will obviously be inadmissible.

34. That is, in my opinion, merely an application of the principle of the 'right to a forum', the fundamental importance of which in the Community legal order has been recognized in the Court's decisions. [28] A situation in which an individual who considers that he has suffered damage cannot, because of the existence of two separate but closely-linked legal orders, find

22 — Case 20/88 Roquette Frères v Commission [1989] ECR 1553.

23 — Point 15.

24 — [1976] ECR at p. 682.

25 — [1976] ECR at p. 684.

26 — For example, Joliet, R., op. cit., p. 250; Rideau, J. and Charrier, J.-L., op. cit., p. 193; Boulouis, J. and Chevallier, R.-M., op. cit., 5th edition, p. 424.

27 — For example, Boulouis, J. and Chevallier, R.-M., op. cit., 3rd edition, p. 462.

28 — Case 222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651; Case 222/86 UNECTEF v Heylens [1987] ECR 4097.

a court to declare whether his claim is well-founded or not would be unacceptable.

35. Vreugdenhil's present action cannot therefore be held inadmissible on the ground that the rights of action under national law have not been exhausted, even though the exercise of those rights would have been the normal course to take in order to obtain compensation for the alleged damage, since such a course could not have enabled it to achieve that result.

36. Let us now turn to consider the substance of the claim.

37. The applicant claims, primarily, that the rule that the Community cannot incur liability unless

'a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred' [29]

can apply only where the alleged unlawfulness concerns

'legislative action involving measures of economic policy'. [30]

That is not the case here, since the Commission acted *ultra vires.*

38. That argument of the applicant's does appear to be crucial if the application is to be granted. It would appear that if the criteria defined in the abovementioned case-law are applied, the claim for compensation must necessarily be dismissed. The requirement of 'a sufficiently flagrant violation of a superior rule of law for the protection of the individual' — derived, according to legal writers, [31] from the 'Schutznormtheorie' developed in German law from, *inter alia,* Article 34 of the Grundgesetz (Basic Law) — is hardly met by a failure to comply with the distribution of powers between the Community institutions, the objective of which, as was emphasized in the Court's judgment in *Parliament* v *Council,* [32] is to safeguard the institutional balance created by the Treaties, [33] and not to protect the personal rights of any particular individual. Mr Advocate General Capotorti, in his Opinion in *HNL* v *Council and Commission* [34] considered that the requirement of a breach of a rule of law conferring personal rights on individuals

'may already serve to exclude liability when a rule relating to the procedure or the form of legislative measures has been infringed; rules of this kind do not in general confer personal rights on individuals even though it is clearly possible for the legislative measure to be declared void on formal or procedural grounds'. [35]

While the rules governing the distribution of powers are not, strictly speaking, formal or

29 — For example, Case 5/71 Zuckerfabrik Schöppenstedt v Council [1971] ECR 975, paragraph 11.

30 — Ibid., paragraph 11.

31 — Joliet, R., p. 267; Boulouis and Chevallier, 3rd edition, p. 445.

32 — Case C-70/88 Parliament v Council [1990] ECR I-2041.

33 — See paragraphs 21 and 22.

34 — Joined Cases 83 and 94/76, 4, 15 and 40/77 HNL v Council and Commission [1978] ECR 1209.

35 — [1978] ECR at p. 1232.

procedural provisions, they are to a large extent comparable.

39. It would appear that the Court's previous judgment in *Vreugdenhil and Another* v *Minister van Landbouw en Visserij* clearly precluded Article 13a of Regulation No 1687/76 from being regarded as legislative action involving measures of economic policy. The Court held that the purpose of the provision in question lay outside the sphere of agricultural policy [36] and that

'By that article, the Commission sought to prevent the arrangements for returned goods from being used to commit fraud to the detriment of Community funds and in particular to re-import into the Community, free of import duties, goods from intervention stocks which are sold at prices below the Community market price'. [37]

40. It was in fact a measure of administrative coordination intended to combat fraud. While it is possible to agree with some authors that 'the liability of the public authorities in the economic field has characteristics so specific that a system which could, without serious danger or incoherent results, abandon the requirement of serious wrongful conduct is quite inconceivable', [38] the same may not be true in the case of a purely legal error when one or more individuals suffer damage as a result of that error. As some writers have stressed, 'where non-legislative action or action which, although legislative, does not involve measures of economic policy is concerned, the criteria for determining the existence of wrongful conduct should be less strict'. [39]

41. The present case therefore affords an opportunity for the Court to clarify its case-law regarding liability and to indicate guidelines as to the degree of seriousness of the wrongful conduct necessary according to the characteristics of the measure in issue. It would appear impossible to treat the conditions for liability as the same when the contested measure falls within a field of economic policy in which the Community institution enjoys broad discretion because it is responsible for monitoring the daily, and often complex, evolution of the market concerned, and when the institution has merely adopted 'ordinary' administrative measures, especially where, as is sometimes the case, [40] the Community measure empowering it to do so lays down precise conditions for the exercise of the power.

42. The considerations which have led the Court to develop that case-law are, *ex hypothesi*, absent in the present case. In *HNL* v *Council and Commission*, the Court noted that in the legal systems of the Member States

'the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy'

and that

36 — Paragraph 17.

37 — Paragraph 18.

38 — Boulouis, J. and Chevallier, R.-M., op. cit., 3rd edition, p. 451.

39 — Vandersanden, G. and Barav, A., op. cit., p. 336.

40 — See my Opinion of 18 June 1991 in Case C-55/90 Cato v Commission.

'this restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals'. [41]

43. In many, if not all, Member States the conditions for liability for legislative action are appreciably different from those concerning administrative action. Often proof of some degree of wrongful conduct is all that is required in the case of administrative authorities; this is true of Italian law, [42] German law, [43] French law, [44] in Belgian law, [45] in Danish law [46] and in Netherlands law. [47] The liability of the legislative authorities, however, is governed by stricter rules, with in particular a requirement of unusual and specific damage, [48] or is quite simply non-existent. [49]

41 — Joined Cases 83 and 94/76, 4, 15 and 40/77 HNL v Council and Commission [1978] ECR 1209, paragraph 5.

42 — Article 2043 of the Codice Civile.

43 — Staatshaftung — Amtshaftung, BGB Paragraph 839 and Grundgesetz Article 34.

44 — Under which, in principle, the fact that an administrative act is unlawful is sufficient to constitute wrongful conduct — see for example Conseil d'Etat 13 February 1952, Sieurs Costa, Recueil Lebon, p. 104; it is still necessary to prove serious wrongful conduct in the case of liability of the public authorities in the judicial field, for operational police services, for tax authorities and where medical liability is involved.

45 — Cour de Cassation, La Flandria, 5 November 1920, Pasicrisie 1920, I, p. 218, and judgment of 23 April 1971, Pasicrisie 1971, I, p. 754.

46 — Betaenkning No 214/1959 om statens og kommunernes erstatningsansvar (Report on the liability of State and local authorities to pay compensation).

47 — Asser/Rutten, Verbinternissenrecht, 4 III, De Verbintenis uit de Wet, 6th edition 1983, pp. 81 and 86.

48 — As in German law (Sonderopfer; see the judgment of the Bundesgerichtshof of 10 June 1953, BGHZ 6, p. 270, and judgment of 25 April 1960, BGHZ 32, p. 208) or French law (Conseil d'Etat, La Fleurette, 14 January 1938, Recueil Lebon, p. 25).

49 — As for example in Italian law.

44. I would not, however, suggest that the Court should draw an *organic* distinction between measures adopted by the Council and those adopted by the Commission. Such a distinction is often unrelated to the content of the measure and the way in which the institution exercises its power to adopt it. The Court, ever since its judgment in *Merkur* v *Commission*, [50] has applied the same principles to the acts of the Commission as to those of the Council.

45. There appear to be two relevant criteria: first, as I have said, the field in which the contested measure operates — does it or does it not involve measures of economic policy? — and secondly the degree of discretion enjoyed by the Community institution. As long as the contested measure does not involve measures of economic policy and the institution concerned did not enjoy broad discretion, the requirement that there must be what some writers call 'serious wrongful conduct', [51] in other words a *grave and manifest* violation of a superior rule of law for the protection of the individual, does not appear to be essential.

46. It would appear, moreover, that the concept of a 'grave and manifest violation' comprises, as some writers have stressed, [52] two aspects. In its judgment in the *HNL* case, when dismissing the action the Court noted that the measure in issue

'affected very wide categories of traders (...) so that its effects on individual undertakings were considerably lessened'

50 — Case 43/72 Merkur v Commission [1973] ECR 1055.

51 — Boulouis, J. and Chevallier, R.-M., op. cit., 3rd edition, p. 451.

52 — Joliet, R., op. cit., pp. 263 to 267.

and that

'the effects of the regulation on the profit-earning capacity of the undertakings did not ultimately exceed the bounds of the economic risks inherent in the activities of the agricultural sectors concerned'.

47. In the judgment in *Dumortier Frères*, [53] however, in which the application was granted, the Court found that the disregard of the principle of equality

'affected a limited and clearly defined group of commercial operators'

and that

'the damage alleged by the applicants goes beyond the bounds of the economic risks inherent in the activities in the sector concerned'. [54]

48. Those findings in fact concern the special and serious nature of the damage — the first aspect — and not the unlawfulness itself. Some authors consider that the Court, when assessing the gravity of the conduct, has thus sought to assess the damage, although the two questions are completely different. [55]

53 — Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 Dumortier Frères v Council [1979] ECR 3091.

54 — Paragraph 11.

55 — See on this point Grondman, F. La notion de violation suffisamment caractérisée en matière de responsabilité non contractuelle, Cahiers de droit européen, 1979, No 1, p. 86; Fuss, E.-W. La responsabilité des Communautés européennes pour le comportement illégal de leurs organes, RTDE, 1981, p. 1.

49. A second aspect, however, concerns the actual nature of the unlawfulness. In the judgment in *Dumortier Frères*, the Court also found that

'equality of treatment (. . .) which had been observed from the beginning of the common organization of the market (. . .) was ended by the Council in 1975 without sufficient justification'. [56]

50. Again, in the *Amylum* judgment, [57] when dismissing the action, the Court pointed out that

'having regard to the fact that an appropriate levy was fully justified, these were not errors of such gravity that it may be said that the conduct of the defendant institutions in this respect was verging on the arbitrary'. [58]

51. That concerns the manifest nature of the unlawfulness. The Court insists that the breach of the rule in issue must 'verge on the arbitrary'. Such a requirement of 'quasi-arbitrary' conduct is justified where, as in the field of economic policy, the Community institution enjoys broad discretion, but is not relevant where the conditions under which the institution may exercise its powers are clearly and precisely defined. In such cases, the Community would appear to incur liability by any infringement of the rule in issue.

56 — Paragraph 11.

57 — Joined Cases 116 and 124/77 Amylum v Council and Commission [1979] ECR 3497.

58 — Paragraph 19.

52. To conclude these general considerations, I propose that the Court should not in this case adopt the reference to the unusually grave and manifest nature of the violation of a superior rule of law for the protection of the individual, since the unlawful measure or activity does not involve a measure of economic policy and the institution concerned did not enjoy broad discretion in this case.

53. I do not suggest that the Court should abandon the criterion of a violation of a superior rule of law for the protection of the individual. In other words, the mere fact of unlawfulness does not in itself constitute wrongful conduct by which the Community incurs liability.

54. The laws of many Member States, not only Germany, require that a *personal right* must be affected before the authorities can incur liability. That is true, in particular, in Belgian law,[59] Italian law[60] and Danish law.[61] In French law, the Conseil d'Etat (Council of State) sometimes bases a dismissal of a claim for compensation on the formal nature of the unlawfulness or on the existence of grounds justifying the contested decision.[62]

55. The Court of Justice also refuses any indissoluble link between the concepts of wrongful conduct and unlawfulness; it has traditionally held that

'The finding that a legislative measure (...) is null and void is (...) insufficient by itself for the Community to incur non-contractual liability for damage caused to individuals under the second paragraph of Article 215 of the EEC Treaty.'[63]

56. As has been pointed out by E.-W. Fuss,[64] 'breach of objective rules of law is not, however, sufficient for the Community to be held liable for damage. (...), there must also be a determining element'. The author continues: 'That determining feature constitutes the formal link between the infringement of the objective rule and the justification of the claim for compensation which an individual may put forward because his personal legal position has been affected. Where a public official merely infringes a rule of objective law, that infringement concerns only the community; it is also an infringement of the public interest. If a citizen wishes, as an individual member of the community, to assert rights arising out of that act, he must show that he has himself been personally affected by the objective breach of the law'. Further on: 'That constitutes the material distinguishing feature between those whose interests the rule of law which has been infringed is (at least to a large extent) intended to protect and the community of individuals who are only concerned in a general way by the lawfulness of the act of the institution. That criterion establishes a closer link between the aggrieved party and the institution than

59 — Cassation La Flandria, cited above.

60 — Cassazione, 20 April 1961, No 884, Foro Amministrativo, 1961, II, p. 366; see also Article 23 of the staff regulations of government officials (DPR, 10 January 1957, No 3) and Article 28 of the Italian Constitution.

61 — For example, Østre Landsret, Ufr 1972, p. 189 and p. 192, 1980, p. 955; H jesteret, Ufr 1972, p. 603, 1981, 394, and 1982, p. 110.

62 — Conseil d'Etat 15 July 1964, Prat-Flottes, Recueil Lebon, p. 438; 4 November 1921, Montpilier, Recueil Lebon, p. 903; 7 June 1940, Vuldy, Recueil Lebon, p. 197.

63 — HNL v Council and Commission, paragraph 4.

64 — Op. cit., p. 9.

that between the institution and the whole body of individuals concerned by the lawfulness of the institution's act.' [65]

57. It is difficult to see how a situation in which an economic operator benefited from the unlawfulness of a Community measure even though none of his personal rights were affected could be justified. All legislation, even outside the field of economic policy, is liable to impose constraints, whether financial or otherwise, on economic operators. The fact that a measure may be formally unlawful, as for example where a consultative body has not given its opinion, cannot in my opinion entitle an economic operator to claim compensation for financial burdens when his personal rights are not involved.

58. The requirement that the Community be governed by the rule of law [66] means, in my opinion, that an economic operator whose personal rights have been infringed must be able, in areas other than those involving measures of economic policy, to obtain compensation for the damage suffered by proving some degree of wrongful conduct; it does not necessarily mean that any unlawfulness, even if of a purely formal nature, should, in the absence of any infringement of a personal right, enable certain economic operators to avoid burdens placed upon them.

59. If those principles are applied to the present case, the application must be dismissed. As I have said, by adopting Article 13a of Regulation No 1687/76, the Commission admittedly failed to comply with the distribution of powers between the institutions of the Community, but the fact that legislation was adopted by one institution rather than another which could have adopted it and which did, moreover, subsequently introduce it [67] cannot cause the Community to incur liability unless that legislation, *in itself, that is to say in its substantive provisions,* violates a superior rule of law for the protection of the individual and thus infringes a personal right. Vreugdenhil, on whom the burden of proof lies, has not put forward the least argument concerning the breach of principles such as equal treatment of economic operators, legal certainty or the protection of legitimate expectations. There is nothing in the Court's previous judgment in *Vreugdenhil and Another* v *Minister van Landbouw en Visserij* referring even remotely to a breach of those principles.

60. I therefore propose that the Court should dismiss this application and order the applicant to pay all the costs.

65 — Op. cit., p. 10.

66 — For an appraisal of the Court's case-law in the field of non-contractual liability, see Rideau, J. and Charrier, J.-L., who consider that the Court has adopted a low profile in defending the rule of law in that regard, op. cit., p. 189.

67 — Council Regulation (EEC) No 1147/86 of 17 April 1986 amending Regulation (EEC) No 754/76 on the customs treatment applicable to goods returned to the customs territory of the Community (Official Journal 1986 L 105, p. 1).