REPORT FOR THE HEARING
delivered in Case 253/84 *

Contents

Page

I — Facts and procedure 124

II — Conclusions of the parties 126

III — Submissions and arguments of the parties 127

A — Admissibility of certain submissions put forward in the application 127

B — Substance 128

1. Infringement of a superior rule of law intended to protect individuals 128

(a) Infringement of procedural rules of the Treaty 128

(b) Improper application of the procedure referred to in Article 93 of the Treaty 131

(c) Infringement of the principle of non-discrimination as a result of the excessive compensation given to German farmers for the abolition of MCAs 131

(d) Misuse of powers as a result of the infringement of the Sixth Directive on value-added tax 134

(e) Infringement of the principle of proportionality as a result of using VAT as the instrument for granting the aid 135

(f) Infringement of Article 96 of the EEC Treaty 136

(g) The reduction in the Community's own resources 137

2. The causal connection between the Council decision and the alleged damage 137

3. The existence of the damage 139

IV — Answers given by the parties to the questions put to them by the Court 141

I — Facts and procedure

The action taken by the Community institutions for the progressive dismantling of the system of monetary compensatory amounts (MCAs) has come up against many difficulties; since the dismantling has to be carried out by aligning the representative rates with the actual exchange rates, the effect, in Member States with strong currencies, is to reduce the amounts of agricultural support prices expressed in national currency and, consequently, farmers' incomes. In order to offset that loss of income, which was to take place as from 1 January 1985, Article 3 of Council Regulation No 855/84 of 31 March 1984 (Official Journal 1984, L 90, p. 1), which reduced positive MCAs by means of an alignment of representative rates, authorized the Federal Republic of Germany to grant to its agricultural producers a special aid

* Language of the Case: French.

consisting of relief from VAT to the extent of 3% of the ex-VAT price paid by the purchaser for the agricultural product.

When that regulation was adopted, the Commission and the Council made a declaration in which the Commission undertook to submit as soon as possible a proposal for a directive enabling derogations to be made from the Sixth Directive on value-added tax so as to enable the Federal Republic of Germany to grant aid to its farmers using VAT as the instrument and the Council undertook to adopt that directive by 1 November 1984.

In May 1984 the Government of the Federal Republic of Germany made requests to the Commission for the following:

(i) The application of the compensatory aid to German agricultural producers to be brought forward to 1 July 1984;

(ii) Article 3 of Regulation No 855/84 to be amended by increasing from 3 to 5% the maximum amount of aid calculated on the basis of the ex-VAT price paid by the purchaser for an agricultural product;

(iii) The derogation from the Sixth Directive on VAT necessary to implement Article 3 of Regulation No 855/84 to be adopted so as to be applicable as from 1 July 1984.

In its reply the Commission expressed understanding about the request that the aid should apply as from 1 July 1984 but stated that it could see no justification for increasing the rate of VAT repayment from 3 to 5%. In its view, such a change would have affected an essential part of the compromise which the Council had achieved on 31 March 1984 after difficult negotiations and which had resulted in the adoption of Regulation No 855/84.

At its meeting on 25 and 26 June 1984 at Fontainebleau the European Council asked the Commission to propose and the Council of Ministers to adopt measures designed to enable the relief from VAT for German farmers in compensation for the dismantling of the MCAs to be increased from 3 to 5% as from 1 July 1984 and until 31 December 1988.

The Commission did not comply with that request on the ground that the supplementary aid measure contemplated by the Federal Republic of Germany had to be authorized by the Council alone pursuant to the third subparagraph of Article 93 (2) of the EEC Treaty.

On 27 June 1984 the Federal Republic of Germany asked the Council of Ministers to adopt a measure pursuant to the third subparagraph of Article 93 (2).

On 29 June 1984 the Bundestag adopted a 'First Law amending the Law on VAT', which, among other things, authorized German farmers subject to the flat-rate VAT scheme to deduct 5% from the amount of VAT due on agricultural products during the period between 1 July 1984 and 31 December 1988.

On 30 June 1984 the Council adopted Decision 84/361/EEC (Official Journal L 185 of 12 July 1984, p. 41), which provides: 'For the period 1 July 1984 to 31 December 1988 the aid granted by the Federal Republic of Germany in the form of VAT relief shall be deemed to be compatible with the common market up to a maximum of 5% of the ex-VAT price paid by the purchaser for the agricultural product'. The delegations of some Member States made declarations qualifying their assent.

On 16 July 1984 the Commission proposed to the Council the derogations from the

Sixth VAT Directive which were necessary in order to implement, with effect from 1 July 1984, the aid system using VAT as its instrument.

In the course of the consultation procedure, the European Parliament adopted a resolution on 19 April 1985 on the basis of a report drawn up by its Committee on Economic and Monetary Affairs and Industrial Policy in which it called upon the Commission to withdraw its proposal for a 20th Directive on VAT pending the outcome of an examination of the legal basis for Council Decision 84/361/EEC.

Notwithstanding that resolution, the Commission maintained its proposal for a directive, which was approved by the Council on 16 July 1985 (Official Journal L 192 of 24 July 1985, p. 18).

By resolution of 12 September 1985, adopted on the basis of a report drawn up by its Legal Affairs Committee, the European Parliament called upon the Commission to bring an action to have that directive declared void.

In the meantime, the Groupement agricole d'exploitation en commun de la Ségaude (hereinafter referred to as 'GAEC'), a French cattle, poultry and dairy farming cooperative, brought an action for damages against the European Economic Community, represented by the Council and the Commission, on the grounds that the aid authorized by the Council resulted in distortions of competition benefiting German farmers, its competitors, and caused it now, and would cause it in the future, to suffer considerable harm.

The application was received at the Court Registry on 29 October 1984.

By order of 6 March 1985 the Court authorized the Government of the Federal Republic of Germany to intervene in the proceedings in support of the defendants' conclusions.

By order of 30 March 1985, the Court authorized the Fédération nationale des syndicats d'exploitants agricoles (hereinafter referred to as 'FNSEA'), Paris, to intervene in support of the applicant's conclusions.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry. However, it asked the parties to provide it with statistics before the hearing and to reply to a number of questions.

II — Conclusions of the parties

GAEC, supported by the *FNSEA*, claims that the Court should:

(a) Declare admissible the applicant's claim for damages of FF 60 000 and any additional sum which may fall due;

(b) Declare that the European Economic Community is liable, in accordance with Articles 178 and 215 of the EEC Treaty, for the damage sustained by the applicant as the result of the Council's adoption of the decision of 30 June 1984;

(c) Declare that accordingly the European Economic Community is obliged to pay the applicant provisional damages of FF 60 000 plus interest;

(d) Declare that the European Economic Community is obliged to pay any further damages as and when the amount thereof is determined;

(e) Order the European Economic Community to pay the costs of these

proceedings and any subsequent proceedings in which a definitive ruling is made as to the further damages.

The *Council of the European Communities* claims that the Court should dismiss as unfounded the application for damages made by the applicant and should order the applicant to pay the costs.

The *Government of the Federal Republic of Germany*, intervening in support of the defendants' conclusions, claims that the Court should:

1. Dismiss the application;
2. Order the applicant to pay the intervener's costs.

The *Commission of the European Communities* submits observations on certain legal questions raised by the applicant but does not submit any conclusions as regards the substance and points out that, in proceedings concerning non-contractual liability pursuant to Articles 178 and 215 of the Treaty, the Community ought to be represented by the institution whose act or omission gave rise to liability. It considers that in this case it is therefore in the interests of the proper administration of justice that the Community should be represented by the Council, which adopted the decision at issue.

III — Submissions and arguments of the parties

A — *Admissibility of certain submissions put forward in the application*

The *Council* does not contest the admissibility of the action as such but considers that:

(i) two of the submissions relied on by the applicant in its application, namely misuse of powers and infringement of essential procedural requirements, are out of place in an action for damages;

(ii) the submissions invoked by the applicant for the first time in its reply should not be admitted.

The Council argues that, in so far as it is maintained in the submissions referred to in (i) that the decision of 30 June 1984 is unlawful owing to the absence of a Commission proposal or the failure to consult the Parliament, those submissions properly belong, as their very wording shows, to an action for the review of the legality of a measure pursuant to Article 173 of the Treaty. They are out of place in an action for damages, since, even if they are justified, the procedural irregularities invoked could in no case constitute an act or omission which caused damage for which compensation is payable under Article 215.

The only act which could have caused the alleged damage was the substantive authorization to pay the contested national aid, and in that respect it is of little importance whether or not the procedure which culminated in the grant of that authorization was formally defective. If the Court were to consider that the authorization in question did not unlawfully distort competition within the common market, it would be inconceivable to hold that the Community had nevertheless incurred non-contractual liability merely because of a procedural irregularity, *a fortiori* because this would enable observance of procedural rules to be separated in a different manner from the substance of the measure in question. Had the authorization been given on the basis of the procedural rules advocated by the applicant, the latter would then have had to abandon any procedural arguments and show that the authorization was substantively incompatible with Community law.

Moreover, it appears from previous cases of the Court (judgment of 15 September 1982 in Case 106/81 *Julius Kind KG* v *European Economic Community* [1982] ECR 2885) that formal complaints are out of place in an action based on Article 215. That must also be true of other procedural flaws which are in principle relevant solely for the purpose of reviewing legality pursuant to

Article 173, such as those raised by the applicant, namely misuse of powers and infringement of essential procedural requirements.

GAEC argues in response that essential procedural rules do also serve to protect individuals. It maintains that a distinction should be made between non-essential procedural rules, which have no impact on the substance of the decision taken, and essential procedural rules, which constitute a safeguard for the person concerned. In the present case, it claims, the procedural rules which were not observed fall into that second category. The obligation to consult the European Parliament which was evaded as a result of the infringement of essential procedural requirements and of a misuse of procedure 'reflects a democratic principle' which is undeniably a fundamental safeguard of the individual.

Similarly, GAEC contends that the contested measure did in fact constitute a breach of a superior rule of law for the protection of the individual (right to a procedure guaranteeing democratic review and information).

Furthermore, GAEC argues that it is evident from the views expressed by the Commission in a letter dated 18 June 1984 to the German Chancellor, Mr Kohl, that if the correct procedure had been followed the contested decision would not have been adopted, which clearly shows the existence of a causal connection between the procedural defect and the damage alleged by the applicant.

The *Council* observes that the three submissions that were raised only in the reply, that is to say, the incorrect application of the third subparagraph of Article 93 (2) of the Treaty, the infringement of the principle of proportionality as a result of the authorization of the use of VAT as the instrument to pay the aid, and the diminution in the Community's own resources, are new and do not appear to have any connection with the submissions set out in the application. They are therefore contrary to Article 42 (2) of the Rules of Procedure, which prohibits the raising of fresh issues in the reply.

The *Commission* observes that the measure alleged to be illegal is Council Decision 84/361 of 30 June 1984, which was adopted in the absence of a proposal from the Commission. Consequently, in accordance with the Court's judgment of 13 November 1973 in Joined Cases 63 to 69/72 *Wilhelm Werhahn Hansamühle and Others* v *Council of the European Communities* [1973] ECR 1229, it is for the Council to represent the Community in these proceedings and the action should be regarded as inadmissible in so far as it is brought against the Commission. Nevertheless, the Commission submits observations on certain legal questions raised by the applicant which the Court may consider if it sees fit.

B — *Substance*

1. *Infringement of a superior rule of law intended to protect individuals*

(a) *Infringement of procedural rules of the Treaty*

In the first place, *GAEC* claims, in support of its application, that procedural rules laid down in the Treaty have been infringed. It bases that submission on the fact that the procedure set out in the third subparagraph of Article 93 (2) of the EEC Treaty, which was utilized in this case by the Council, is expressly confined to dealing with 'exceptional circumstances' and may not derogate from any provisions of the Treaty other than Articles 92 and 94 as regards aid.

GAEC argues that the dismantling of MCAs in the Federal Republic of Germany does not constitute an exceptional circumstance, since it falls into the category of action designed to bring the agricultural sphere within the normal context of economic life. Furthermore, the fact that the third subparagraph of Article 93 (2) permits derogations only from Articles 92 and 94 of the Treaty implies that the procedure provided for in Article 93 may not be employed to adopt measures relating to matters such as agriculture or the harmonization of legislation, fields in which the Council may take measures only after following a well-defined procedure, including, among other things, consultation of the European Parliament. It argues that the Council chose an inappropriate procedure to avoid some of the steps that were prescribed for adopting such a measure — including a proposal from the Commission and an opinion of the European Parliament — and the Council was therefore guilty of a misuse of procedure.

FNSEA concurs entirely with GAEC's arguments and stresses in addition the following points:

(i) Contrary to the opinion expressed by the Council and the Commission, the aid granted to the Federal Republic of Germany must be viewed in its entirety as Community aid rather than domestic aid, since the decision of 30 June 1984 merely increased the amount of aid without changing its character or the instrument for granting that aid;

(ii) As the European Parliament has also pointed out, the principle of the hierarchy of rules absolutely precludes the granting of an aid by means of the procedure followed by the Council; the Parliament was not even consulted on the occasion of the adoption of Regulation No 855/84 itself;

(iii) As is clear from, among other things, the record of the proceedings of the Bundestag, the German Government was perfectly aware that the decisions taken by the Council were unlawful in form and substance.

The *Council* considers that the applicant's line of argument is unfounded. In the first place it considers that, on the procedural level, there is no rule in Community law of the type existing in certain national legal systems requiring absolute parallelism of procedures, and hence it is possible to derogate from a measure based on one article of the Treaty by means of a subsequent measure based on another article, provided that the principle of the hierarchy of rules is observed.

Secondly, the Council argues that the situations involved, albeit linked, are fundamentally distinct and come under different provisions of the Treaty, which, contrary to the applicant's view, are not intrinsically mutually exclusive.

As for the argument based on the procedure followed in adopting Regulation No 855/84, the Council considers that a clear distinction should be made between the special aid authorized in that regulation, that is to say, aid authorized under Articles 42 and 43, towards which the Community contributes financially, and the supplementary aid authorized by the decision of 30 June 1984, which is based on Article 93 (2) and is not covered by the Treaty rules on agriculture but by the Treaty competition rules. Indeed, according to decided cases of the Court of Justice, the provisions on aid must apply in the case of the common organization of the markets in so far as the Council has made them applicable, and other articles of the Treaty — no matter how fundamental they may be — must not

be applied so as to deprive the abovementioned provisions of all effect.

The Council argues that it should also be borne in mind that the Court has also recognized in principle the lawfulness of national fiscal measures designed to neutralize a potential inappropriate increase in farm income resulting from the green rates. In the Council's view, the same conclusion should apply with even greater force in this case — the converse situation — where national aid is intended to offset any inappropriate loss of income which would otherwise have resulted from the revaluation of the green Deutschmark.

In the light of those considerations, the Council concludes that it certainly cannot be held that there has been a breach of an essential procedural requirement.

The *Commission* makes the preliminary observation that the provisions relating to aid do not apply automatically to the agricultural sector and that, if the Council had not utilized the power given to it under Article 42, by the reference to Article 43, to make those provisions applicable, any aid could be granted by a Member State in that sector.

Article 42 does not set out an exhaustive list of aids which may be authorized pursuant to Article 43, but merely sets out a few examples of such aid. In the case of all the market organizations, the Council could regulate the grant of aid either simply by making Articles 92, 93 and 94 of the Treaty applicable or by specifying the conditions for the grant of the aid. In this case the first solution was adopted, that is to say, utilization of the procedure set out in the third subparagraph of Article 93 (2). As far as that procedure is concerned, it should be stressed that, contrary to the applicant's contentions, it does not require the submission of a proposal by the Commission. Whilst it is not possible to use that procedure in order to derogate from the general principles of Community law, the Council could very well derogate from the provisions of Community secondary legislation, including the specific prohibition of aid in the rules on agriculture.

The *Government of the Federal Republic of Germany* asks, in the first place, whether Article 42, Article 43, the third subparagraph of Article 93 (2), Article 91 and Article 100, which the applicant claims have been infringed, indeed constitute not only superior rules of law but also rules to protect individuals.

In its view, they are procedural rules, which are not capable of causing the Community to incur liability. What is more, those rules do not concern a limited and clearly defined group of traders.

Furthermore, the contested aid is a supplementary national aid authorized solely on the basis of the third subparagraph of Article 93 (2). Hence there was no need for a proposal from the Commission or for consultation of the European Parliament.

As a result, it simply has to be established whether the conditions laid down in that provision, in particular the justification by 'exceptional circumstances', were fulfilled. But even if that question were answered in the negative, a superior rule of law intended to protect individuals would not be involved.

Contrary to the applicant's view that procedural rules are designed at least to ensure that review by the courts is possible in cases where the substance and consequences of a decision may be affected, the German Government considers that the Community cannot incur liability as a result of a breach of procedural rules which have at most an indirect effect on the substantive legal situation, but solely as a result of the illegality of the substantive decision taken by the Community institution concerned.

But the Council decision of 30 June 1984 does not constitute a substantive infringement of the Treaty in view of the wide discretionary powers which the Court has held the Council to possess with regard to the implementation of the common agricultural policy and especially with regard to the dismantling of MCAs. Furthermore, the adoption of that decision is justified by 'exceptional circumstances', namely the special difficulties and exceptional sacrifices that the dismantling of MCAs has occasioned and will still occasion for German farmers.

(b) *Improper application of the procedure referred to in Article 93 of the Treaty*

Another submission relating to the procedure provided for in Article 93 was raised by *GAEC* in its reply. The applicant considers that the Council could not in any event take a decision until the Commission had been informed of the plan to grant aid in accordance with Article 93 (3) and had then assured itself, by means of a preliminary examination, that the planned aid was compatible with the common market or, in the event that the Commission found the aid not to be compatible with the common market, until the Commission had initiated the procedure prescribed by Article 93 (2).

The *Council* considers, as has already been seen, that all the submissions raised by the applicant in its reply must be regarded as inadmissible.

As for the substance, the Council challenges the view that it could not act under the third subparagraph of Article 93 (2) before the Commission had initiated the procedure provided for in the first subparagraph of Article 93 (2) and had formally called on the parties concerned to submit their observations. In its view, it is clear from the wording of the relevant provision that an application by the government of a Member State to the Council suspends any procedure already initiated by the Commission and therefore, *a fortiori*, prevents the latter from initiating a procedure if it has not already done so. Interests of third parties are respected since, if the Council does not take a decision within three months, the Commission has to take the decision pursuant to the normal procedure.

The *Commission* concurs entirely with the view put forward by the Council.

(c) *Infringement of the principle of non-discrimination as a result of the excessive compensation given to German farmers for the abolition of MCAs*

Thirdly, *GAEC* submits that the principle of non-discrimination has been infringed in so far as the relief from VAT affords German farmers a substantial advantage going beyond mere compensation for the dismantling of MCAs, especially since they were already given relief from VAT six months before the abolition of MCAs took effect and the contested decision makes no distinction between agricultural products subject to MCAs and those not subject thereto.

It rejects the argument that there was no discrimination in so far as the initial situations of German and French farmers were different. In actual fact, GAEC contends, the situation created by 16 years of MCAs is abnormal compared with a situation of free competition and discriminates against producers in countries with weak currencies, so that by maintaining that situation, even by means of instruments other than MCAs, discrimination is simply being preserved. However, while that is acceptable for a transitional period in order to obviate a sharp fall in German farmers' incomes, it is

unacceptable that that decrease in income should be overcompensated and, what is more, for a fairly long period (four and a half years according to the decision of 30 June 1984).

Contrary to the Council's statement that 5% is a ceiling which will be only reached if necessary, GAEC considers that there is no provision in the decision of 30 June 1984 formally prohibiting the Federal Republic of Germany from overcompensating its farmers for their loss of income. It further stresses that the German Law of 29 June 1984 provides unreservedly for a general 5% reduction in VAT until 31 December 1988 and for a 3% reduction for the period between 1 January 1989 and 31 December 1991.

As regards the starting point for the grant of the aid, GAEC considers that, in any event, the scale of the measure taken very much exceeds that of a transitional measure which might have been taken to cope with pressure on prices, if indeed such a situation has actually arisen.

Lastly, as regards the point that the aid was authorized for all products, whether or not they were subject to MCAs, GAEC contends that it is affected by that type of aid even though it produces only products subject to MCAs, since the comprehensiveness of the aid leads to distortion affecting all products, including those produced by GAEC

In its view, neither the Commission nor the Council have attempted to show that aid of 5% corresponded to the damage actually suffered by the German farmers. According to a calculation carried out by the Committee on Economic and Monetary Affairs and Industrial Policy of the European Parliament on the basis of estimates provided by the Commission of the European Communities, 5% aid represents approximately DM 3 000 million whereas the MCAs for that same period were estimated at around DM 2 250 million.

FNSEA points out that the ECU prices of agricultural products are the same for all Community nationals and that, whilst the dismantling of MCAs results in lower incomes for German farmers, it nevertheless constitutes a return to normality and cannot be viewed as a measure penalizing one category of farmers in relation to another category. For 15 years farmers in countries with weak currencies suffered discrimination as a result of the MCA system and made sacrifices in the interest of the common agricultural policy and in order to maintain the free movement of agricultural products.

German farmers cannot now claim that they have vested rights to advantages that they gained from that abnormal situation, although they should be aided by appropriate means to overcome, during a transitional period, the difficulties encountered by them in returning to a normal situation.

First and foremost, the *Council* argues that there can be no question of discrimination in this case, since the dismantling of MCAs which was decided in March 1984 resulted in increased incomes for French farmers but in smaller incomes for German farmers, and the aid therefore simply sought to put situations back on their previous equal footing.

However, even if that consideration were to be ignored, the Council considers that no distortion of competition has taken place to the advantage of German farmers. Although the intervention prices and, therefore, the market prices of German agricultural products fall by 5.2% as a result of the revaluation of the representative rate of the German mark, at the same time the MCAs granted on exportation fall by 5%, so that export prices could not be lowered by 5% unless the exporter were prepared to bear out of his own trading profit the decrease corresponding to the reduction in the MCA, which does not appear very likely.

However, even if distortion did exist, which remains to be proved by the applicant, it could not exceed the difference between the maximum aid (5%) and the percentage which the applicant itself considers to be permissible (3.75%), and would be even lower in the sector of beef and veal, where ECU prices fell by 1% as from 1 April 1984.

The earlier payment of the aid was justified by the fact that a 3% reduction in export MCAs for German agricultural products was already applied as from 1 April 1984. Furthermore, a decline in prices on the national market had already been observed before 1 January 1985, in so far as traders were aware that prices would decline by 5.2% as from 1 January 1985 and had obviously not been prepared to pay in the months preceding that fall a market price which was entirely based on the former rate of the German mark.

The failure to distinguish between products subject to MCAs and products not subject to MCAs cannot affect GAEC in so far as the products with which it is concerned (cattle, poultry, milk) are all subject to MCAs.

Lastly, the Council challenges the applicant's estimates of the extent of the overcompensation.

It observes that a 5.2% revaluation of the green Deutschmark results in at least a 4% decline in the market price for all agricultural products whether or not they are subject to MCAs, since a decrease in the price of a product subject to MCAs necessarily results in a decrease in the price of competing products, even if they are not subject to MCAs.

In view of the fact that the value of German agricultural production has been estimated for the 1980/81, 1981/82 and 1982/83 marketing years at an average of DM 60 000 million, that would result in a foreseeable decrease of income of DM 2 400 million. A 3% aid related to the value of production would only be worth DM 1 800 million. It is therefore obvious that Regulation No 855/84 did not offset the loss of income resulting from the revaluation of the German mark.

After that regulation had been adopted, the German Government updated its estimate of the amount realized by recipients of the aid, on the basis of the data for the 1983/84 marketing year and on the value of sales, which was lower than the total value of production.

On that revised basis, the loss of income was calculated at approximately DM 2 800 million as compared with compensation of approximately DM 2 200 million.

In any event, it is incontestable that the 3% aid does not represent full compensation for the loss of income and that the Council, in authorizing an increase in the aid, in no way acted arbitrarily.

(d) *Misuse of powers as a result of the infringement of the Sixth Directive on value-added tax*

Fourthly, *GAEC* submits that by using VAT as an instrument for paying the contested aid the Council diverted the Sixth VAT Directive from its proper aim, which is to secure competitive neutrality as between the Member States so as to achieve the convergence of national VAT systems. The requirement that VAT should be neutral emerges very clearly from Article 25 (3) of the Sixth Directive, which authorizes Member States to introduce a flat-rate system for the repayment of VAT but stipulates that such repayment 'may not be used to obtain for flat-rate farmers refunds greater than the value-added tax charged on inputs'.

Admittedly, the Commission proposes that the directive be supplemented by a derogation for the benefit of the Federal Republic of Germany, but the legitimization of the overcompensation would strike a fatal blow to the aim of harmonizing domestic legislation, which is the basic purpose of the directive. Moreover, the measures implementing the decision of 30 June 1984 are all the more serious since the Federal Republic includes in the category of flat-rate farmers almost all agricultural producers, whereas in France their number does not exceed one-third of the total.

The *Council* points out in the first place that the authorization to use VAT as the technical instrument for paying the aid was initially given by Regulation No 855/84 and it is therefore legitimate to ask whether the applicant, which did not contest that regulation, is still entitled to invoke that complaint in relation to the decision of 30 June 1984 which merely confirmed, as regards the supplementary aid, the authorization already given by Regulation No 855/84.

Apart from that, the Council considers that the procedure followed in no way constitutes a misuse of powers. Article 25 (3) of the Sixth Directive is intended to obviate the distortions of competition in the agricultural sector which may result from disguised subsidies calculated to increase farmers' incomes indirectly. That is by no means the case here.

Furthermore, since the Sixth VAT Directive, Regulation No 855/84 and the decision of 30 June 1984 are all measures of secondary legislation, it must be conceded that the latter two measures — being subsequent measures of secondary legislation — may introduce selective derogations of a purely technical nature from the directive, a prior measure of secondary legislation, without providing for substantial, general amendment of the system of the Sixth Directive, which could only be effected by another directive.

In the Council's view, it is impossible to agree with the applicant's view that the authorizations given by Regulation No 855/84 and the decision of 30 June 1984 should remain in abeyance pending formal amendment of the Sixth VAT Directive. If that were so it would be possible to authorize an aid in substance but not to specify a particular technical procedure for paying it and that would be liable to deprive both Articles 42 and 43 and Article 93 of the EEC Treaty of effectiveness.

The Commission adds that, in so far as the derogation has to be formalized by a new directive, a proposal for a directive to that effect has in fact been submitted by the Commission.[1] There is no need to consider

1 — This directive has since been adopted on 16 July 1985 (Official Journal 1985, L 192, p. 18).

whether that directive will be declaratory or constitutive since, even if it were to be regarded as constitutive, there would be nothing to prevent it from being retroactive.

Accordingly, the Council considers that the alleged misuse of powers is by no means established and that, in any event, such a misuse of power could not constitute a sufficiently serious breach of a superior rule of law protecting the individual.

The *Commission* observes that it was the Commission itself which suggested to the Council, in its proposal for Regulation No 855/84, that the fiscal technique contested by the applicant be used for the grant of the aid. The logical consequence of utilizing that technique was the necessity to amend Articles 17, 22 and 25 of the Sixth VAT Directive, from which the proposal derogated.

The *Government of the Federal Republic of Germany* considers that Article 25 of the Sixth VAT Directive constitutes neither a superior rule of law nor a rule intended to protect the individual. The decision of 30 June 1984 ranks higher than Article 25, since it was unanimously approved by the Council, it is more recent and it governs a special situation, which is circumscribed from the substantive and temporal points of view. Furthermore, the Sixth Directive is not a rule intended to protect the individual, in so far as VAT served solely as a technical instrument for the grant of the special aid.

(e) *Infringement of the principle of proportionality as* a result of *using VAT as the instrument for granting the aid*

In its reply, *GAEC* raises another argument concerning the utilization of VAT, which is based on the contention that it is inappropriate to use VAT as the instrument for the aid and that the measure adopted therefore infringes the principle of proportionality. VAT is not an appropriate instrument for the purposes of granting the aid for the following reasons:

(i) the aid granted by means of relief from VAT is necessarily general and therefore also applies to products on which there are no MCAs or whose prices are only minimally affected by MCAs;

(ii) the aid granted by means of VAT is in reality much higher than it appears given that it applies in fact to any commercial operation between farmers and not to added value;

(iii) the trader receiving the aid can fraudulently increase the number of pointless or fictitious commercial transactions;

(iv) the aid as envisaged is bound to affect the Community's own resources;

(v) the aid in question will benefit large farms more than small ones, thus accentuating the distortion of competition.

It is therefore obvious that other aid instruments would be more appropriate for achieving the objective in question and would not constitute a manifest infringement of the rules of the Treaty.

FNSEA entirely shares the view expressed by the applicant and argues that the use of VAT as the instrument for the aid, far from restoring a normal situation, will institutionalize a distortion of competition, especially since, as far as concerns the 3% granted by Regulation No 855/84, the aid is neither tapering nor granted for a limited period.

The *Council* considers that the argument is without foundation; what is more, even if it were founded, it would not be possible to find a link between the claimed deficiencies in the system for applying that national aid and the alleged damage. It is significant that the applicant has not suggested, nor furnished the necessary explanations and justifications for alternative systems for the payment of the aid which would be more appropriate in this case. In fact, in order to offset the loss of income of all the farmers concerned, it was vital to introduce a system of direct income subsidies. In theory it would be possible to envisage a more selective system than the flat-rate and comprehensive compensation system employed in this case, for example a system of subsidies differentiated according to products, but such a system would be extremely complicated and hence, albeit theoretically conceivable, it would in practice create almost insurmountable administrative obstacles.

Above all, it should also be held that even if the use of VAT as an instrument for the payment of the aid were considered disproportionate, there would in fact be no link between that and the applicant's claim for damages. If there is fraud involving the aid in the Federal Republic of Germany or if the procedures for granting the aid result in a reduction of the Community's own resources it cannot be seen how such circumstances can have any bearing at all on the damage which the applicant claims to have suffered.

The *Government of the Federal Republic of Germany* claims that it is impossible to discern in the decision of 30 June 1984 an infringement of the principle of proportionality.

In any event, it is impossible to speak of a serious and manifest infringement of the law when the procedure for amending the Sixth Directive is in progress.

It is within the powers of the Community institutions to remedy, by means of a retroactive amending measure, a derogation from a directive in a Council decision.

(f) *Infringement of Article 96 of the EEC Treaty*

GAEC further maintains that the overcompensation granted to German farmers in respect of all their products, and hence also in respect of those products intended for export, infringes Article 96 of the EEC Treaty, which provides: 'Where products are exported to the territory of any Member State, any repayment of internal taxation shall not exceed the internal taxation imposed on them whether directly or indirectly'. In its view, it is surprising that the Commission failed to pick up that difficulty, when, in its first report to the Council of 14 September 1983 on the operation of the common system of value-added tax, it stated that it had initiated infringement proceedings pursuant to Article 169 of the EEC Treaty against a Member State which it rightly accused of having granted a disguised subsidy to farmers by means of a flat-rate refund of the VAT on certain products which markedly exceeded the amount of the tax on inputs.

In this case, even if the aim of the aid is not to subsidize exports, the way in which it is granted has the effect of making it into such a subsidy.

In reply, the *Council* argues that the aim of Article 96 is to obviate disguised export subsidies at the commercial level whereas what is involved in this case is an income aid designed to make good a loss of income and granted at the level of the individual

farmer and not in respect of exported products. No tax refund is granted in respect of trade in German agricultural products intended for intra-Community trade and the effect of the aid is, in any event, offset at the commercial level by the corresponding reduction in the MCAs granted on exportation.

The *Commission* considers that Article 96, which prohibits repayment of internal taxation on exported products, is inapplicable in this case since the grant of the aid in question is in no way connected to the exportation of an agricultural product.

The *Government of the Federal Republic of Germany* considers that the applicant has misconstrued the field of application and the scope of Article 96 and that the aid is neither wholly nor partly a refund granted in respect of exports from the Federal Republic of Germany to France nor a repayment of internal taxation.

(g) *The reduction in the Community's own resources*

Lastly, in its reply, *GAEC* submits that, even though the contested decision provides that the supplementary aid of 2% will be paid by the Federal Republic of Germany, it is not certain that the fiscal neutrality of the operation will be ensured or that the Community's income will be safeguarded.

It contends that the Council decision endorses *ex post facto* a German law which makes no fiscal distinction so as to differentiate clearly between VAT, on the one hand, and aid, on the other. The aid is granted on farm turnover without there being any guarantee of separate indications being given on VAT declarations and invoices, with the result that the volume of the Community's own resources is liable to be affected, as the European Parliament observed in its draft resolution of 4 December 1984.

The *Council* observes that that submission has no connection with the action for damages brought by GAEC. It is impossible to see how a possible diminution in the Community's income can result in arbitrary discrimination against the applicant in this case and cause it to suffer the alleged damage.

2. *The causal connection between the Council decision and the alleged damage*

GAEC argues that German farmers may utilize the undue advantage given to them by passing it on directly in their selling prices, or by granting substantial rebates thanks to the increased margin given to them by the aid or by increasing the competitiveness of their farms by means of investment made possible by that advantage.

The price variations which might result are of the order of 5 to 10% and are even higher in the case of the applicant's livestock-raising activities, given that in France the flat-rate repayment of VAT is 3.5% as against 7% VAT paid on inputs, whereas in Germany it is, partly as a result of the aforementioned decision of the Council, 13% as against 6.5% VAT paid on inputs.

GAEC adds that it cannot be considered that the alleged damage was caused by the German measures which were taken following the Council decision of 30 June 1984 and not by the decision itself. In actual

fact, the German measures antedated the Council decision but they could come into force only as a result of the Council decision. Admittedly, that decision merely authorizes the Federal Republic of Germany to grant an aid, but the causal connection is none the less proven since, under the Treaty itself, no Member State may grant aid without the authorization of the Community institutions.

The *Council* argues that it has not been proved in this case that the alleged damage — namely the fall in the price of cattle raised by the applicant following the overcompensation of German farmers — was caused directly by its decision of 30 June 1984. In point of fact, the direct cause of the damage — as the applicant itself states — was the German domestic measures taken following the decision of 30 June 1984. The latter decision did not itself grant aid but merely authorized the Federal Republic of Germany to pay aid. What is more, that authorization is limited to a ceiling of 5% of VAT, corresponding to the actual loss of revenue suffered by German farmers, and does not in any way oblige the Member State concerned to pay the aid in question, in particular where that would lead to overcompensation. As a result, it is absolutely out of the question to claim that that authorization was the direct cause of any damage whatsoever to the applicant.

In the Council's view that conclusion is borne out by the fact that GAEC has sought to prove that there was a distortion of competition, and hence damage to it, largely on the basis of consideration of the German VAT system alone. But in so far as the applicant contends that the German domestic VAT system already distorted competition even before authorization was given for the aid, which merely aggravated that distortion, it is thus relying on arguments which show, on the contrary, that there is no direct causal connection between the decision authorizing the aid and the alleged damage.

The *Government of the Federal Republic of Germany* refutes the contention that damage in the sector of beef and veal — the only one for which the applicant has attempted in any way to quantify the alleged damage — could have been caused by the grant of excessive aid to German beef and veal producers which in July 1984 triggered an increase of French imports of beef and veal from the Federal Republic of Germany as compared with July 1983 and a resultant decline in French beef and veal prices.

The German Government observes, in the first place, that external trade figures for a single month are of no utility whatsoever as an argument for or against a particular market trend. In fact, in 1984 as a whole French exports to the Federal Republic rose by 62% as compared with 1983, whilst German exports to France went up by a mere 3%. As regards the claimed 17% rise in imports from the Federal Republic in July 1984 as compared with July 1983, other months in preceding years and in 1984 should be examined. It would then be seen that imports from the Federal Republic increased by 22% in February 1984 and 20% in May, well before the aid was authorized. In contrast, the period following the grant of the aid — when the aid could have had a possible impact — shows significant falls in French imports of beef and veal from the Federal Republic.

The Federal Republic of Germany further contends that it is also impossible to establish a causal connection between German exports and the decline in beef and veal prices in France. Market price formation depends on manifold factors. Indeed, in the very period mentioned by the applicant, restrictions imposed by the Community institutions on milk production resulted in the increased slaughtering of cows in the Community, which had a decisive impact on the decline in beef and veal prices.

There is thus no evidence to support the proposition that the alleged damage must be attributed to the supplementary aid which the Council authorized by its decision of 30 June 1984. Even if the applicant had succeeded — *quod non* — in proving the existence of actual damage, both the external trade figures and the trend in beef and veal prices would militate strongly against the existence of a causal connection between the alleged damage and the decision in question.

As regards future damage as well the applicant merely states that it will suffer damage as a result of the aid granted to German farmers without in any way proving that the alleged future damage will be a consequence of that aid.

3. *The existence of the damage*

GAEC contends that in July 1984, as a result of the aid granted to German farmers, prices on the French market fell by an average of 13% compared with prices in July 1983.

As regards sales of beef and veal, GAEC states in its application that in 1983 its gross earnings amounted to FF 354 000 and that, on the basis of forecast sales for the second half of 1984, it estimated that its loss of profits on its gross earnings from sales of cattle is at least 5%. As far as sales of poultry and milk are concerned, it states that it does not yet have figures available.

GAEC has, however, provisionally estimated the damage that it has suffered at FF 60 000 for 1984. This figure is subject to revision when the statistics for the second half of 1984 are available and GAEC has drawn up its operating results and balance sheet for 1984. It also points out that, according to decided cases of the Court of Justice, the alleged damage does not need to be definitively specified in order for an action to be admissible.

In its reply GAEC has not supplied any new data concerning the quantum of the damage.

The *Council* contests the existence of the damage alleged by GAEC and considers that the evidence of damage put forward by GAEC, in so far as it is not completely lacking, by no means satisfies the requirements laid down in the Court's case-law.

In the first place, no account can be taken of the poultry and milk sector, since the applicant states that it does not yet have available data enabling it to quantify any damage in that sector.

As for sales of cattle, the only attempt made by the applicant to prove the damage consists in its statement that the selling prices of its cattle fell sharply on the French market as from 1 July 1984 as a result of massive imports of processed beef and veal products from the Federal Republic of Germany, which, it alleges, were assisted by the aid granted to German farmers.

Apart from the fact that the applicant has by no means proved that the aid was the real

reason for what happened, it has also failed to prove the existence of actual damage.

In that respect, the following facts show that it is more than improbable that the aid in question can have had the impact alleged by the applicant:

(i) As the applicant itself admits, the maximum distortion of competition to the advantage of German farmers was of the order of 1.25%;

(ii) As from 1 April 1984 the beef and veal sector in the Federal Republic suffered a 1% decline in income whereas in France income rose by approximately 5%;

(iii) The actual distortion of competition cannot therefore be more than 0.25% as from 1 January 1985;

(iv) The applicant has not taken account of the decrease in the German export MCA, to the extent of 3% as from 1 April 1984 and 5% as from 1 January 1985.

T*he Government of the Federal Republic of Germany* considers that the application must be dismissed simply because the applicant has not explained in detail or adduced evidence for its claim that the overcompensation resulting from the grant of aid to German farmers has caused it to suffer damage or will cause it to suffer damage in the future.

As regards the claimed existing damage, the applicant has not adduced specific facts — or, *a fortiori*, appropriate evidence — for the economic sectors of poultry and milk production. As for the beef and veal sector, the applicant has not explained how it arrives at the figure of 5% for the damage which it claims to have suffered and has not specified the basis for calculating the damage allegedly suffered by it in the second half of 1984, whereas it should have already known its gross earnings for 1984 in the beef and veal sector and the way in which its gross earnings had developed with respect to previous years at the latest at the time of the drafting of its reply, which was submitted in March 1985.

Consequently, the applicant has not shown that it suffered actual damage for the period July 1984 to February 1985, that is to say for the period preceding the submission of its reply.

In so far as the applicant relies on future damage, that damage must be shown to be imminent and foreseeable with sufficient certainty if an action for damages is not to degenerate in practice into an action for annulment or even a 'Popularklage' (collective action, brought in the public interest).

As regards the requirement that the damage must be imminent, it can be considered that damage should have occurred as from the second half of 1984, since the aid was granted as from 1 July 1984. Nevertheless the applicant has not yet proved — in May 1985 — that it suffered damage in the second half of 1984. *A fortiori* it is thus impossible to foresee future damage with sufficient certainty.

Neither is the applicant entitled to rely on the case-law of the Court in order to justify the lack of concrete evidence of alleged damage, since the issue of the legal basis of any liability on the part of the Community would in this case require numerous legal and factual considerations to be taken into account and hence does not lend itself to a separate decision; furthermore, the applicant has not adduced sufficient evidence of the existence of present or future damage

arising as a result of the Council decision of 30 June 1984.

IV — Answers given by the parties to the questions put to them by the Court

GAEC states in answer to the Court's first question that it determined the extent of the discrimination which, in its view, arises as a result of the aid authorized by the decision of 30 June 1984 separately from the extent of the discrimination which it considers to have existed already, before any aid was granted, as a consequence of the differences between the systems for the repayment of VAT existing in the Federal Republic and France.

In this connection GAEC produced statistics on the decline in the market prices of beef and veal in the Federal Republic of Germany since July 1984, on the impact of that price decline on export prices and on the decline in prices on the French market for beef and veal which it alleges to have been caused by the German price trend.

In reply to the Court's question about the extent of the damage for which it is seeking compensation, GAEC estimates the damage which it suffered in respect of its sales of adult bovine animals during the second half of 1984 at FF 10 894 (corresponding to 5.6% of its sales of such animals during that period). In answer to the second question put by the Court, GAEC produced statistics on price trends for beef and veal, milk and poultry in France in the 12 months preceding the decision of 30 June 1984 and, in addition, statistics on imports of milk and poultry from the Federal Republic in the same period.

Lastly, GAEC produced its profit and loss account and balance sheet for 1982, 1983 and 1984.

In reply to the first question put to it by the Court, the *Council* states that the inclusion of agricultural products not subject to MCAs within the scope of the aid which is intended to compensate German farmers for loss of income was already envisaged in Regulation No 855/84, which states that the reason for this is that adaptation of the representative rates entails in the countries concerned an overall reduction in prices expressed in national currencies and consequently lower farm incomes generally.

In answer to the second question, the Council states that revaluation leads to a fall in the market price of products which are not supported by intervention as well as those that are.

As to the question whether it was reasonably foreseeable that there would be a fall in market prices in the Federal Republic of Germany during the second half of 1984, the Council states that it considered it probable that trade circles, which knew as from 1 April 1984 that there was to be a 5% decrease as from 1 January 1985, would gradually pass on this decrease in the prices paid to German farmers after 1 April 1984. That fall was not hypothetical, as witness the transitional measures whereby the Commission, in Regulation No 2677/84, brought forward to 21 September 1984 the date on which the new revalued rate took effect in the case of sugarbeet and industrial potatoes.

The *Government of the Federal Republic of Germany* produced statistics relating to the trend in the market prices of products subject to MCAs during the second half of 1984. It observes that those statistics show a fall in prices during the second half of 1984 as compared with the same period in previous years.

The Federal Government goes on to state that its request to bring forward to 1 July 1984 the application of the aid was justified by the fact that the dismantling of the German positive MCAs, which had been scheduled to take place on 1 January 1985, was already having major effects on market prices well before that date; in view of the reduction in prices which was to take place on 1 January, purchasers of agricultural products had only two options even in the second half of the preceding year: they could keep to a minimum their purchases of agricultural products until 1 January, which would have had a very serious impact on farmers, or they could purchase at a lower price, thus already making allowances for the future fall in prices.

A second reason for seeking to grant the aid earlier was that there had already been a reduction in positive German MCAs, which had resulted in a price rise of at least 15% in the context of the common organization of the markets.

G. Bosco
Judge-Rapporteur