JUDGMENT OF THE COURT
29 SEPTEMBER 1982 [1]

SA Oleifici Mediterranei v European Economic Community

(Non-contractual liability)

Case 26/81

Non-contractual liability — Requirements — Accusation of unlawful conduct — Damage — Causal connection
(EEC Treaty, Art. 215, second para.)

It appears from Article 215 of the EEC Treaty that the involvement of the non-contractual liability of the Community and the assertion of the right to compensation for damage suffered depends on the satisfaction of a number of requirements relating to the unlawfulness of the conduct of which the institutions are accused, the reality of the damage and the existence of a causal connection between that conduct and the damage in question.

Hence the Community cannot be regarded as having incurred liability except in the presence of all the conditions to which the duty to make good any damage, as defined in the second paragraph of Article 215, is subject.

In Case 26/81

SA OLEIFICI MEDITERRANEI, based at Quiliano (Italy), represented by E. Jakhian of the Brussels Bar, with an address for service in Luxembourg at the Chambers of E. Arendt, Centre Louvigny, 34/B/IV Rue Philippe-II,

applicant,

1 — Language of the Case: French.

EUROPEAN ECONOMIC COMMUNITY, represented by its institutions, namely:

1. Council of the European Communities, represented by Daniel Vignes, Director of its Legal Department, acting as Agent, assisted by Arthur Brautigam, Administrator in the said Department, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director in the Directorate for Legal Questions of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

2. Commission of the European Communities, represented by its Legal Adviser, J. C. Séché, acting as Agent, assisted by J. Sack, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for damages pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, whereby the applicant seeks an order for the payment to it by the Community, by way of damages, of 50 629 units of account (u.a.) as principal, together with interest at 8% from 4 May 1979 until the date of judgment,

THE COURT

composed of: J. Mertens de Wilmars, President; G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, A. O'Keeffe, T. Koopmans, U. Everling and F. Grévisse, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

I — Facts and written procedure

1. The legislative context

The Communities' olive oil market displays certain characteristics which explain why, as part of the common organization of the market in oils and fats, olive oil is governed by a system which, on certain points, makes *ad hoc* provisions.

(a) The system prior to the 1978 reform

Regulation No 136/66/EEC of the Council of 22 September 1966 establishing a common organization of the market in oils and fats (Official Journal, English Special Edition 1965-1966, p. 221) had laid down the main rules for olive oil:

(i) Single prices for the Community were fixed by the Council for each marketing year (running from 1 November to 31 October of the following year): they were increased in monthly steps over the 10 months following 1 January in order to regularize the market whilst avoiding the sale of the whole harvest to the intervention agencies as soon as the marketing year had opened (Article 4);

(ii) Owing to the relatively low price-levels for substitutes such as seed oil it was not possible to raise the market price to a level at which producers would be adequately remunerated. Consequently, a system of subsidies to producers — exceptional in the common agricultural policy — was set up (Article 10);

(iii) As far as trade with non-member countries was concerned, imports were subject to a levy which was designed to bring the price of olive oil up to the Community level (Article 13), whilst exports benefited from a refund whenever the price within the Community was higher than the world price (Article 18). That is why licences were required for both importation and exportation and were issued only against a deposit which was forfeited in whole or in part if the transaction was not effected within the period of validity of the licence, or if it was only partially so effected (Article 17 as amended by Regulation (EEC) No 2554/70 of the Council of 15 December 1970: Official Journal, English Special Edition [1970] III, p. 866);

(iv) Still in the context of trade with non-member countries, there is a specific system of refunds known as "Exim", which was created by Regulation No 171/67/EEC of the Council of 27 June 1967 on export refunds and levies on olive oil. The system is expressly set forth in Article 9 (1), which provides as follows:

"On application by the party concerned, the export refund on olive oil shall be granted in the form of an authorization to import, free of levy, a quantity of olive oil corresponding to the quantity of olive oil exported, provided it is proved that exportation was effected before importation and

provided that importation is effected within a time limit still to be determined."

The conditions under which importation may be permitted free of levy are stipulated by Regulation (EEC) No 2041/75 of the Commission of 25 July 1975 on special detailed rules for the application of the system of import and export licences and advance fixing certificates for oils and fats (Official Journal 1975, L 213, p. 1).

(b) The 1978 reforms

By Council Regulation (EEC) No 1562/78 of 29 June 1978 amending Regulation No 136/66/EEC (Official Journal 1978, L 185, p. 1) the system relating to olive oil was amended, but not abolished: single prices continued to be fixed annually, and trade with non-member countries remained as it had been, so that the "Exim" system underwent no revision. The only fundamental amendment was the creation of a consumption aid (Article 11) which was due to the fact that, since 1975, the system of production aids had been proving unsatisfactory. Thus olive oil has, since 1978, qualified not only for production aid but also for consumption aid.

Owing to the difficulties in operating the system for verifying eligibility for consumption aid, it was impossible to bring these new provisions into force on 1 November 1978. For that reason Council Regulation (EEC) No 3088/78 of 19 December 1978 fixing for the 1978/79 marketing year the representative market price and threshold price for olive oil and the percentage of consumption aid referred to in Article 11 (3) of Regulation No 136/66/EEC laid down prices which were to prevail for the periods from 1 January to 28 February 1979 and from 1 March to 31 October 1979, since it was estimated that the new aid system could enter into force on 1 March 1979.

However, when the Council in February 1979 observed that there were still difficulties, it introduced Regulation No 360/79 of 20 February 1979 amending Regulation (EEC) No 3088/78 in respect of the periods of application of the 1978/79 marketing year of the representative market prices and of the threshold prices for olive oil (Official Journal 1979, L 46, p. 1), whereby it decided to extend the former prices by one month and therefore not to bring the new prices into force until 1 April 1979.

Consequently, from 1 April 1979 onwards, the threshold price fell by 25.99 u.a. per 100 kg of olive oil, which meant that the levies declined proportionately. As the levy could be fixed in advance, the Commission adopted, in Regulation (EEC) No 884/79 of 3 May 1979 adjusting the amount of the levies applicable in the olive oil sector (Official Journal 1979, L 111, p. 18), transitional measures designed to reduce the levy payable upon those quantities of olive oil subject to the system of fixing by the tendering procedure and imported after 1 April 1979 under certificates for which application had been made before that date. The reduction in question amounted to approximately 24.18 u.a. per 100 kg, which is more or less the same as the margin by which the threshold price was reduced, namely 25.99 u.a. per 100 kg.

No transitional measure relating to the "Exim" system was adopted with respect to quantities of oil imported after 1 April 1979. Thus traders who opted for the "Exim" system and who exported olive

oil before 1 April without drawing any refund, imported equivalent quantities, without paying any levy, which they then had to dispose of at the new Community price, that is to say, at a price which was 25 u.a. per 100 kg lower than the former price.

2. The facts

Since there is no agreement as to the facts it is necessary to record them as stated in the arguments of the parties.

According to the applicant, the damage it has suffered related to a quantity of 194.805 tonnes exported and imported under the "Exim" system.

The documentary evidence and the memorandum concerning the damage suffered ("note relative au préjudice subi") disclose that the applicant sold 268 tonnes of olive oil to the National Supply Corporation of Libya, and invoiced this quantity on 27 January 1979 at the price of LIT 1 230 per kg, whereas the average price for olive oil sold on the home market was approximately LIT 1 720 per kg.

The Commission maintains that this initial phase of the "Exim" operation is debatable, since in the absence of a relevant export certificate, the invoice produced "can hardly be identified as the one which in fact related to the exportation of 190 tonnes under the 'Exim' system".

As far as importation is concerned, the applicant has attached to its application two import certificates covering altogether 194 805 tonnes, which expired respectively on 30 May 1979, as regards 33 tonnes, and on 30 June 1979, as regards 161 tonnes. The applicant further produces, as an annex to its reply, seven invoices relating to purchases of olive oil in Spain which were made between 12 May and 13 June 1979. According to the Commission, however, these invoices do not account for 194.805 tonnes, but cover only 104 tonnes. Moreover, the Commission claims that, of the quantity invoiced, 57.4 tonnes refer, not to virgin olive oil, but to refined oil which was not imported free of levy.

It is undisputed that those imports were carried out at a price of approximately LIT 1 630 per kg, although the Commission claims that this price was slightly higher than the Spanish offer prices recorded for the same period on the world market.

Once imported, the oil was resold within the EEC at approximately LIT 1 900 per kg.

That being so, the applicant's "damage" — which the Commission describes as "reduced profit" — is equivalent to the difference between the average price of oil on the Community market, namely LIT 1 750 per kg, and the resale price to Libya, namely LIT 1 230 per kg. That difference (approximately LIT 520 per kg), in relation to a quantity of approximately 190 tonnes, amounts to about one hundred million lire. The applicant, however, maintains that the loss is approximately LIT 120 000 000, on the grounds that the loss per kilogram amounts to LIT 700 whilst the quantity imported was 194 tonnes, the equivalent of a quantity of 175.5 tonnes exported, given that 1 kilogram exported entitles the trader — according to the applicant — to import 1.10 kg free of levy. The applicant does none the less concede, on page 4 of its memorandum on the damage suffered by it, that the loss upon exportation is in the region of LIT 500 per kg.

The Commission contends that the loss in question, of LIT 520 per kg, has to be viewed in conjunction with the amount of export refund which the "Exim" trader has foregone, namely LIT 277 per kg. Consequently, if the applicant had

not foregone the export refund it would, in the Commission's view, have accepted a reduced profit amounting to 520 — 277 = LIT 243 per kg.

The applicant calculates that, upon importation, it realized a profit on only LIT 233 per kg, (that is, LIT 1 900 minus LIT 1 612 minus costs) since the resale within the EEC had been carried out without the benefit of consumption aid. Thus it claims to have made a profit of LIT 42 000 000.

The Commission contests the figure of LIT 1 900 per kg in respect of the resale within the EEC. It maintains that the figure has been merely put forward without any supporting evidence, notwithstanding the four invoices produced to the Court by the applicant. In the Commission's opinion, the selling price in the EEC lay between LIT 2 507 and LIT 2 780 per kg. Thus, even if the applicant had not been in receipt of consumption aid, it could or should have sold the olive oil at between LIT 2 200 and 2 480 per kg.

The Council notes that the resale prices fluctuate considerably (between LIT 1 590 and 1 940) without any explanation being given for this. Without going into detail, the Council wonders generally if the prices quoted by the applicant are truly representative of normal commercial transactions so far as price levels are concerned. It further considers that any comparison between a quantity exported totalling 8 000 tonnes — being the total exported to Libya — and imports of only 20 tonnes at a time — the importation of 190 tonnes being made up of a number of consignments of 20 tonnes — is bound to be misleading.

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.

II — Conclusions of the parties

The *applicant* claims that the Court should:

Declare the application admissible and well founded; consequently, order the European Economic Community, represented by its organs, namely the Council of Ministers and the Commission, to pay the applicant by way of damages the sum of 50 629 European currency units together with interest thereon at 8% from 4 May 1979 until the date on which judgment is given;

Order the European Economic Community to pay the costs.

The *Council* contends that the Court should:

Dismiss the application as unfounded and order the applicant to pay the costs.

The *Commission* contends that the Court should:

(a) Dismiss the application;

(b) Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

In its defence, the *Council*, without raising any objection to the admissibility of the action as such, none the less expressed doubts as to whether the application was compatible with the requirements of Article 38 of the Rules of Procedure. However, on having sight of the documents annexed to the

applicant's reply, the Council abandoned the reservations on this point which it had formulated in its defence.

B — Submissions directed against the Commission

To the extent to which it is directed against the Commission, the application alleges that the latter, in exercising its legislative function, committed a wrongful act, namely the adoption of Regulation No 884/79.

(a) The *applicant's* main argument is to the effect that the restrictive conditions imposed by the Court in other cases for the purpose of establishing liability in connection with the legislative function are not applicable in this case. According to the applicant, the Court has always connected the existence of the restrictive conditions which it has formulated — particularly in its judgments of 2 December 1971 *(Schöppenstedt,* Case 5/71, [1971] ECR 391) and of 13 June 1972 *(Compagnie d'Approvisionnement and Grands Moulins de Paris,* Joined Cases 9 and 11/71 [1972] ECR 391) — with the observation that the contested rules constituted "a legislative measure involving choices of economic policy".

Even though Regulation No 884/79 does constitute a legislative measure it does not involve, according to the applicant, any choice of economic policy since such choice was, in this case, in the hands of the Council and found expression in the regulations adopted by the latter in 1978. The applicant takes the view in regard to this point that the Council exercised to the full the political choice available and that the only powers entrusted to the Commission were strictly executive ones, as is implied, in particular, by Article 16 (6) of Regulation No 136/66 (as set forth in Regulation No 1562/78). Moreover, in the recitals in the preamble to the regulation at issue, the Commission did not claim to be making a choice of economic policy when it limited the transitional measures adopted to those imports which were subject to levies. Thus, contrary to the Commission's unsubstantiated assertions, the choice made by the Commission is, the applicant maintains, extraneous to any considerations of economic policy.

That being so, the applicant claims that it need do no more than show that the regulation at issue is defective, without having to demonstrate that it amounts to a serious breach of a superior rule of law for the protection of the individual.

The *Commission* rejects that line of argument. In its view, the legal basis for the regulation at issue is Article 16 (6) of Regulation No 136/66 of the Council, which provides that the detailed rules for the application of that Article are to be adopted in accordance with the procedure laid down in Article 38. The purpose of the provision is therefore to enable the Commission to adopt measures in regard to the fixing of the import levy, with which Article 16 is concerned, yet without requiring the Commission to exercise its powers.

When the Commission chose both to grant to "cash" traders an adjustment of the levy which had been fixed in advance and to withhold those benefits from "Exim" traders, it did so in exercise of its economic discretion.

Furthermore, if the Commission had been bound to exercise its powers the applicant would have had to seek the alleged illegality in a measure adopted by the Council, whereas the applicant brings no charge of illegality against the Council's regulations.

(b) In the alternative, the *applicant* maintains that, even allowing that the Commission can become liable only on the basis of the more restrictive conditions mentioned above, it must be conceded that such conditions are met in this case. According to the applicant two superior rules of law for the protection of the individual have been infringed by the Commission, namely the principle that comparable situations should be treated equally and that discrimination between them should be forbidden and the principle of the protection of legitimate expectation.

1. The principle of equality of treatment and non-discrimination

The *applicant* considers that in Regulation No 884/79 the Commission has confined itself to providing for an appropriate reduction in the levies applicable to quantities of olive oil imported on and after 1 April 1979 on the strength of certificates for which application had been made before that date, thereby refraining from introducing a similar measure in respect of quantities of olive oil imported on and after 1 April 1979 under certificates for which application was made before that date when those quantities, corresponding to equal quantities exported without refund before 1 April 1979, were not subject to the levies. Since the two situations are, in the applicant's submission, objectively comparable, the introduction of such a differentiation in treatment constitutes a "manifest disregard" and "a serious breach" of the general principle of equality of treatment and of non-discrimination.

Turning to the Commission's argument which seeks to show that the two situations described are not comparable, the applicant admits that differences do exist, but that they are not such as to justify the inequality of treatment which it denounces. By applying a distinction which confers a greater general advantage upon the trader operating under the "Exim" system, the Commission fails to take account of one essential factor, namely that, if an "Exim" trader, when exporting, forgoes a refund of only 24 u.a. at a time when the difference between the price inside the Community and that outside it amounts to approximately (145 u.a. — 95 u.a.) 50 u.a. he will normally resell at a loss on the world market. That loss is offset by the "advantage derived from the converse operation, namely importation.

Thus, the only objective difference between the two situations arises from a differentiated amendment of the prices respectively within and outside the Community, so that the "Exim" trader incurs a moderate risk offset by an equally moderate chance of profit, according to whether the gap between the two prices widens or narrows.

Admittedly, the transitional measure favouring "cash" traders is justified. The applicant argues that that is certainly no reason to inflict a loss upon the "Exim" trader, on the grounds that, having exported without refund, he may relinquish the planned importation without losing his deposit. Unless there were transitional measures in his favour, the "Exim" trader would have to resign himself to not setting off the loss on exportation against the anticipated

advantage upon importation, and his only choice would then lie between incurring a loss at the outset or a loss as a result of reselling imported quantities at a price lower than expected. Such a loss would be out of proportion to the margin of risk normally accepted by the "Exim" trader. Thus, although it is true that the latter is free to choose this system, he does so by reference to a margin of risk or profit which has nothing in common with the certain loss arising from a serious decline in the Community price, as occurred in the applicant's case.

Finally, as far as the arguments on Community price trends are concerned, the applicant considers that the point at which the discriminatory character of the regulation at issue should be judged is the date of its adoption: subsequent trends in the Community price are, in themselves, irrelevant to this analysis.

The *Commission* contends that the difference in its treatment of the "cash" trader on the one hand and the "Exim" trader on the other is based on the finding that the two situations are not comparable.

Where a "cash" trader, after carrying out an export attracting a cash refund (24 u.a.), decides to import an equivalent quantity of olive oil under the system whereby the levy is determined in advance, he has to pay this levy at a level which has to remain constant throughout the duration of the validity of the certificate, since that trader wishes to take precautions against an economic risk, namely a fluctuation in the prices recorded on the market, such risk involving an appropriate amendment of the levy. To that extent the "cash" trader's commitment holds good for a given legal situation and, when that situation changes fundamentally as a result of an amendment to Community rules, it is proper that it should be taken into account, since otherwise the trader would suffer a pecuniary loss equivalent to the amount by which the levy has been changed.

On the other hand, the situation of the "Exim" trader is, according to the Commission, totally different. In the case of an importation and an exportation carried out before 1 April 1979, the trader would — upon exportation — have purchased on the Community market at the Community price (about 145 u.a.), but would have forgone the refund (24 u.a.); upon importation he would have purchased at the world price (about 95 u.a.) whilst enjoying an exemption from the levy (52 u.a.), in order to resell at the Community price (about 145 u.a.). Thus the choice made by the "Exim" trader is usually such as to give him a general advantage over the "cash" trader.

Admittedly, that advantage was reduced in cases where the "Exim" trader, having exported prior to 1 April 1979, chose not to import until after that date, since the Community price at the time of importation stood at no more than about 120 u.a., even though, in the Commission's opinion, that is not certain in view of the rise in prices which in fact took place in the Community after 1 April 1979.

Whilst conceding that the levy was reduced from 52 to 32 u.a., the Commission stresses, however, that the amount of the exemption granted to the

"Exim" trader (32 u.a.) nevertheless continues to be higher than the refund which he waived (24 u.a.). The Commission concludes from this that if Regulation No 884/79 had granted the "Exim" trader a reimbursement corresponding to the change in the amount of the levy, it would have conferred upon him a guarantee of profit which was not envisaged by the system. Unlike the "cash" trader, the "Exim" trader is not entitled to have the levy determined at a fixed amount and it is, in any case, a completely voluntary decision on his part to join the "Exim" system. He is even at liberty not to import any olive oil, even after forgoing the refund, since, unlike the "cash" trader, he does not stand to lose his deposit.

The Commission adds that, whereas the intention of the "cash" trader is to take precautions against an economic risk, the "Exim" trader enters upon a speculative venture whereby he waives one advantage in exchange for another which he reckons will be superior.

That being so, the Commission takes the view that no reduction in the levy is required for the benefit of a trader whose speculation proved to be less profitable than he might have hoped, especially when he was free to choose the time of importation

Moreover, even if the Commission had wished to introduce a transitional measure in favour of "Exim" traders as well, it could not have adopted the method of calculation used in the case of "cash" exporters The only expedient in such a case would have been a fiction whereby the export and import operations would have been deemed to have been transacted "in cash". However, such a transitional measure would thus have caused the applicant to benefit from the export refund (24 u.a.) retroactively and to pay the import levy of 32 u.a., for instance. In this example the applicant, far from being entitled to any allowance whatever, would have had to repay the difference between the two amounts to the intervention agency. In any event, no basis for such a legal contrivance could have been afforded by Article 16 (6) of Regulation No 136/66, which certainly does not permit an export refund to be made retroactively.

2. Legitimate expectation

The *applicant*, whilst recognizing it was foreseeable that a new system would supplant the former one, nevertheless maintains that the date on which the new system was to enter into force had not been disclosed: as the Council itself had put back the date twice, the "Exim" traders were unable to establish or even to calculate the date of the amendment.

Observing that the "Exim" system was not suspended during this period of uncertainty, the traders in question could legitimately expect that the administration would either adopt appropriate transitional measures or else suspend the system so as to prevent those traders from incurring heavy losses.

In reply to the Commission's arguments regarding the foreseeability of the entry

into force of the new measures, the applicant maintains that the measures were indeed foreseeable by July 1978 and certain of them as early as 28 December 1978, but only in their broad outline. On the other hand, no reasonable forecast could have been made in regard to their entry into force.

Moreover, the details of the new rules remained uncertain even longer, because it was only on 3 May 1979 that Regulation No 884/79 laid down the transitional measures introduced when those rules entered into force, and it was not until then that the applicant could be informed that it would not benefit from the transitional measures. Thus, in the applicant's view, there are no grounds for saying that it undertook the risk that the produce imported under the "Exim" system might fall appreciably in value, and that its speculations were the true cause of the damage which it had suffered. This view is all the more justified inasmuch as, since it is just as legitimate to join the "Exim" system as the "cash" system, traders who do so must be assured, for so long as recourse to this system is possible, that the margin of risk will remain constant and will not be substantially altered. If it were otherwise, "Exim" traders would have to incur unknown risks which would cause them to abandon the "Exim" system, which would thus be paralysed.

The *Commission* acknowledges that the principle of legitimate expectation undoubtedly underlies the transitional measures adopted by it in the regulation at issue. However, it takes the view that, as the situation of "Exim" traders is different from that of "cash" traders, it would not be justifiable to extend to the former the benefits of that regulation.

The Commission contends that the applicant could not have been unaware that the import levy was going to fall following the amendments made to Community legislation in 1978. The applicant should also have known that, in the past, "Exim" traders had always been excluded from transitional measures similar to those in the regulation at issue.

Moreover, the applicant calculated that the Council would defer still further the date of entry into force of the new system, but such speculation was disappointed. In this connection the Commission adds since the very purpose of a new body of rules is to take effect, it may not be regarded as legitimate on the part of traders to anticipate that it will not ender into force.

It is true that, as it happened, the implementation of the rules was deferred more than once, but on each occasion precise dates were stipulated in the measure adopted, without suspensory conditions being attached, so that there was no possible doubt as to the intention of the Community legislature.

Finally, the Commission rejects the applicant's argument that there was some uncertainty surrounding the detailed procedures for implementing the new rules: it recalls that, in any case, the "Exim" traders had always been excluded from such transitional measures and that the applicant could not have been unaware of that. Furthermore, according to the Commission, no other "Exim" trader was mistaken about the intention of the Community legislature.

C — *Submissions directed against the Council*

The *applicant* maintains that, although Regulations Nos 1562/78, 3088/78 and

360/79 cannot be regarded as either illegal or defective, the Council is none the less liable for the damage suffered by the applicant. Such liability flows from the principle, recognized by Community law, of the liability without fault of the legislative body and is based upon the fact that the regulations in question contain no transitional measures relating to those addressees, who, like the applicant, had joined the "Exim" system.

(a) The question whether there is in Community law a principle of liability without fault

According to the *applicant*, the non-contractual liability of the Community may arise where there is serious and exceptional damage amounting to a breach of the principle of the equality of all citizens in sharing public burdens.

The principle rests, in the first place, upon the fact that the second paragraph of Article 215 of the EEC Treaty does not stipulate that the damage must have been due to a fault on the part of the institutions or their servants. The term "fault" appeared in the first draft of Article 215 and was deliberately deleted from the final draft, which serves to demonstrate that the authors of the Treaty did not wish to rule out the possibility of liability without fault. The purpose of Article 215 was to entrust to the Court the task of formulating the principles applicable in this field.

Turning next to the case-law of the Court, the applicant maintains that the Court allowed for the possibility of applying a rule of liability without fault on the part of the Community authorities when it used, in paragraph 46 of the grounds of its judgment of 13 June 1972 (*Compagnie d'Approvisionnement and Grands Moulins*, Joined Cases 9 and 11/71 [1972] ECR 391), the following phrase: "Any liability for a valid legislative measure". According to the applicant, that notion is also expressed by a number of academic writers, including Mr Du Ban, according to whom "... it seems that, when it comes to legislative measures, liability may fall upon the Community independently of any illegality" (Cahiers de Droit Européen 1977, p. 423).

Lastly, the applicant takes the view that whilst the Court has, in the later developments in its case-law, declined, in the circumstances of each case in point, to embark upon a discussion of the principle, it has not, on the other hand, repudiated the principle itself, as clearly set forth in the *Compagnie d'Approvisionnement* judgment.

The applicant maintains that in any event, contrary to the Council's contentions, the general principles common to the laws of the Member States (referred to in the second paragraph of Article 215) make it possible to confirm the existence of the liability of public authorities in respect of legislative measures and, in particular, of statutes whenever a citizen suffers special, serious and exceptional damage.

In this regard, the applicant observes in the first place that there is, in its view, a qualitative difference between a national statute and a Community regulation. Although the latter constitutes the Community's "legislation" such legislation is not, unlike domestic law, the work of democratically elected national representatives. Hence the Community regulation, being the product of delegated authority, must be placed in a lower category, comparable to administrative regulations at the national level.

The applicant claims that the national legal systems are sufficiently similar to warrant the inference that there are

general legal principles which make it possible to confirm the existence of the principle of liability without fault. Whilst it is true that not all Member States recognize the existence of such liability, the applicant considers, with regard to non-contractual liability, that an analysis of national legal systems may not be reduced to a quest for "the highest common denominator" whereby the only "common" principles are those expressly and without reservation enshrined in the legislation or case-law of each of the Member States. Such an approach would amount to bringing Community law into line with the "most impoverished" of the national legal systems. Unanimity is therefore unnecessary. The finding that liability without fault has been recognized by some of the Member States, though not by others, is sufficient for that principle to apply in Community law.

The applicant further takes the view that, although the restrictions which the Court places upon the Communities' non-contractual liability arising from their legislative measures are indeed justified, it is none the less necessary, in this field, to balance the interests of the Community authorities against the legitimate interests of the individual, by taking into account all the relevant public and private factors. Consequently, the fact that serious and exceptional harm has occurred to a private interest must justify even the existence of a liability arising from lawful legislative measures.

The *Council* contends in essence that the consistent case-law of the Court on the matter of non-contractual liability for legislative measures has rejected the principle of liability such as that just described. The Council argues that it follows from that case-law that the following preconditions have to be satisfied for the non-contractual liability of the Community for legislative measures to be incurred:

(a) The measure in question must be unlawful;

(b) Such unlawfulness must amount to a sufficiently serious breach of a superior rule of law for the protection of the individual;

(c) The institution's conduct must disclose errors so serious that it may be described as arbitrary.

Thus, in the Council's view, the principle of liability without fault for legislative measures does not exist in Community law. Neither is it enjoined upon the Community by the reference in Article 215 to the laws of the Member States, the reason being that such a principle is not generally recognized in those laws as a whole.

The Council rejects the applicant's arguments concerning the absence of the word "fault" [faute] from the second paragraph of Article 215, and contends that it is pointless to appeal to the preparatory documents when the substantive and procedural reasons underlying an amendment of a draft text are unknown. In this matter, however, those reasons are not known, since the archives recording the negotiation of the EEC Treaty have not yet been made public.

As to the argument to the effect that the Court, in its judgment in Joined Cases 9 and 11/71, itself acknowledged the existence in Community law of a principle of liability without fault, the Council points out that in the paragraph referred to the Court merely mentions a possible liability as a hypothesis, and does so in order to discard it straight away. That being so, the Council takes the view that the paragraph cited demonstrates that the Court did not wish to leave unanswered an argument

presented before it; however, it did not have to resolve it as the rest of the case was such that dismissal of the application was inevitable.

The Council further recalls that, since that judgment, the Court had continually stressed, in a consistent line of decisions on Article 215, that manifest unlawfulness is an essential precondition of liability. The Council also recalls that the Court had always justified this narrow view by holding that the legislative authority "cannot always be hindered in making its decisions" (paragraph 5 of the judgment in *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others* v *Council and Commission of the European Communities*, Joined Cases 83 and 94/76, 4, 15 and 40/77 [1978] ECR 1209). Since that view of the Court governs cases of liability for unlawful legislative measures, it must do so *a fortiori* where the Court considers an application founded on "any liability for lawful legislative measures".

Turning to the applicant's thesis according to which the quest for a principle common to the Member States should not be undertaken by determining the "highest common denominator", the Council maintains that, as the Court has stressed in the context of fundamental rights, it is not possible to rely upon any one specific legislation or national constitution, on the grounds that such a solution would destroy the unity and the effective application of Community law, thereby jeopardizing the very foundations of the Community. In this instance, non-contractual liability on the part of the Community which is modelled to an excessive degree upon the particular characteristics of a given national system of law might represent a solution which would be unacceptable to other, and different, national laws. What is more, it follows from the wording of Article 215 that, in order for these principles to be common to the laws of the Member States, they must have found at least a wide measure of acceptance either in the statute law or the case-law of most of those States. However, the applicant itself has admitted that such is not the case here.

The Council goes on to point out that the loss alleged in the present case does not appear to be so serious as to exceed the reasonable limits to which the Court referred in the *HNL* case and that, at all events, the loss has not threatened the survival of the applicant's business. Thus, even the conditions set by French law are not satisfied in this case.

(b) Absence of transitional measures

The *applicant* maintains that the fact that the three regulations at issue were not accompanied by transitional measures relating to the "Exim" traders caused exceptional damage to that particular group among the persons to whom those regulations were addressed.

It takes issue with the Council's thesis that the damage for which the applicant is seeking compensation is due to its own conduct on the grounds that it voluntarily accepted the risk that the resale prices might be affected by the effective and comprehensive application of the consumption-aid system and thus did not act as an "informed and prudent trader". The applicant's answer to the Council is the same as its answer to the Commission under the heading "The principle of legitimate expectation", namely that, faced with the uncertainty as to the date of entry into force of the new system and with the Council's vacillations, suitable transitional measures

were imperative in order to avoid the paralysis of the "Exim" system.

The *Council* contends that only if the amendment is sudden and unforeseeable and if there is no overriding public interest to the contrary can transitional measures be required for "old contracts".

In the present case, however, it had been foreseeable from 7 July 1978 onwards that the olive-oil prices were going to be adjusted in the near future following the introduction of the new consumption-aid system. Thus, according to the Council, it would have been normal for an informed and prudent trader to make inquiries with the national authorities in order to ascertain whether transitional measures were envisaged and to take precautions by way of contractual stipulations. That being so, the Council is of the opinion that the damage of which the applicant complains could in any case have been avoided by a prudent trader who had taken the necessary precautions.

It follows from these factors that the applicant's conduct was more akin to a voluntary acceptance of the risk that the resale prices might be affected by the effective and comprehensive application of the consumption-aid system.

Again, the Council claims that there was no discrimination between importations carried out under the "cash" system and those under the "Exim" system, because, as already demonstrated by the Commission, the two cases are, by objective criteria, totally different.

Lastly, the Council maintains that the applicant cannot validly maintain that the Council's regulations had, for lack of any transitional measures relating to it, caused the applicant serious and exceptional damage, since those regulations provide precisely the legal bases needed to enable transitional measures to be introduced if necessary.

D — Damage suffered and causal connection

The *applicant* claims that it is the fall in the threshold price which constitutes the damage suffered, such damage having being caused by the adoption of the aforementioned regulations and amounting to 25.99 u.a. multiplied by 1 948.05, giving 50 629 u.a. if the reduction in the threshold price is taken into account as the applicant proposes. It would be possible, however, to take the reduction in the levy into account, in which case the amount of the damage would be 24.18 u.a. multiplied by 1 948.05, giving 47 103 u.a. The applicant is content to leave the matter to the discretion of the Court.

The applicant adds that the damage it has suffered is special inasmuch as the applicant was probably alone in having found itself in the situation which has given rise to the present dispute. Furthermore, the damage is very considerable. The applicant claims that, as soon as the new system entered into force, all the companies operating in Italy brought down their tariffs by a margin of LIT 299, a reduction which corresponded to the consumption aid and was later refunded to those entitled. The applicant had not drawn upon any aid and yet it had been forced to apply the same discount, in accordance with a tariff which had been duly submitted for approval to the Italian Prefect's Department. The damage suffered is therefore by no means commensurate with the normal risks inherent in a commercial activity.

As for the defendants' argument to the effect that the applicant has failed to prove a causal connection, the applicant

repeats that the cause of the damage incurred by it is attributable to the succession of regulations which were adopted by the Council and the Commission and in particular to the absence of any transitional measures in the Council's regulations, and to the discrimination contained in the Commission's regulation. In the applicant's view, the only counter-argument adduced by the defendants in this context is afforded, in a somewhat oblique manner, by the assertion that the damage is due exclusively to the applicant's own lack of foresight. On this point the applicant refers to the arguments which it puts forward in relation to its complaint based on breach of legitimate expectation.

Finally, in reply to the defendants' arguments regarding the assessment and quantum of the damage, the applicant reiterates that the very principle of transitional measures benefiting "cash" traders implies necessarily that the latter received compensation which was equal to a given fall in Community prices. Hence the damage could be quantified in the manner already suggested and could indeed be calculated in European units of account, since what is really in question is an assessment and not a refund of a sum paid in error, the amount of which would be definitively fixed.

The *Commission* contends that, as the European currency unit (ECU) is not a currency but merely an accounting unit, damage, even if it were attributable to a measure adopted under the common agricultural policy, may not be expressed in this way.

As regards the special nature of the alleged damage, the Commission observes that it is more correct to say that the applicant is alone in having deliberately put itself in that situation and in having speculated that a transitional measure would be introduced by the Commission.

On the subject of the extent and quantum of the damage, the Commission maintains that the applicant has attempted to circumvent the duty incumbent upon it in an action based on Article 215, namely that of proving the alleged damage. Not only has it expressed its damage in units of account but, what is more, it has wholly failed to provide proof of the discount of LIT 299 to which it alludes, particularly if it be borne in mind that the guaranteed price was not a maximum price, that importations did not qualify for consumption aid and that traders had not abruptly reacted overnight by making their prices reflect the fall in the guaranteed price which was due to the introduction of the reform.

Consequently, the applicant has been unable to establish any connection between the alleged unlawfulness of a measure adopted by the Commission and damage which it claims to have suffered.

The *Council* maintains that the applicant has not proved the damage incurred by it except in abstact terms, whereas Article 215 requires it to prove the existence and extent of that damage by reference to the level of the prices which it actually received. In fact, given the difficulties in implementing the consumption-aid system, it does not seem very likely that the actual market prices actually and unfailingly followed, in 1979, the price levels established by regulation at the Community level. According to the Council, it is necessary, for the purpose of proving specific damage, to argue in terms of the difference between the real market price expressed in national currency and not in units of account, especially as the latter merely constitute

an arithmetical means of ascertaining the level of common prices and not of a form of legal tender.

As regards the further particulars supplied by the applicant in its reply, the Council maintains that they fail to determine conclusively the extent and the quantum of the applicant's damage. On the other hand, those particulars do demonstrate clearly that at the time when the applicant committed itself, not only was the new system established in principle but even the actual date of implementation was known and published in the Official Journal of the European Communities. That being so, the applicant, having voluntarily assumed the risk of incurring the damage for which it now seeks compensation, has failed to establish a direct and unbroken causal connection between the operation of the Community regulations and the damage suffered.

IV — Oral procedure

At the sitting on 12 May 1982 the applicant, represented by Mr Mahieu of the Brussels Bar, the Commission of the European Communities represented by Mr Seché, assisted by Mr Sack, acting as Agent, and the Council of the European Communities, represented by Mr Vignes, acting as Agent, presented oral argument and replied to the questions put to them.

The Advocate General delivered his opinion at the sitting on 22 June 1982.

Decision

1 By application lodged at the Court Registry on 13 February 1981, SA Oleifici Mediterranei, an undertaking established in Quiliano (Italy) and dealing in the import and export of olive oil, brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty, seeking an award of 50 629 units of account as a principal sum, together with interest at the rate of 8% from 4 May 1979 until the date of judgment, by way of compensation for the damage which has allegedly been caused to it by the European Economic Community, owing to the adoption by the Council and by the Commission of the European Communities of a body of rules designed to reform the system applicable to olive oil under the common organization of the market in oils and fats.

2 Since it is by reference to its regulations that the Community's liability is called in question, it is appropriate to recall at the outset the legislative framework which established the system applicable to olive oil.

3 Regulation No 136/66/EEC of the Council of 22 September 1966 establishing a common organization of the market in oils and fats (Official Journal, English Special Edition 1965-1966, p. 221) laid down the basic rules governing trade in olive oil, which involved fixing single prices, accompanied by production subsidies whose justification was stated to be the relatively low prices of substitute products. As far as trade with non-member countries was concerned, it was provided that a levy should be collected on importation and a refund paid on exportation. That arrangement required licences for both operations, which were not issued until a deposit had been lodged which was forfeited in whole or in part if the transaction was not effected, or was only partially effected, during the period of validity of the licence. Those provisions were made by Article 17 of Regulation No 136/66, as amended by Regulation (EEC) No 2554/70 of the Council of 15 December 1970 dealing with import and export licences for oils and fats (Official Journal, English Special Edition 1970 (III), p. 866).

4 This system of trade with non-member countries was supplemented by Regulation No 171/67/EEC of the Council of 27 June 1967 on export refunds and levies on olive oil (Official Journal, English Special Edition 1967, p. 136) which set up a specific trading system, known as "Exim". That system is expressly laid down in Article 9 (1) which provides:

"On application by the party concerned, the export refund on olive oil shall be granted in the form of an authorization to import, free of levy, a quantity of olive oil corresponding to the quantity of olive oil exported, provided it is proved that exportation was effected before importation and provided that importation is effected within a time-limit still to be determined."

5 In 1978, the system described above was amended. In order to ensure the sale of Community olive oil in the face of competition from other vegetable oils, while ensuring a fair income for the producers, the Council adopted Regulation (EEC) No 1562/78 of 29 June 1978 (Official Journal 1978, L 185, p. 1), whereby it supplemented the production-aid system under Regulation No 136/66 by a system of consumption aid (Article 11) designed to ensure that olive oil was sold at prices which were competitive with the price of seed oils. Bringing Community prices into line with world market prices led, in its turn, to a lowering of the threshold price and consequently to a reduced import levy on olive oil coming from non-member countries.

6 In addition, the system of levies was substantially amended. Under Article 16 of the regulation, the Commission is empowered in certain circumstances to impose a system of levies to be fixed by tendering procedure. In such cases, the Commission is to fix periodically the rate of the minimum levy, and any tenderer having indicated a rate of levy equal to or higher than that minimum is to be declared a successful tenderer and is to be obliged to import the quantity of the product specified in his application at the rate of levy indicated by him, irrespective of the time of importation.

7 According to the Council the entry into force of the consumption-aid system, originally fixed for 1 November 1978, that is to say, the start of the 1978/79 marketing year, had to be deferred, in the first instance until 1 March 1979, owing to the technical difficulties of introducing the system. Consequently, Council Regulation (EEC) No 3088/78 of 19 December 1978 (Official Journal 1978, L 369, p. 11) established two different threshold prices for the remaining portion of the marketing year 1978/79: the first was fixed at 145.43 units of account (u.a.) per 100 kg until 28 February 1979, the second at 119.44 u.a. per 100 kg commencing on 1 March 1979, which represents a fall of 25.99 u.a. per 100 kg.

8 In February 1979, however, the Council observed that the difficulties still existed and it postponed the introduction of the new prices until 1 April, by Council Regulation (EEC) No 360/79 of 20 February 1979 amending Regulation (EEC) No 3088/78 in respect of the periods of application for the 1978/79 marketing year of the representative market prices and of the threshold prices for olive oil (Official Journal 1979, L 46, p. 1).

9 The Commission, which is empowered by virtue of Article 16 (6) of the basic Regulation No 136/66 (as amended by Regulation No 1562/78) to adopt detailed rules for the application of the system of levies, considered that, since the threshold price for olive oil had appreciably changed after 1 April 1979, the rates of levy obtained by a tendering procedure prior to that date, which were stated in the import certificates, should be brought down to 24.18 u.a. per 100 kg in the case of those imports of olive oil for which a certificate had been applied for before 1 April 1979 but which had not been effected until after that date (see Regulation (EEC) No 884/79 of 3 May 1979, Official Journal 1979, L 111, p. 18). On the other hand, no comparable transitional measure was introduced into the "Exim" system as regards quantities of olive oil imported after 1 April 1979 when the exportation of corresponding quantities had taken place before that date.

10 Before 1 April 1979 the applicant exported to, and after that date imported from, non-member countries some quantities of olive oil under the "Exim" system, the benefit of which it had sought. It thus exported without refund and imported free of levy. In support of its action it maintains, in essence, that the Commission should also have provided a transitional system for "Exim" transactions and that its omission to do so constituted an illegality giving rise to liability on its part and requiring it to make good the damage — be it loss incurred or gains prevented — sustained by the applicant as a result of the "Exim" transactions during the period under consideration.

11 The applicant admits that it was foreseeable by all the traders that the introduction of the consumption-aid system, originally fixed for 1 November 1978, was bound to bring about a fall in the price of olive oil, whether imported or home-produced, in the common market. It maintains, however, that after the date on which the aid system was to come into force had been postponed once, and then a second time, it could reasonably count on the previous system's being further extended beyond 1 April 1979. Consequently, the applicant carried out the "Exim" transactions upon conditions which, as regards the prices which it paid for oil imports into the Community, involved the assumption that the price of oil within the common market would be maintained, also after 1 April 1979, at the levels derived from the threshold price as fixed prior to that date.

12 The applicant's main contention, therefore, is that the Commission, by failing to lay down in Regulation No 884/79 transitional measures designed to compensate "Exim" importers for the fall in prices on the Community market, in the same way as it laid down transitional measures in favour of importers who had committed themselves to paying a high levy, was responsible for an illegality which was of such a nature as to give rise to liability on the part of the Community and injurious consequences of which the Community must make good. In the alternative, the applicant pleads the liability of the Community as arising out of the acts of the Council on the basis of the application of the principle of liability without fault arising from a legislative measure.

The action brought against the Commission

13 The applicant's main argument is to the effect that the Commission did not, in this instance, have a true discretion involving an economic choice as its powers were confined, within the limits of the Council regulations which it implemented, to adopting a transitional measure when there was a reduction in the rate of the levies, as the result of an appraisal undertaken by the Council itself. The applicant infers from that legal position that it need do no more than establish that the regulation was unlawful, without having to prove the existence of a serious and substantial illegality amounting to a breach of a superior principle of law for the protection of the individual. However, in the alternative, the applicant takes the view that if the Court were to uphold the argument to the effect that the Commission did enjoy a large measure of discretion, the complaints formulated against the latter would nevertheless provide grounds for finding that there was a serious fault of that nature, namely the omission to adopt transitional measures in favour of "Exim" traders. Thus, the Commission has offended, in the first place, against the principle of equality of treatment, namely by differentiating between objectively comparable situations and, secondly, against the principle of legitimate expectation, for the "Exim" traders, being unable to ascertain the date on which the amendment was to take effect, could legitimately have anticipated that transitional measures would be adopted. In the final analysis, the cause of the damage is to be found in the fact that no transitional measures were adopted in favour of the "Exim" traders.

14 The Commission wholly rejects that line of argument. Turning first to its discretion, it contends that Article 16 (6) of Regulation No 136/66 (as set forth in Regulation No 1562/78) is designed to enable the Commission to adopt measures fixing the levy in compliance with the procedure set forth in Article 38, in consultation with the Management Committee for Oils and Fats. The Commission further contends that the respective situations of the two categories of traders concerned are not comparable because, whereas the "cash" trader endeavours to take precautions against an economic risk by fixing his levy in advance, the "Exim" trader, on the contrary, agrees to accept such a risk by embarking upon a speculative venture which entails foregoing one advantage in exchange for another, potential advantage which he expects to be greater. That difference justifies the fact that no transitional measure was adopted in favour of "Exim" traders

15 Moreover, the Commission stresses — as does the Council — a further argument for having the action dismissed. They claim that the cause of the damage is to be found not in the regulations but in the applicant's conduct.

16 The Court has consistently interpreted Article 215 of the EEC Treaty as meaning that the involvement of the non-contractual liability of the Commission and the assertion of the right to compensation for damage suffered depend on the satisfaction of a number of requirements relating to the unlawfulness of the conduct of which the institutions are accused, the reality of the damage and the existence of a causal connection between that conduct and the damage in question.

17 Hence the Community cannot be regarded as having incurred liability except in the presence of all the conditions to which the duty to make good any damage, as defined in the second paragraph of Article 215, is subject.

18 In this case it is necessary to examine in the first place the submission that there is no causal connection between the conduct for which the Commission is criticized and the alleged damage.

19 According to the defendants, the reason for the applicant's failure to make a profit lies in its own conduct in choosing the "Exim" system at a time when it knew for a fact that amendments were imminent which would consist essentially in the creation of a consumption aid which was bound to entail a fall in Community prices: but the applicant calculated that the entry into force of the new system would be postponed long enough to enable it to complete its "Exim" transaction before that event. The Council points out in particular that such an attitude amounts to the voluntary acceptance on the applicant's part of the risk that the Community selling prices for olive oil might be affected by the operation of the consumption-aid scheme.

20 The applicant maintains that, inasmuch as the date of the entry into force of the approved amendment had remained uncertain for too long, the "Exim" trader was entitled to suppose that, since the "Exim" system was available, he was free to use it and that if need be the Community legislature would

introduce the requisite transitional measures to prevent the system from turning to his disadvantage. Thus the fact that such measures were not adopted constitutes the cause of the damage.

21 It is common ground that the applicant was aware that Council Regulation No 1562/78 had, on 29 June 1978, introduced a new system for olive oil which was intended to cause threshold prices to fall, and that Council Regulation (EEC) No 3088/78 of 19 December 1978 had stipulated 1 March 1979 as the date on which the new system was to enter into force.

22 In those circumstances, the applicant, as an informed exporter and with full cognizance of the conditions governing the market laid down by the regulations, must have known by 27 January 1979, when it exported to Libya, in the first phase of its "Exim" transaction, that the threshold prices were due to be lowered on 1 March 1979, which was bound to make the levy-free importations less advantageous.

23 The fact that the actual date of entry into force of the consumption-aid system was postponed, for the second time, by one month on 20 February 1979 was not such as to alter the risk which the applicant had freely chosen to run.

24 It follows that the damage alleged was not caused by the conduct of the Community institutions, but is exclusively attributable to the choice of the applicant, which could not have been unaware of the rules relating to its transactions, and of the consequences which its conduct might entail.

25 Thus, without there being any need to examine the lawfulness of Regulation No 884/79 or the reality of the damage, the action, in as far as it is brought against the Commission, must be dismissed

The action against the Council

26 The applicant's case against the Council is that, although Regulations Nos 1562/78, 3088/78 and 360/79 are not unlawful, the liability of the Council is none the less incurred as it stems from the principle, recognized in Community law, that a legislative authority may become liable without fault.

27 It follows, however, from the considerations set out above that the alleged damage, even assuming it to have been substantiated, is attributable entirely to the applicant's conduct and that accordingly the action must also be dismissed inasmuch as it is brought against the Council.

Costs

28 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

29 Since the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mertens de Wilmars Bosco Touffait Due
Pescatore O'Keeffe Koopmans Everling Grévisse

Delivered in open court in Luxembourg on 29 September 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President