JUDGMENT OF THE COURT (First Chamber)
6 June 1990 *

In Case C-119/88

AERPO — Associazione emiliano romagnola tra produttori ortofrutticoli, whose principal office is at 65 via Riva di Reno, Bologna, (Italy) in the person of its Chairman, Antonio Camerani,

CAPO — Cooperativa agricola fra produttori ortofrutticoli Soc. Coop. Srl, whose principal office is at 23/B via Cavallazzi, Mordano (BO) (Italy), in the person of its Chairman, Gianni Marani — a member of the Aerpo,

ALPO — Associazone laziale produttori ortofrutticoli, whose principal office is at 161 via Enrico Fermi, Rome, in the person of its Chairman, Sergio Ricotta,

COT — Cooperativa centrale ortofrutticola Tarquinia Srl, whose principal office is at via Monterozzi Marina, Tarquinia (VT) (Italy), in the person of its Chairman Giuseppe Luccioli — a member of the ALPO,

Groupement des producteurs 'Hermitage-Basse Isère' — GIE — groupement d'interêt économique, whose principal office is at BP 45 Tain (26600), France, in the person of its Chairman Jean-Claude Guillermain,

Jean-Claude Guillermain, a grower, of 95 avenue du Vercors, Tain (France), Chairman and member of the 'Hermitage-Basse Isère' Group,

Groupement 'Dauphiné-Vivarais', whose principal office is at 435 avenue Victor-Hugo, Valence, in the person of its Chairman, Paul Filhol,

Jean Julien, a grower, of Quartier St Martin, Lauriol (26270) (France), a member of the 'Dauphiné-Vivarais' Group,

* Language of the case: Italian.

all represented by E. Cappelli and P. de Caterini, of the Rome Bar, with an address for service in Luxembourg at the chambers of C. Turk, 4 rue Nicolas-Welter,

applicants,

v

Commission of the European Communities, represented by E. de March and P. Oliver, members of its Legal Department, with an address for service in Luxembourg at the office of Georgios Kremlis, Wagner Centre, Kirchberg,

defendant,

APPLICATION for a declaration that the Community must pay compensation for the damage incurred by the applicants as a result of the adoption by the Commission of Regulation No (EEC) 3587/86 of 20 November 1986 fixing the conversion factors to be applied to the buying-in prices for fruit and vegetables (Official Journal 1986, L 334, p. 1),

THE COURT (First Chamber)

composed of: Sir Gordon Slynn, President of Chamber, R. Joliet and G. C. Rodríguez Iglesias, Judges,

Advocate General: F. G. Jacobs
Registrar: H. A. Rühl, Principal Administrator

having regard to the Report for the Hearing and further to the hearing on 7 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 March 1990,

gives the following

Judgment

1 By application received at the Court Registry on 18 April 1988, Aerpo (Associazione emiliano romagnola tra produttori ortofrutticoli), ALPO (Associazione laziale produttori ortofrutticoli), groupement des producteurs 'Hermitage-Basse Isère' and groupement 'Dauphiné-Vivarais', fruit and vegetable producers' organizations, established in Italy and France, respectively, CAPO (Cooperativa agricola fra produttori ortofrutticoli), COT (Cooperativa centrale ortofrutticola tarquinia Srl) and Messrs Jean-Claude Guillermain and Jean Julien, fruit and vegetable producers, established in Italy and France, brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty to obtain compensation for the damage allegedly suffered by them as a result of the adoption by the Commission of Regulation No 3587/86 of 20 November 1986 fixing the conversion factors to be applied to buying-in prices for fruit and vegetables (Official Journal 1986, L 334, p. 1, hereinafter referred to as 'the contested regulation').

2 By Regulation (EEC) No 1035/72 of 18 May 1972 (Official Journal, English Special Edition 1972 (II), p. 437, hereinafter referred to as 'the basic regulation'), the Council established a common organization of the market in fruit and vegetables.

3 Under that system, producers' organizations were assigned an important role in the management of the market. For example, for the purpose of stabilizing prices, they may intervene in the market by buying products offered for sale by their members at a price known as the 'withdrawal' price when the prevailing prices fall below the latter price.

4 Under Article 16(1) of the basic regulation, the Council is required each year to fix for certain products listed in Annex II thereto a basic price and a buying-in price.

5 The basic price is fixed on the basis of the average of the prices recorded during the preceding three years on the most representative Community production markets, for a product with defined commercial characteristics such as variety or type, quality, class, sizing and packaging (hereinafter referred to as the 'reference product').

6 The buying-in price is the price at which the public intervention agencies are required to buy the fruit and vegetables offered to them. However, such intervention is exceptional: it may operate only when the Commission has recorded that the market for the product in question is in a state of serious crisis. The buying-in price is fixed, according to the products concerned, at between 40 and 70% of the basic price.

7 Pursuant to Article 18 of the basic regulation, as amended by Regulation (EEC) No 2474/72 of the Council of 21 November 1972 (Official Journal, English Special Edition 1972 (November), p. 60), the Member States are required to grant financial compensation to those producers' organizations which intervene under Article 15 of that regulation, provided that the withdrawal price does not exceed a certain level calculated by reference to the buying-in price. The financial compensation is equal to the indemnities paid by the producers' organizations to their members, less the net receipts from the products withdrawn from the market.

8 Where the products offered by producers display characteristics different from those of the reference product, the withdrawal price at which the product is purchased by the producers' organizations is calculated by applying a conversion factor to the buying-in price of the reference product. The conversion factors are fixed by the Commission under the management committee procedure.

9 By Regulation (EEC) No 1203/73 of 4 May 1973 (Official Journal 1973, L 123, p. 1), the Commission fixed the conversion factors to be applied with effect from the 1973/74 marketing year. That regulation was replaced by the contested regulation which lays down the conversion factors applicable with effect from the 1987/88 marketing year.

10 The applicants maintain that they have suffered damage of two distinct kinds as a result of the application of the conversion factors introduced by the contested regulation. First, in withdrawal operations, the indemnities received by the producers and the financial compensation paid to the producers' organizations are, by virtue of the application of the new conversion factors, lower than those which would have been fixed by virtue of the old conversion factors. Secondly, the new factors, by reducing the intervention level, have brought about a general drop in the prices of fruit and vegetables and caused damage to all the producers.

11 Reference is made to the Report for the Hearing for a fuller account of the facts, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Admissibility

12 The Commission considers the application inadmissible. The applicants could have obtained compensation for the first head of damage before the national courts by challenging the amount of financial compensation paid to them by the Member States and by asking for a reference to be made to the Court of Justice for a preliminary ruling on the validity of the contested regulation.

13 It must be stated that the application is admissible in so far as it seeks compensation for the second head of damage, that is to say such damage as may have derived from the fall in prices resulting from the adoption of the contested regulation. The applicants could not have obtained compensation for that damage by an action before the national courts.

14 Since the Court will have in any event to give a decision on the second head of damage and since the submissions put forward by the applicants in support of both heads of damage are the same, it is appropriate to examine the merits of those submissions and it is unnecessary to give a decision on the Commission's objections concerning the admissibility of the application with respect to the first head of damage.

Substance

15 The applicants maintain that the contested regulation constitutes an administrative measure and that the Community's liability is not therefore conditional upon a sufficiently serious breach of a superior rule of law for the protection of the individual.

16 They add that, even if it were assumed that the contested regulation were a legislative measure, it is vitiated by defects in law each of which constitutes a serious breach of a superior rule of law for the protection of the individual. First, the Commission misused its powers since the effect of the new conversion factors was to reduce the buying-in prices, which affect the withdrawal prices, whereas only the Council is competent to determine the level of intervention. Secondly, the contested regulation infringes the basic principles of the common organization of the market in fruit and vegetables since the conversion factors alter the effect which the buying-in prices fixed by the Council have on the development of the market. Finally, the statement of the reasons on which the contested regulation is based is inadequate.

17 It must be stated in the first place that the contested regulation is a legislative measure involving choices of economic policy. First, it is a legislative measure because it covers all persons engaged in a commercial activity in the fruit and vegetables sector. Secondly, it involves choices of economic policy. The purpose of conversion factors is to determine the buying-in prices of products whose characteristics differ from those of the relevant reference product. When it fixes the buying-in price for the reference product, the Council is obliged, under Article 16(3) of the basic regulation, to take account of the characteristics of the market and, in particular, the extent to which market prices fluctuate. It follows that the Commission must adopt similar criteria when it fixes the conversion factors applicable to products with characteristics different from those of the reference products.

18 It must also be borne in mind that in its judgment of 2 December 1971 in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, paragraph 11, the Court held that the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of action involving choices of economic policy, by virtue of the second paragraph of Article 215 of the Treaty, unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

19 It must be stated that the Commission has not committed a sufficiently serious breach of a superior rule of law for the protection of the individual. So far as the applicants' complaints of misuse of powers and breach of the basic principles of the

common organization of the market are concerned, it must be remembered that, by virtue of the division of powers as between the Council and the Commission provided for in the basic regulation, it is the responsibility of the Commission to fix the conversation factors, after consulting the management committee. Accordingly, there can be no question of the Commission's encroaching on the Council's powers when it exercises powers conferred on it within the limits of the market organization. Moreover, a change in the buying-in price to be applied to certain products as a result of the introduction of new conversion factors is a consequence of the operation of the machinery for regulating the market introduced by the basic regulation.

20 Finally, with respect to the alleged inadequacy of the statement of the reasons on which the contested regulation was based, the Court has consistently held (see the judgment of 15 September 1982 in Case 106/81 *Kind* v *European Economic Community* [1982] ECR 2885, paragraph 14) that any inadequacy in the statement of the reasons on which a measure contained in a regulation is based is not sufficient to make the Community liable.

21 Without there being any need to consider whether the other pre-conditions for a finding that the Community has incurred liability have been fulfilled, it must be stated that the applicants have not put forward any argument or produced any evidence to show that the contested regulation is unlawful. The application must therefore be dismissed as unfounded.

Costs

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

23 Since the applicants have failed in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT (First Chamber)

hereby

(1) Dismisses the application as unfounded;

(2) Orders the applicants to pay the costs.

Slynn Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 6 June 1990.

J.-G. Giraud
Registrar

Gordon Slynn
President of the First Chamber