REPORT FOR THE HEARING
delivered in Case C-119/88 *

I — Facts and legislative background

By Regulation (EEC) No 1035/72 of the Council of 18 May 1972 (Official Journal, English Special Edition 1972, p. 437), the Council established a common organization of the market in fruit and vegetables. The arrangements include a price system.

Pursuant to Article 16(1) of that regulation, each year the Council fixes a basic price and a buying-in price for each of the products which may be covered by intervention measures.

According to Article 16(2), 'the basic price shall be equal to the arithmetic mean of prices recorded on the representative Community market or markets which are situated in the surplus production areas with the lowest prices during the three marketing years immediately preceding the date on which the basic price is fixed for a product with defined commercial characteristics (such as variety or type, quality class, sizing and packaging)'.

Pursuant to Article 16(3) of Regulation No 1035/72,

'The buying-in price shall be fixed for each of the relevant products at between:

(i) 40 and 45% of the basic price in the case of cauliflowers and tomatoes,

(ii) 50 and 55% of the basic price in the case of apples and pears,

(iii) 60 and 70% of the basic price in the case of the remaining products listed in Annex II.'

The buying-in price is the price at which the intervention agencies buy the fruit and vegetables offered to them until the Commission determines that the market for the product in question is in serious crisis.

Pursuant to Article 16(4), the buying-in price is calculated by applying conversion factors where a product has 'commercial characteristics different from those of the product by reference to which the basic price is fixed'. Those factors are fixed by the Commission after hearing the opinion of the Management Committee.

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 as from the 1973/74 marketing year. That regulation was replaced by Regulation (EEC) No 3587/86 which fixed the conversion factors to be applied as from the 1987/88 marketing year (Official Journal, L 334, p. 1). The Commission considered it necessary to apply certain of the new conversion factors

* Language of the case: Italian.

progressively. It therefore adopted Regulation (EEC) No 1998/87 of 7 July 1987 (Official Journal 1987, L 188, p. 30) which laid down certain derogations for the 1987/88 marketing year from Regulation No 3587/86.

Furthermore, within the framework of the common organization of the markets, producers' organizations were entrusted with an important role in the management of the market. Thus, with a view to stabilizing prices, the producers' organizations may intervene in the market by applying a withdrawal price below which they withdraw from the market the products put on sale by their members. Pursuant to Articles 18 and 19 of Regulation No 1035/72, the withdrawal price must not exceed a maximum level equal to that of the buying-in price, subject where appropriate to the conversion factors, plus 10% of the basic price.

In the event of withdrawal taking place, the producers' organizations are to pay producers compensation for the quantities of products remaining unsold. Under Article 18 of Regulation No 1035/72, those organizations are to receive from the Member State financial compensation equal to the indemnities paid to the producers, less the net receipts from the products withdrawn from the market.

The applicants are producers and associations of producers which market fruit and vegetables in France and Italy. They consider that they have suffered damage of two kinds as a result of the application of the conversion factors introduced by Regulation No 3587/86. On the one hand, in the event of a withdrawal operation, the indemnities which they would obtain after application of the new conversion factors would be lower than that which they would have received after application of the old conversion factors. On the other hand, the introduction of the new conversion factors led to a fall in price levels, which was damaging to producers as a whole. The price levels fixed by the Community institutions serve as a guide for prices in ordinary commercial transactions, so that a drop in withdrawal prices leads to a fall in prices on the market.

Consequently, they decided to bring the present action for compensation.

II — Written procedure and conclusions of the parties

The application was received at the Court Registry on 18 April 1988.

The written procedure followed the normal course. 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. The applicants were asked to give a written reply to two questions and did so within the period specified.

Pursuant to Article 95(1) and (2) of the Rules of Procedure, on 15 November 1989 the Court assigned the case to the First Chamber.

The applicants claim that the Court should:

dismiss any claim to the contrary and declare, in so far as is appropriate, that the Commission acted unlawfully and in particular that Regulation No 3587/86 of 20 November 1986 is unlawful, and:

(i) hold that the Community has incurred non-contractual liability, and accordingly

(ii) order the Community to make good the damage resulting from the adoption of the said regulation, namely:

(a) LIT 39 069 000 for Aerpo and LIT 16 008 292 for ALPO, as compensation for direct damage;

(b) if the organizations to which they belong are not held to have *locus standi*, LIT 4 381 483 for CAPO, a member of Aerpo, and LIT 16 008 292 for COT, a member of ALPO, as compensation for direct damage;

(c) as regards the applicant producer-groups Hermitage-Basse Isère and Dauphiné-Vivarais:

— the sum of ECU 24 270 for the Hermitage-Basse Isère group, and

— ECU 23 023 for the Dauphiné-Vivarais group as compensation for direct damage;

(d) if the organizations to which they belong are not held to have *locus standi*, ECU 607 for Mr Guillermain, the Chairman of the Hermitage-Basse Isère group and ECU 691 for Mr Julien, the Chairman of the Dauphiné-Vivarais group, as compensation for direct damage;

(e) for all the applicants, in respect of the damage due to the lowering of the level of intervention and hence of the market rates, the sum of LIT 1 for the applicants operating in Italy and FF 1 for those operating in France;

(iii) in any event, order the defendant to pay the costs.

The Commission claims that the Court should:

(i) dismiss the application;

(ii) order the applicants to pay the costs.

III — Submissions and arguments of the parties

A — *Admissibility*

The Commission states that it will rely on the judgment of the court as regards the admissibility of the action. It observes, however, that the applicants should have brought their action before the national courts and the latter would have been able to ask the Court of Justice for a preliminary ruling on the validity of the regulation. The applicants cannot evade that obligation by

seeking symbolic compensation for any damage resulting from a fall in prices.

The applicants reply that the Court is the only competent jurisdiction for actions for damages under the second paragraph of Article 215 of the EEC Treaty. Their action is intended principally to obtain recognition of the damage resulting from the lowering of the level of intervention and the fall in fruit and vegetable prices which followed. Since, as far as the second head of damage is concerned, they are interested in recognition of its existence rather than compensation for it, they have limited their claim to the symbolic sum of LIT 1 and FF 1.

B — *Substance*

Certain points of fact

According to the applicants, the Commission reduced the conversion factors in order to limit agricultural expenditure in respect of the intervention system.

The application of the new conversion factors provoked both a considerable fall in the withdrawal prices and a general reduction in the prices paid in ordinary commercial transactions.

As regards the fall in withdrawal prices, the applicants give figures which in their view show that the producers received, after application of the conversion factors fixed by Regulation No 3587/86, indemnities much lower than those which they would have received if the conversion factors fixed by the previous regulation, Regulation No 1203/73, had been applied. Moreover, in those cases where Regulation No 3587/86 fixed conversion factors higher than those previously in force, the new conversion factors related only to products produced in small quantities.

As regards the general reduction in prices paid in ordinary commercial transactions, the applicants ask the Court to instruct an expert to determine whether the reduction in the withdrawal prices led to a fall in the prices prevailing in the market.

The Commission replies that its intention was not to reduce agricultural expenditure by changing the conversion factors. Those changes, both upward and downward, were solely a function of the changes in prices in the market for each of the products concerned.

As regards the fall in withdrawal prices, the Commission states in the first place that several conversion factors were increased. The applicants cannot therefore contend that there was a generalized reduction of prices. Furthermore, the applicants overstate the fall in the withdrawal price of certain products, such as cauliflowers, since they did not take account of the rise in the buying-in price decided on by the Council for the 1987/88 marketing year. Finally, the Commission states that it limited the effect of the introduction of the new conversion factors by adopting Regulation No 1998/87 and for the 1987/88 marketing year.

With respect to the general reduction in prices, the Commission provides a table of figures showing that the prices of all the products used in fixing the basic prices, with

the exception of apple prices, were higher during the 1987/88 marketing year than in the previous marketing years. Since the prices of those products increased, the prices of the products to which the conversion factors were applied could not have fallen appreciably. In those circumstances, the Commission contends that the Court should not order preparation of the expert's report called for by the applicants.

Legal considerations

The illegality of Regulation No 3587/86

According to the applicants, the contested regulation constitutes an administrative measure and not a legislative act. Therefore, a finding that the Community has incurred liability is not conditional on the existence of a serious breach of a superior rule of law for the protection of the individual. The fixing of conversion factors is an administrative measure involving only a technical operation in which the Commission has no discretion whatsoever, and not a legislative measure in which an economic policy choice is inherent.

The applicants add that even if the contested regulation were to be regarded as a legislative act, the Community would have incurred liability in any event. The provision is vitiated by irregularities which constitute sufficiently serious breaches of superior rules of law for the protection of individuals.

The illegality of the regulation stems from the Commission's lack of powers, infringement of the basic principles of the common organization of the markets, and also the inadequacy, illogicality and contradictory nature of the statement of the reasons on which the measure was based.

With respect to the Commission's lack of powers and the breach of the basic principles of the common organization of the markets, the applicants claim that the Council only has power to determine the intensity of intervention in the market. It exercises that power by fixing the basic prices and the buying-in prices. By changing the conversion factors, the Commission arrogated to itself a power which is not vested in it since, on its own initiative, it reduced the level of intervention determined by the Council.

As regards the statement of reasons on which the contested measure was based, the applicants maintain that it is inadequate, illogical and contradictory. Inadequate because it does not give any reasons to justify the reductions of the conversion factors. Illogical in so far as the Commission relied on considerations of economic policy, such as the demands of the market and the amplitude of the fluctuations during particularly sensitive production periods, whereas it was under an obligation to fix the conversion factors solely by reference to the prices prevailing on the markets. Contradictory because the Commission emphasized, in the preamble to the regulation, that is was necessary to consolidate the provisions relating to the conversion factors whereas in fact its intention was merely to reduce those factors.

The Commission replies that Regulation No 3587/86 is an act of general application. Moreover, the fixing of conversion factors may indeed involve operations of a technical nature but that fact does not entirely

deprive the Commission of any power of appraisal. In the first place, the prices notified by the Member States are recorded on markets of differing economic importance, so that the Commission could not limit itself to taking a simply arithmetic average of the prices in order to determine the conversion factors. Then, the Commission must take account of the seasonal character of supply and fix factors which are not too high for the periods in which large quantities of products are placed on the market. It thus obviates the withdrawal of unjustified quantities from the market.

The Commission adds that the conditions laid down by the Court for the Community to incur non-contractual liability are not satisfied. The Commission states that even if it had usurped the powers of the Council and breached the basic principles of the organization of the markets, its breach would be of a rule concerning the balance of powers as between the institutions and not of a superior rule of law for the protection of individuals. As to the statement of reasons, the Court held in its judgment of 15 September 1982 in Case 106/81 *Kind* v *EEC* [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'.

With respect to the alleged lack of powers and breach of the basic principles of the common organization of the markets, the Commission contends that it relied, when adopting the contested regulation, on market management criteria which are fully within the limits of its powers.

Furthermore, the statement of the reasons on which Regulation No 3587/86 is based is not inadequate or illogical. The Commission never intended reducing agricultural expenditure by changing the conversion factors. Nor is the statement of reasons contradictory, since the last recital in the preamble to the contested regulation shows clearly that the consolidation of the conversion factors must be accompanied by the necessary adjustments.

The reality of the damage and the causal connection

According to the applicants, the direct damage is equal to the difference between the value of the indemnities calculated after application of the old conversion factors and those calculated after application of the new conversion factors. The applicants submitted an evaluation of that damage with their pleadings.

With respect to the damage deriving from the unfavourable development of prices on the market by reason of the reduction in the level of the buying prices and the withdrawal prices, the applicants limit their claim for compensation to the symbolic sum of LIT 1 and FF 1.

Finally, the applicants maintain that they are not required to prove the existence of causal connection since the damage is the automatic and immediate result of the reduction of the conversion factors brought about by Regulation No 3587/86.

The Commission reserves the right to challenge the calculation of damage made by the applicants.

IV — The applicants' replies to the questions put to them by the Court

The Court asked first whether the applicants Aerpo, CAPO, ALPO, COT, groupement des producteurs 'Hermitage-Basse Isère' and groupement 'Dauphiné-Vivarais' are producers' organizations within the meaning of Article 13 of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables, or associations of such organizations.

It was stated in reply that only Aerpo, ALPO, groupement des producteurs 'Hermitage-Basse Isère' and groupement 'Dauphiné-Vivarais' are fruit and vegetable producers' organizations within the meaning of Article 13 of Regulation No 1035/72 of the Council.

The Court then asked which of the applicants were actually engaged in production.

It was informed in reply that the applicants which are actually engaged in production are the CAPO and COT cooperatives and Messrs Guillermain and Julien.

R. Joliet
Judge-Rapporteur