OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 23 January 1991 *

Mr President,
Members of the Court,

1. The applicants, insurance companies operating in the export credit insurance market, are seeking compensation for the damage sustained by them as a result of the entry into force of Council Directive 87/343/EEC of 22 June 1987 (Official Journal 1987 L 185, p. 72).

The applicants claim essentially that the directive in question is discriminatory, and therefore unlawful, because, as part of the harmonization of the financial guarantees required of insurance companies for the protection of third parties, it imposed such guarantee requirements — and hence the related costs — on private sector companies alone, thereby exempting public sector export credit insurance agencies. The directive is therefore a source of discriminatory burdens (for the private sector), namely the costs incurred in creating and maintaining the required financial instruments. And it is precisely the economic damage arising from that situation that is the subject-matter of the present action for damages.

Obviously, the subject-matter of the action is delicate and of considerable importance from a legislative and economic point of view. But I should here point out that beyond those matters of general concern the action raises two important questions of principle: the first, relating to admissibility, concerns the relationship between bringing proceedings to establish non-contractual liability under Article 215 of the Treaty and recourse to national legal remedies; the second, relating to the substance of the case, concerns the extent to which the principle of equal treatment must be observed when an institution limits the harmonization of the conditions under which an economic activity is pursued to one category of undertakings, thereby excluding another — at least to some extent — competing category from the scope of the harmonized rules.

The observations which follow will, in the main, concentrate on those two points. However, before considering those and other important aspects, it is essential to outline the substance and above all the origin of the rules at issue. It should be emphasized that the legislative history of the directive, and in particular the positions adopted by the institutions during the legislative procedure, are of considerable importance, particularly for the purpose of determining whether the directive at issue is discriminatory.

The relevant provisions and the legislative history of Directive 87/343

2. In 1973, with Council Directive 73/239/EEC (Official Journal 1973 L 228,

* Original language: Italian.

p. 3), the Community took the first steps towards coordination of the provisions relating to insurance other than life assurance. In order to afford greater freedom of establishment and freedom to provide services in this sector, the directive, which is based in particular on Article 57(2) of the Treaty, provided that certain divergences between national supervisory legislation should be eliminated and that the provisions relating to the financial guarantees required of insurance undertakings for the protection of insured and third parties should be harmonized. In particular, Articles 15, 16 and 17 of the directive impose an obligation on the Member States to require undertakings in their territory to establish respectively 'technical reserves', a 'solvency margin' and a 'guarantee fund'. Those elements taken together constitute the so-called common *prudential rules* which are intended to ensure that undertakings throughout the Community remain solvent.

It should be pointed out that — as the Commission stated in its defence — the proposal submitted to the Council envisaged, in the export credit insurance market, the extension of those prudential rules to *all* the undertakings concerned, and made no distinction between those in the private sector and those in the public sector.

The Council did not accept that solution. As is clear from the fourth recital in the preamble, it was considered 'desirable to exclude from the application of (the directive) mutual associations which, by virtue of their legal status, fulfil appropriate conditions as to security and financial guarantees'. It was therefore decided to exclude from the scope of the directive 'export credit insurance operations for the account of or with the support of the State (see Article 2(2)(d)); however, that exclusion was intended to be strictly *temporary* since it was expressly subject to 'further coordination, which shall be implemented within four years'.

3. Further coordination turned out to be much more difficult than anticipated. When, on 13 September 1979, it submitted a proposal for the amendment of the Directive 73/239, the Commission confirmed the exclusion of operations for the account or with the support of the State, and, what is more, removed all reference to further coordination in that regard.

However, that position was resolutely opposed by both the Economic and Social Committee and the European Parliament. In an opinion of 27 February 1980 the Economic and Social Committee expressed its regret that 'because of the basically political nature of the problems facing export credit insurance the Commission has not carried out any coordination here'. The European Parliament, in a resolution of 17 October 1980, made the following assessment (which is reproduced in full because of its importance for consideration of the case):

The European Parliament, as regards credit insurance

'Notes that the Commission proposes to exclude definitively from the scope of application of the first Directive export credit insurance operations transacted for the account of or with the guarantee of the State;

Observes that this exclusion as proposed by the Commission perpetuates a difference in treatment between the public and private sector;

Affirms that such different treatment is incompatible with the proper working of the Common Market as regards both:

— exports to another Member State, State guarantees being an unacceptable form of aid in trade within the Community, and also

— exports to third countries in so far as the guarantee granted by the State is not yet governed by rules laid down under the common commercial policy;

Considers that having regard to the statement [1] to the Legal Affairs Committee by the Member of the Commission responsible, the exclusion of credit insurance operations from the scope of application of the Directive should be limited pending subsequent coordination to trade with third countries;

Considers that only the amendment in those terms of the proposal under consideration would enable greater progress to be made towards freedom of establishment in the sector concerned, but that it remains necessary:

— to draw up a Community position on the question of aid for exports to third countries, of which State guarantees for export credit insurance operations are one example; [2]

— to ensure the total equalization of conditions of competition between public and private undertakings'. [3]

The European Parliament accordingly proposed that the grounds for the directive should be changed by inserting the following recital:

'whereas — as regards export credit insurance operations — free competition should be guaranteed between public and private sector undertakings; whereas the risks covered by export credit insurance in trade within the Community are not of a different economic kind from those covered by credit insurance for transactions within the domestic market of a Member State; whereas, therefore, in this case credit insurance operations for the account of or with the guarantee of the State should be included within the scope of this Directive; whereas — as regards export credit insurance operations in the context of trade between Member States and third countries — further coordination of national provisions is required to achieve a common export policy, which is essential to the common commercial policy'.

1 — See Annex II to the report of the Legal Affairs Committee (Doc 1-457/80).

2 — See the resolution on the harmonization of export aid systems adopted by the European Parliament on 15 June 1977 (OJ 1977 C 163, p 42) and the Couste report (Doc. 129/77)

3 — See the resolution on the seventh report of the Commission of the European Communities on competition policy adopted by the European Parliament on 13 October 1978 (OJ 1978 C 261, p. 48) and the Damseaux report (Doc. 334/78)

Finally, an amendment to Article 2(2)(d) of the directive was proposed which excluded from the scope of the directive, pending further coordination, *only* credit insurance operations for exports to non-member countries; for the purposes of other operations the public and private sector undertakings were to be subject to the same rules.

4. Those comments prompted the Commission to reverse its position and to propose to the Council a new draft of the directive which incorporated the European Parliament's suggestions. That proposal was accompanied by a memorandum in which the Commission, in reference to the market in question, stated significantly that it

'fully accepts that everything possible must be done to ensure that competition between the public and private sectors takes place in conditions of neutrality and transparency',

and went on to point out that,

'after consultation with those concerned, it accepts that the application of the present Directive to public sector bodies acting in this area is *practicable and will make a useful contribution* to the achievement of these conditions'.

The Commission emphasized in addition that the same objectives of competitive neutrality and transparency were also important where the customer of the insured was outside the Community; it pointed out, however, that, as the European Parliament itself had recognized, in such a case, the risk insured often has a high political content which only State-backed bodies are willing to cover by insurance.

The Commission's new proposal therefore envisaged that the system of prudential rules would apply without distinction to the public and private sectors, with the sole exception of credit insurance for exports to non-member countries, in respect of which it was thought desirable, in view of the highly political nature of the risk covered, to postpone the application of the common rules pending a subsequent coordination of legislation.

5. However, the Council again rejected the solution proposed to it. In the directive finally adopted on 22 June 1987, Directive 87/343, Article 2(2)(d) of the earlier Directive 73/239 was amended in order to exclude export credit insurance operations for the account or with the support of the State from the application of the common rules pending subsequent coordination, but without any time-limit being fixed.

So much for the scope of the directive. With regard to its content, on the other hand, Directive 87/343 confirms the prudential rules already introduced by Directive 73/239, but adds a new instrument, the 'equalization reserve', intended to further strengthen the system of financial guarantees for third parties.

Admissibility

6. The defendant institutions raise two objections of inadmissibility. The first objection concerns the action as a whole;

the second is directed specifically against one of the claims made by the applicants in their conclusions.

The first objection of inadmissibility

The first objection of inadmissibility is that the action is in fact intended not to obtain compensation for damage suffered but to deprive Directive 87/343 of any effect. It is therefore a 'disguised' action for annulment, which, if held to be admissible, would side step the Community's procedural rules.

The only submission relied on by the Council and the Commission in support of their objection of inadmissibility is that an action to establish non-contractual liability may not be used as an alternative to proceedings under Article 173. However, it is clear that, expressed in those terms, the objection is unfounded for the simple reason that the Community measure at issue in this case is, as I have pointed out, a directive — that is to say a measure which could not conceivably be challenged by the applicants under the second paragraph of Article 173.

However, in my view it is clear that consideration of the question of admissibility cannot be confined just to an analysis of the relationship between actions to establish non-contractual liability under Article 215 and actions for annulment. The problem raised by the defendant institutions proves on closer examination to be much wider in scope; it concerns, in general, the extent to which claims for compensation are autonomous where the damage allegedly sustained stems not from an actual deed or conduct attributable to the Community, but from a **legal act** — which is supposedly unlawful — adopted by the Community.

It should be pointed out that in the present case the act which was directly harmful to the applicants is not the directive but the national implementing provisions, or national measures, individual in scope, adopted pursuant to the provisions implementing the directive itself.

Consequently, what must be determined is not whether the applicants should have brought an action for annulment under Article 173 instead of an action for damages, but whether they should not rather have challenged before the national courts the national measures adopted under the directive and, in those proceedings, to have raised the question of the validity of the Community act, namely the directive, on which those provisions were based.

In my view that is the issue which is raised by the defendants' objection of inadmissibility and which must be considered. In any event, I would point out that, as was confirmed in the judgment in the most recent *Roquette* case (Case 20/88 *Roquette Frères* v *Commission* [1989] ECR 1553, at paragraph 14), the Court may, of its own motion, verify whether an action to establish non-contractual liability is inadmissible on the ground that it is subsidiary to national remedies, and the question of inadmissibility should therefore be examined irrespective of what is held to be the scope of the objection raised by the defendants.

Action to establish non-contractual liability and national remedies

7. In general, the problem of the relationship between these two classes of action arises essentially when a national authority adopts a measure pursuant to a Community act and that measure has adverse economic consequences for an individual.

The Court has stated that 'where an individual considers that he has been injured by the application of a Community legislative measure that he considers illegal, he may, when the implementation of the measure is left to the national authorities, contest the validity of the measure, when it is implemented, before a national court in an action against the national authorities', although, of course, 'that court may, or even must, as provided for in Article 177, refer the question of the validity of the Community measure in dispute to the Court of Justice' (judgment in Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, at paragraph 11), and that, consequently, the existence of such 'an action is by itself of such a nature as to ensure the efficient protection of the individuals concerned' (judgment in Joined Cases 116 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497, at paragraph 14).

Similarly, and in even more general terms, the Court has held that 'such actions must be examined in the light of the whole system of legal protection for the individual established by the Treaty and . . . the admissibility of such an action may in certain cases be dependent on the exhaustion of national rights of action available to obtain the annulment of a national authority's decision'; however, 'it is essential, for that condition to apply, that those remedies under domestic law effectively ensure protection for individuals aggrieved by measures of Community institutions' (see the judgment in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, at paragraph 27, and, more recently, the judgment in Case 20/88 *Roquette*, cited above).

It seems that the following inference — which is, moreover, in accordance with the views of academic writers [4] — may be drawn: when an action can be brought before a national court, that remedy takes precedence over an action under Article 215, although the action for damages may still be brought autonomously, in other words irrespective of whether national remedies have already been exhausted, if such remedies cannot ensure effective judicial protection of the legal situations which have allegedly been damaged.

Nevertheless, having regard to the importance of the question, the scope of the relevant case-law cannot, in my view, be deduced from the foregoing general statements alone but must also be examined in the light of the different situations which gave rise to that case-law. That is, I believe, the only way in which it is possible to define

4 — On the subsidiary nature of a claim for damages in relation to national remedies (at least) where the Community measure has given rise to national implementing measures, see J. Rideau and J. L. Charrier, *Code des Procédures Européennes*, Paris, 1990, pp. 185 — 186; *R. Joliet*, Le Droit Institutionnel des Communautés Européennes, Le Contentieux, Liège, 1986, p. 250 et seq; M. Waelbroeck, in Megret, *Le Droit de la Communauté Economique Européenne*, vol. 10, part 1, pp. 276-281.

the conditions under which an action for damages must be held to be admissible whether or not recourse has been had to national remedies.

Analysis of the case-law[5] shows that an action under Article 215 is as a rule (with the sole exception of the judgment in Joined Cases 67 to 85/75 *Lesieur* v *Commission* [1976] ECR 391) admissible, irrespective of whether recourse has been had to national legal remedies, where the effect of the measure of the national authority adopted on the basis of Community provisions (of secondary legislation) is to withhold or withdraw benefits, grants or other advantages. That case-law is inspired essentially by the fact that, in such a situation, an action brought before the national courts, even if successful, would not guarantee effective protection of the rights claimed. Indeed, even if the Court of Justice, following a reference from the national court under Article 177, declared that the Community provisions at issue were invalid and the national court then, by virtue of that ruling, annulled the national provision at issue, that result would still not be of any concrete benefit to the applicant. Merely annulling the (negative) measure is not the same as granting the right which is claimed. The Community legislation under which the national administration acted would still have to be amended. It would therefore be up to the Community legislature to draw the consequences of the Court's declaration of invalidity and introduce the positive act without which the national authority would be unable to adopt the measures sought by the plaintiff.

In view of those circumstances, and thus essentially because of the unsatisfactory nature of a judgment obtainable in the national courts, the Court of Justice has accepted the admissibility of an action under Article 215 as an alternative to the national remedy, even if the compensation sought corresponds to the sum which the applicant is seeking from the national authorities.

The rationale of that case-law, correctly identified in the Opinion of Advocate General Capotorti in *Granaria*,[6] was confirmed by the Court in the judgment in *Unifrex* (paragraph 12) and, most recently, in the judgment in *De Boer Buizen* (Case 81/86 *De Boer Buizen* v *Council and Commission* [1987] ECR 3677, at paragraph 10), where it was observed that:

'the annulment by a national court of a refusal to grant such a licence to a distributive undertaking cannot have the effect of giving that undertaking the right to obtain either the licence or compensation for any damage which it may have suffered. Nor is that the case if a national court were to find, after referring a question on the matter to the Court for a preliminary ruling under Article 177 of the Treaty, that the provisions of the regulations in question were invalid'.

The Court appears to reach an entirely different conclusion, however, regarding the

5 — See R. Joliet, op. cit., p. 255 et seq.

6 — Judgment in Case 90/78 *Granaria* v *Council and Commission*, [1979] ECR 1081. After citing the case-law at issue Advocate General Capotorti pointed out significantly that:
'In all the judgments cited the Court accepted the admissibility of the actions without objecting that internal remedies must first be exhausted. That is explained, in my opinion, by the fact that they were cases in which, even if the applicants had succeeded in convincing the national court of the illegality of the Community measures which had caused them damage, they still could not have obtained from the national administration the benefit to which they claimed to be entitled without the prior intervention of the Community legislature. On the other hand, if the claim could be satisfied at the national level the Court has rejected, as inadmissible, the action for damages under Article 215'.

admissibility of actions for damages in cases in which the national remedies ensure effective protection, to the extent that academic writers are inclined to accept that it is an actual principle that actions under Article 215 are subsidiary to national remedies.

However, it should be pointed out that that case-law was established essentially in relation to specific, clearly defined facts, namely to cases in which an individual pays a charge (or other levy) to a national authority pursuant to Community legislation but considers that legislation to be unlawful and subsequently brings an action for compensation seeking a sum equivalent to the amount which he paid, in his view, unduly. In those circumstances, the Court has already held in the judgment in *Haegemann* (Case 96/71 *Haegemann* v *Commission* [1972] ECR 1005) that disputes concerning the levying on individuals of charges and levies referred to in a Community regulation 'must be resolved, applying Community law, by the national authorities and following the practices laid down by the law of the Member States. Issues, therefore, which are raised during such a procedure as to the interpretation and validity of regulations establishing the Community's own resources must be brought before the national courts which have at their disposal the procedure under Article 177 of the Treaty'. On those grounds the claim for compensation corresponding to the sums unduly levied was declared inadmissible.

Similarly, in *IBC* (Case 46/75 *IBC* v *Commission* [1976] ECR 65), the applicant company sought compensation for the damage caused when the Italian authorities applied to it a provision of a regulation concerning monetary compensatory amounts; because of the provision, which the applicant claimed was unlawful, it was required to pay sums which it considered to be in excess of the sums due; it was precisely to obtain reimbursement of those sums by way of compensation that the action for damages was brought.

Declaring the action inadmissible, the Court held that:

'The action in fact concerns decisions of the Italian authorities adopted in implementation of Community rules which the applicant regards as unlawful. It thus concerns the legality of the imposition of the sums in dispute by the national authorities responsible for the implementation and enforcement of the provisions concerning monetary compensatory amounts and seeks the reimbursement, by the Community rather than by the national authorities, of the sums which are said to have been improperly charged.

The provisions of these rules lay down criteria for the calculation of sums payable by way of equalization between the import charge and the compensatory amounts and therefore leave no doubts that the actual assessment and imposition of the sums due are matters for the national authorities.

The question of the legality of such implementing measures adopted in pursuance of Community law is, therefore, a matter for the competent national courts or tribunals to decide, using the procedures laid down under national law and after application, where appropriate, of Article 177 of the Treaty.'

The judgment in *Wagner* (Case 12/79 *Wagner* v *Commission* [1979] ECR 3657) represents a further development in the case-law. Let me summarize the facts. The Bundesanstalt für Landwirtschaftliche Marktordunung (BALM) refused Wagner's request for cancellation of an export licence for sugar. In order to avoid drawn-out and risky national court proceedings involving a reference to the Court of Justice, Wagner decided not to challenge the refusal. Moreover, with the expiry of the licence imminent (which would have entailed loss of the deposit), Wagner decided to go through with the export transaction after all. However, that transaction was financially less favourable than it would have been had the licence been cancelled, as requested. Failure to cancel the licence meant that account could not be taken of an earlier change in exchange rates in the agricultural sector. That *lost profit* constituted the subject-matter of the claim for compensation, which was based once again on the contention that the BALM's refusal was based on unlawful Community provisions.

In the judgment declaring the application inadmissible the Court held that:

'The action for damages provided for in Articles 178 and 215 of the Treaty was included as an independent form of action, with a particular purpose to fulfil within the system of legal remedies, and subject to conditions on its use arising out of its specific nature. Its purpose is not to enable the Court to examine the validity of decisions taken by national agencies responsible for the implementation of certain measures within the framework of the Common Agricultural Policy or to assess the financial consequences resulting from any invalidity of such decisions.

The applicant has brought its action against the Community on the basis of non-contractual liability, alleging that the contested refusal by the Federal Office is entirely the result of the Commission's conduct. In the applicant's view the damage suffered arises from that conduct, since the national authorities had no choice other than to apply the Community provisions and to follow in this respect the directions given to them by the Commission.

It follows from the judgment of the Court of 31 March 1977 in the aforementioned Case 88/76 that Regulation No 1579/76 could not lawfully be applied to a request for cancellation lodged on 1 July 1976. However, it was for the national courts to give a ruling on the legality of the refusal by the Federal Office in pursuance of Community law within the forms laid down by national law, following recourse, where necessary, to Article 177 of the Treaty.

The action by the applicant is seeking in fact compensation for the damage resulting from the fact that the applicant did not succeed in rendering the refusal by the Federal Office ineffective. Whatever the reasons which have led the applicant not to bring an action against that decision before the national courts having jurisdiction, the Court cannot allow an action for damages such as that in the present case against the Community without disregarding the whole system of legal recourse conceived *inter alia* to protect the undertakings concerned against a wrongful application of the measures adopted within the framework of the Common Agriculture Policy.

It follows that the Court must reject as irrelevant the applicant's argument that the bringing of an action against the refusal would have led to the export licence's not being used and the loss of the security pending the subsequent outcome of the action and that this result would be such a financial risk that an average-sized undertaking such as the applicant's could not reasonably bear it. In choosing to avoid such a risk the applicant has also deprived itself of the opportunity then open to it of correcting the illegality of which it complains.'

8. Of course, the case-law cited may be interpreted differently depending on what is held to be its rationale.

If the view were taken that the Court acted essentially with the intention of preventing the Community proceedings for damages becoming merged with proceedings for repayment of sums unduly paid, which must be brought before national courts, the logical conclusion would be that the action for damages is inadmissible *only* if the damage complained of corresponds exactly to the amount paid in application of the allegedly unlawful national implementing provision. In that case, however, the claim for damages would be inadmissible simply because the Community would thereby be placed under an obligation to reimburse the loss suffered by the individual, whereas it is obviously for the national authority to repay the sums which it levied *wrongfully*.

However, in my view that case-law is also open to a wider interpretation. I believe that it allows of the conclusion that an action under Article 215 is generally inadmissible when it seeks to achieve the same outcome as could expediently have been sought by means of an action before the national courts. In practice, that means that an action for damages may not be used in order to eliminate or in any event neutralize the effects of a harmful act if that objective may be achieved by challenging the act itself before the national courts (and raising there the question of the validity of the basic Community provision), on the sole condition that — as stated above — the national remedy is capable of ensuring effective protection.

That interpretation is borne out, in my view, by the statements of a general nature made by the Court, in particular in the judgment in *Wagner*, concerning the need to respect the specific function which the various remedies envisaged by the Treaty assume within the overall system of judicial protection.

In *Wagner* the applicant undertaking did not seek the reimbursement, by way of compensation, of the sums unduly paid; it sought compensation for the loss of profits arising from the refusal to cancel the licence. In that case the Court evidently took account of the fact that the applicant could have obtained a similar outcome by challenging the refusal before the national courts. The Court therefore wished to prevent an action under Article 215 from being used as a kind of *alternative* to national remedies, even if in some circumstances — as in the *Wagner* case itself — national remedies involve greater risks for the person concerned. In other

words, the Court appears to be guided by the principle, clearly defined by Advocate General Capotorti in *Granaria*, that an action for damages is inadmissible if 'the claim could be satisfied at the national level'.

In my view that interpretation is also consistent with the balanced structure of judicial protection in the Community. In this regard it should be pointed out that the case under consideration is one of non-contractual liability due not to an actual deed or conduct, but to a supposedly unlawful legal act. In this case therefore review of the legality of the act is a fundamental precondition for determining whether there is liability and consequently an obligation to pay compensation. Since the Community legal order lays down appropriate procedures for carrying out that verification, it would be entirely unjustified to disregard them and use as an alternative the action for damages, which is not intended or designed for reviewing the lawfulness of measures.

Indeed, as the Court has pointed out, proceedings under Article 215 concern only compensation and, in particular, they are not intended to permit review of the validity of measures adopted by national bodies on the basis of unlawful Community acts. In the case of acts of the institutions adopted under discretionary powers, there can be question of compensation only if the conditions exhaustively listed in *HNL* (Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209) have been fulfilled. It follows that the review carried out within the context of Article 215, being solely for the purpose of compensation, will not be a comprehensive review of legality, but will be confined to examining whether there exists a sufficiently serious breach of a superior rule of law for the protection of the individual; consideration of the measure will therefore be limited to assessing those aspects and only if the substantive conditions in question are met will the action be allowed.

Moreover, even if an action under Article 215 is successful, the declaration of unlawfulness is still purely incidental and certainly does not produce the effects which follow from a declaration of invalidity under Article 177. Such a declaration entails — at least — the non-application of the Community act declared invalid within the context of the dispute referred for a preliminary ruling, which generally involves the annulment of the national implementing measure challenged before the national court. Moreover, the Court, when ruling under Article 177, has not confined itself to declarations of invalidity; it has recognized (see the operative parts in the judgments in Joined Cases 117/76 and 16/77 *Ruckdeschel* v *Hauptzollamt Hamburg-St Annen* [1977] ECR 1753, and Case 300/86 *Van Landschoot* v *Meyrer* [1988] ECR 3443) that the Community authorities are under an obligation to adopt the necessary measures (revocation or amendment) to remedy the incompatibilities found to exist; a further instance is where the Court found a regulation invalid for infringement of the principle of equal treatment in so far as it did not grant an exemption from the co-responsibility levy to some categories of operators, and held that, pending the adoption by the Community legislature of the necessary measures to restore equality of treatment, the *national authorities* should continue to apply the exemption laid down in the provision declared invalid but should

also extend it to operators affected by the discrimination found to exist (see the judgment in *Van Landschoot*, cited above).

Thus, both the scope and the effects of the review of the legality of the acts differ substantially depending on whether that review takes place within the framework intended for that purpose, namely a reference for a preliminary ruling under Article 177, or within the much narrower context envisaged by Article 215. In my view, therefore, it is consistent with both the general interest and the interest of persons bringing legal proceedings that the assessment of the lawfulness of Community measures upon which national measures giving rise to damage are based should not be of limited scope and should have comprehensive effect: the appropriate framework for an assessment of that kind (within the system of judicial protection set up by the Treaty) can only be the reference from the national court in which the national implementing measure was challenged.

The interpretation which I propose is, of course, supported and not contradicted by the fact that exceptionally the Court considers an action for damages admissible if national remedies appear unable to ensure effective judicial protection (although in the light of recent judgments, such as *Van Landschoot*, cited above, it must be considered that an action before the national courts, with the consequent reference for a preliminary ruling, represents in *almost all* cases the most *appropriate* means of ensuring the effective protection of the rights of plaintiffs). In this case the action is not seeking to achieve a similar result to that which is obtainable by means of national remedies but one which it is impossible to achieve in national proceedings.

Clearly then, where the removal of the contested national measure is not sufficient to negate all the harmful effects found to exist, it will always be possible to bring an action to establish liability for the compensation of those effects. Thus, for example, if a national authority suspends an import licence pursuant to a Community regulation and a national court annuls that suspension after the basic regulation has been declared invalid, it will still be possible to bring an action under Article 215 seeking compensation for the expenses incurred *in the meantime*, for example, for the storage of the goods, or on account of their deterioration. However, it should be emphasized, the action will be brought only after the fate of the provisions at issue has been decided, within the appropriate framework, and consequently in respect of damage which is already in existence and can be evaluated.

There remains one final point. Some have suggested that to exhaust national remedies requires the plaintiff to pursue a laborious judicial process,[7] which is particularly long where a reference is not made by a court of first instance.

That objection has in part already been answered by the observation that it is also in the interests of the plaintiff to challenge the measure adversely affecting him directly before the national court (without prejudice to the possibility of an action under Article 215 seeking compensation for greater damage).

As for the greater length or complexity of the national procedure, it is, in my view, a

7 — See M. Waelbroeck, op. cit., p. 281.

risk which is more apparent than real. Although the diffuse system of review founded on Article 177 operates at various levels, it was designed to be a system that is integrated and unitary, characteristics which have been progressively highlighted and developed There is no reason to regard that system as inadequate to afford individuals full protection, leading to the action for damages being seen as an *alternative* (at the option of the plaintiff) to the remedy actually envisaged for reviewing the lawfulness of acts. That view is supported by the confirmation in the judgment in *Foto-Frost* (Case 314/85 *Foto-Frost* v *Hauptzollamt-Lubeck-Ost* [1987] ECR 4199) that a reference is *mandatory* if the national court believes that the Community act on which the national measure under consideration is based is invalid, and also the fact that, according to the same judgment, the national court appears to have the power, as a preventive measure, to order the suspension (of the effects) of the Community act at issue, thereby reducing the risk that the prolongation of the proceedings could prejudice the rights claimed by the plaintiff.

9. Those are the principles to be applied. Turning now to the case at issue, it should be pointed out first of all that the action for damages is based on the submission that the provisions of Directive 87/343 concerning the equalization reserve are unlawful in so far as they infringe the principle of equal treatment.

The first thing which must be determined is whether there were national judicial remedies available to the applicants within the framework of which they could raise the question of the validity of the Community act in question.

In the United Kingdom at least, which is, it will be noted, one of the countries in which Les Assurances du Crédit operates and, therefore, one of the three markets in which the damage at issue in these proceedings was allegedly caused, the applicants could have made an application for judicial review to the national courts in order to obtain a declaration that the regulations implementing the directive were unlawful in so far as they were based on a Community act which infringed the principle of equal treatment, and at the same time requested the court to refer the case to the Court of Justice for a preliminary ruling on the validity of the directive. A very recent example of the use of that procedure is found in the judgment in *Fedesa* (judgment of 13 November 1990 in Case 331/88 [1990] ECR) which originated with a dispute before an English court in which the applicants called into question the validity of the 'hormones' directive and the national implementing rules.

However, even in the event that is not possible to bring a *direct* challenge against the national provisions implementing a directive (for example because they are in the form of a law and there is no other regulatory act which can be challenged) the situation with regard to the possibility of national judicial protection is only slightly more complicated. It should be pointed out that Article 20 *et seq.* of Directive 73/239, which is the legislative framework of which the directive at issue forms a part, envisage a series of measures which the national supervisory authorities may adopt should insurance undertakings fail to comply with the prudential rules and related requirements. In particular, the directive provides for withdrawal of authorization as an 'extreme' measure (Article 22) and at the same time provides that each Member State is to make provision for a right to apply to

the courts against such a decision (Article 22(3)). The directive also lays down less severe measures such as restrictions on the free disposal of assets (Article 20(1)) and, in general, 'all measures necessary to safeguard the interests of the insured' (Article 20(4)). In my view there can be no doubt that by failing to establish wholly or in part the reserve referred to in Directive 87/343, or in any event by failing to fulfil an administrative or accounting requirement in connection with that reserve, the applicants could have caused the supervisory authority to adopt one of the said measures and could then have challenged the validity of that measure before a national court on the ground that it was based on unlawful Community provisions; they could have also asked the national court to suspend the operation of the measure addressed to them pending a final decision. In my opinion, therefore, even in those circumstances there was a way open to the applicants to institute proceedings before a national court.

The objection could be raised that in such a case the applicants would have been forced to infringe the provisions of the directive, thereby exposing themselves to the risk of more or less serious consequences. That is a situation which normally arises whenever persons affected wish to contest the lawfulness of Community or national provisions which impose burdens, obligations or other restrictions and cannot be challenged directly by them. Moreover, there are a great many instances of cases referred to the Court of Justice for a preliminary ruling stemming from proceedings brought by national authorities against individuals who have infringed particular rules; where such rules cannot be challenged directly, for example by means of an application for judicial review, the usual way of bringing the matter before the courts, for the examination of both the compatibility of the national provisions with Community law and — as in the present case — the validity of the Community provisions upon which the national rules are based, is precisely to fail to observe one of the obligations imposed and to ask for a preliminary ruling to be sought during the ensuing proceedings.

It is a true that such a course may involve risks (although those risks are limited in the more serious cases by the possibility of a suspension of any implementing measures), but those risks — as the judgment in *Wagner* confirms — are a natural concomitant of any court action and it is ultimately for the plaintiff to decide whether or not to accept the advantages and risks inherent in any judicial proceedings, quite apart from the fact, moreover, that in the present case those 'limited' risks could, it seems, have been avoided by making an application for judicial review to an English court.

That having been said, I must add that, by bringing the present action for damages, the applicants are seeking to achieve a result which is very similar to the result they would have obtained by means of one of the abovementioned national proceedings. In this instance, the action under Article 215 seeks only to obtain from the Community compensation for the financial burden of establishing and maintaining the reserve provided for in Directive 87/343. In other words, the action is intended essentially to

neutralize, if not to remove, the economic effects of the directive which the applicants consider to be discriminatory. However, even that objective could have and should have been achieved by a reference for a preliminary ruling to obtain a declaration that the effects of the directive are discriminatory and that therefore the directive itself is invalid.

Moreover, confirmation that what is sought in the present case is not so much compensation for damage as essentially neutralization of the effects of the directive, seems given by the fact that, if the Court allowed the action, it would in practical terms confer on the applicants a sort of permanent right to compensation for the financial burden of the reserve. The damage is equivalent to the cost of establishing and maintaining the reserve and therefore a judgment which allowed the action would in a way entail exempting the applicants from the reserve rather than making good specific damage.

Finally, it should be pointed out that in the present case the national judicial remedies would have not only enabled the same objective to be achieved as is sought with the present action for damages, but would also have ensured effective and more extensive judicial protection. As I have already mentioned, the Court has held on a number of occasions, in the context of references under Article 177, that measures which impose burdens on (or conversely confer advantages on) only certain categories of economic operators are discriminatory. A declaration of invalidity means that the national implementing measures cease to apply and that the Community institutions are under an obligation to remedy the unlawfulness found to exist (leaving aside the possibility that the Court might even specify the measures which the national authorities must adopt following the ruling and pending changes in the Community rules in question). There is no doubt therefore that a reference for a preliminary ruling as to the validity of the directive would have afforded the applicants much more effective protection of the right (not to be subject to discriminatory burdens) which they seek to establish in a different way by the alternative course of an action under Article 215.

To summarize, in my opinion the present action is intended to challenge the validity of the directive at issue and it therefore seeks the same result as ought to have been pursued by recourse to national judicial remedies. I therefore propose that the application be declared inadmissible.

The second objection of inadmissibility

10. In the conclusions set out in the application the applicants request the Court, *inter alia*, to order the institutions to adopt appropriate measures to bring to an end the illegalities found to exist. The defendant institutions contend that that request is inadmissible on the ground that the Court does not have the power to make such orders.

In my view that objection must be upheld.

Contrary to what the applicants claim, the Court does not have such a power under

Article 178. That article empowers the Court to decide on claims for damages against the Community, but it does not enable it to deliver judgments requiring the Community institutions to adopt positive measures for a particular purpose. According to a principle common to all legal systems requiring a clear separation between the judicial function and law-making, the courts may not interfere in the legislative choices which fall within the discretionary power of the competent institutions. Moreover, the Court has consistently held — in the context of staff cases, but obviously guided by the principles referred to above — that it is not for the Court to address orders to the administration and that any obligations on the administration can only arise from the annulment of one of its acts (see the judgments in Case 224/87 *Koutchoumoff* v *Commission* [1989] ECR 99, Joined Cases 41 and 178/88 *Becker* v *Parliament* [1989] ECR 3807, and the judgment of 14 February 1990 in Case 137/88 *Schneemann* [1990] ECR 369).

However, it should be pointed out that, in their reply, the applicants have at least in part changed the scope of the claim made in the application. Indeed it would seem that they are essentially asking the Court to declare, once it has been established that the contested rules are discriminatory, that the institutions are under an *obligation* to adopt the necessary measures to restore equality of treatment.

As stated above, such an obligation does flow from a declaration that an act is invalid but not from a judgment which upholds an action for damages, in the context of which any finding as to the lawfulness of the act is entirely incidental. If anything, the applicants' request in this regard confirms once more that they have set in motion an inappropriate procedure since their objective could and ought to have been pursued by means of an action brought before a national court in which they raised the question of the invalidity of the allegedly discriminatory rules.

Nor is it possible to accept the other argument put forward by the applicants in their reply to the effect that the Court could in any event adopt injunctive measures in the present case under Article 186 of the Treaty. Not only is there no reference to that article in the conclusions in the application, but above all it is clear from the application that the applicants have not requested the adoption of urgent interim measures but the adoption of *definitive* measures for the amendment, in accordance with their wishes, of the Community rules on export credit insurance.

The argument that the Court could adopt injunctive measures under the second paragraph of Article 176 — which is also put forward only in the reply — must be rejected too. The interpretation of the article put forward by the applicants is in my view a complete distortion of its purport. The second paragraph of Article 176 merely reserves the right of a person who has been harmed by an act which has (already) been annulled under Article 173 to apply to the Court to obtain compensation for any further damage; however, that does not

serve to change the competence of the Court within the context of an action for compensation, which is confined, as I have repeatedly observed, to making an order for the payment of a sum of money and does not include the power to order the institutions to adopt measures with a particular content.

Substance

11. With regard to the substance, the defendant institutions first raise an objection of a preliminary nature. They contend that in the present case the Community did not adopt discriminatory rules. Quite simply, when the first directive was adopted it was realized that it was not yet possible to harmonize the national rules relating to export credit insurance for the account of or with the backing of the State. Consequently, a partial harmonization was undertaken, laying down rules for the private sector (in particular regulating the various financial guarantees for the protection of third parties) and leaving to the Member States the power to regulate the activities of the public insurers in this sector.

The Council and the Commission recognize, furthermore, that limiting the application of the common prudential rules to the private sector alone meant that the public operators in fact would continue not to be subject to any financial guarantee. However, the institutions point out that they simply accepted that factual situation without having created it; and that if the Member States have decided not to impose on public insurers any burden comparable to the reserve laid down by the directives, that is a choice for which the Member States themselves are legally responsible and not the Community. In the final analysis, there is nothing to stop the Member States from adopting prudential rules for public insurers which are similar to those laid down by the directive for private insurers.

In my view the defendants' objection must be rejected since there is a risk that it will lead to the unacceptable consequence that, in cases where only one sector of a particular field is harmonized, the Community legislature will be spared the need to observe the principle of equal treatment.

It should be pointed out that the principle of equal treatment is fundamental not only because it is a cornerstone of contemporary legal systems but also for a more specific reason: Community legislation chiefly concerns economic situations and activities. If, in this field, different rules are laid down for similar situations, the result is not merely inequality before the law, but also, and inevitably, distortions of competition which are absolutely irreconcilable with the fundamental philosophy of the common market.

Turning to the problem at issue, I should point out that the Community legislature must in particular have regard to equality of treatment when *defining the persons covered* by the rules it adopts, especially when those

rules envisage or entail the placing of burdens (or the conferring of benefits) on particular economic operators. In such cases there is an obvious risk that rules which differentiate between those to whom they apply will create distortions of competition which are unjustified and harmful both from the point of view of the overall balance of the market and from the point of view of the individuals who suffer direct damage.

That is the situation in general terms. However, the defendants contend that the situation is different where the Community act in question is not a regulation, but a directive introducing partial harmonization. The defendants' argument may be summarized in the following terms.

If a regulation imposes burdens (or confers benefits) on certain economic operators and not on others (for example by providing that some categories of cereals producers are exempt from the co-responsibility levy but not others), such a difference in treatment is automatically imputable to the Community legislature, which must therefore bear responsibility for it. In such cases, it is the Community act which establishes the rules applicable to the various categories which are, or are not subject, to the burden (or the benefit).

According to the defendants, the position is quite different when the measure adopted is a directive introducing partial harmonization, as in this instance. In such cases, the Community legislature merely lays down the common rules which are applicable to the operators covered by the harmonizing directive. However, no Community rule applies to persons outside the scope of the directive; they remain subject to the national rules alone. The content of the national rules may or may not be the same as the content of the harmonized rules. If it is not the same, a difference in treatment may still result in so far as dual rules are in fact applied to operators who are, ultimately, competitors. But that unequal treatment, according to the defendants, will depend exclusively on the legislative choices made by the Member States, and it is to them, therefore, that any infringement of the principle of equal treatment is attributable.

While recognizing the dialectic quality of that argument, I consider, nevertheless, that it is based essentially on a fiction. It does not take account of the fact that in the present case the discrimination is perceived by the applicants in the arbitrariness of the partial harmonization and not in the content of the national rules (legitimately) applied in the (as yet) unharmonized sectors. Let me explain more fully. What the defendants fail to mention is that when the Community legislature, in harmonizing the conditions under which an economic activity (such as export credit insurance) is pursued, *limits* the scope of the harmonized rules to a single category of economic operators (private insurers), it *ipso facto allows* the national authorities to adopt different rules for the other categories (public insurers) which are not covered by the harmonization.

If therefore two sets of rules are created, consisting in the application of the Community rules on the one hand and the national rules on the other, that is due solely to the choice made by the Community legislature in defining the persons covered by the directive. And if then — to be even more explicit — the effect of those two sets of rules is that, by virtue of the directive, the private sector is subject to a burden such as the equalization reserve, while the public sector, which is regulated by the national rules, is not subject to any financial constraint, that inequality of treatment can be related and is attributable exclusively to the Community legislature in so far as it was the Community legislature which *allowed* the national legislature to apply rules which were different from the common rules.

That is particularly evident in the case at issue if account is taken of the legislative history of the rules at issue, which I dealt with earlier. From when the first directive in the field was adopted, the Community institutions were perfectly aware of the fact that no financial guarantee was required in the Member States from undertakings in the public sector. As the Commission stated, the Community *accepted* that situation. Consequently, by subjecting — albeit temporarily — only the private sector to the common prudential rules, the Council was allowing — neither more nor less — the public sector to remain exempt from any burden of that kind.

I conclude then that in the present case the Council and the Commission cannot claim in their defence that the discrimination complained of is not imputable to the Community.

Furthermore, that argument would lead to the absurd result that if discrimination were objectively shown to exist, it would not be imputable to anyone. The Member States could not be held responsible, since they could legitimately adopt or retain their own rules by virtue of the fact that the directive harmonized the field in question only in part (unless it is to be held that even in the event of partial harmonization the Member States are still required, in the sectors for which they retain competence, to adopt rules which are similar in content to the rules laid down by the directive in the harmonized sectors; that would clearly be anomalous since it would surreptitiously transform the partial harmonization into a complete harmonization); nor could the Community be held responsible since it takes the view that it is not answerable for differences in treatment due to the limitation of the persons covered by the directive. In short, it would mean that should the Council introduce a partial harmonization of the conditions under which a particular economic activity is pursued, imposing burdens on a certain category of economic operator and at the same time excluding other categories of competing operators from the harmonization and therefore from the burdens themselves, that situation could *never* be scrutinized in order to determine whether the principle of equal treatment had been complied with.

The scope of the alleged discrimination

12. Having rejected the defendants' preliminary objection, and before considering whether or not the rules at issue are discriminatory, we should first ascertain the scope of the alleged discrimination.

Article 2(2)(d) of Directive 73/239 provides that the directive does not apply to export credit insurance *operations* for the account of or with the support of the State. Article 1 of Directive 87/343 uses the same wording. Strictly speaking, therefore, it is the operations and not the *operators* that are outside the scope of the harmonized rules.

However, that distinction seems of little importance. First of all, it is clear that operations for the account of or with the support of the State can be effected only by those bodies and institutions which belong — albeit under different forms — in the public sector and which, as institutions, provide export credit insurance. Thus the exclusion of such operations from the scope of the directive benefits only public operators.

It must also be added that in some Member States — in particular the United Kingdom, and also Greece, Italy and Ireland — the public operator in question can act only *for the account of the State*, any activity *for its own account* being excluded. In those cases therefore the exclusion of the *operations* laid down by the directive is entirely equivalent to the exclusion of the *operators* since those operators may execute operations only for the account of the State.

In other countries the situation is different only in appearance. In Belgium the public operator executes all operations *for its own account*; elsewhere, for example in France, the public operator pursues part of its activities *for its own account*. However, as emerges from the answers given by the Commission to the Court, the rules contained in the Community directive do not apply to those cases either; at most — where provided for — prudential rules laid down in national provisions may apply. That appears to be due to the fact that the institutions and bodies operating in the export credit insurance market, even when formally acting *for their own account*, are nevertheless *supported* by the State since they receive — albeit by different ways and means — public financial backing (for example, in France, the public operator, COFACE, claims that the national rules also apply to the activities it carries out for its own account and in fact states that *all* its commitments are, in any event, guaranteed by the treasury). However, if we accept that in the States (such as France or Belgium) in which the public insurer operates partly, or exclusively, for *its own account*, the directive must necessarily be applied to those operations, the conclusion must be that those States have been in breach of the law for many years since it is common ground — as I have pointed out — that those operations may be subject to national rules but they have never been subject to the rules laid down in the directive. In conclusion, therefore, Article 2(2)(d) of Directive 73/239, as amended by the directive at issue, must be interpreted as excluding *public sector* export credit insurance from the common prudential rules laid down for the private sector. Moreover, the Commission, in paragraph 10 of its defence states that 'it was . . . building upon a state of fact in which the supervisory powers of Member States including the rules relating to prudential requirements applied to the *private sector* but not to the *public*'; later, in paragraph 11, the Commission adds that, because of the fears expressed within the Council, the Council decided that there was no need 'to subject the *public sector* to the

same prudential requirements'. The European Parliament also expressed itself in exactly the same terms in the resolution of 17 October 1980 referred to above.

13. That is the actual scope of the rules at issue in relation to which it must be determined whether or not there is unlawful discrimination.

For reasons of clarity it is appropriate to describe in outline the analysis which follows below.

In the first place, it must be determined whether, and to what extent, there is competition between the operators subject to the different rules.

Once the existence of competition has been established, it will be necessary to ascertain whether the different treatment, which is damaging to private operators (or to the operations executed by them), is justified for objective reasons.

Finally, if the rules at issue are not objectively justified (or are vitiated as being unlawful on other grounds), it must be determined whether or not the conditions have been met to enable the applicants to invoke the non-contractual liability of the Community and to be awarded the compensation they seek.

Competition between the private sector and the public sector in the field of export credit insurance

14. In a report annexed to the application, the applicants claim that it is only in long-term export credit insurance that there is no competition between the private sector and the public sector. On the other hand, there is vigorous competition for the insurance of short to medium-term commercial risks relating to intra-Community exports (or to OECD countries). However, there is very little competition for the insurance of political risk, at least for exports to developing countries. Those general conclusions are supported by detailed analyses of the three markets in question (the United Kingdom, France and Belgium) which are not reproduced here so as not to burden my opinion any further.

The defendant institutions, for their part, do not in any way dispute the existence of market sectors in which there is competition between the private and the public sectors. Indeed the Court asked a specific question in this regard and in its reply the Commission confirmed the truth of the applicants' assertions.

In Annex II to that reply the Commission observes that:

'Apart from a few marginal cases (PARIS subscription pool in France for political risks), competition between bodies with

State support and private insurers essentially concerns short-term commercial risk for exports to OECD countries. Significant capacity has not yet emerged among private insurers to underwrite political risks or long-term commercial risks without State guarantee'.

In the same document the Commission states that:

— with regard to the *United Kingdom*, the public operator, the ECGD (Export Credit Guarantee Department, an autonomous government department responsible to the Secretary of State for Trade and Industry) *is in competition with various private operators*, including Les Assurances du Crédit de Namur, for short-term commercial risk (and possibly medium-term) and to a small extent for political risk;

— with regard to *France*, the public operator, COFACE (a limited company the majority of whose capital is held, indirectly, by the State), *is in competition with private insurers*, including Les Assurances du Crédit de Namur, for short-term commercial risks (in addition, one of the private insurers, the PARIS pool, covers political risk with no State guarantee);

— with regard to *Belgium*, the public operator, the OND, *is in competition with private insurers*, including Les Assurances du Crédit de Namur, for the insurance of commercial risk in general and, since 1986, of political risk.

Those individual findings are further supported by the observations made by the Economic and Social Committee and the European Parliament during the preparatory work on Directive 87/343, and by the Commission itself in the memorandum which accompanied the proposed revision of the directive; for an account of those observations I refer to the description of the legislative history of the directive.

On the basis of those factors it is, in my view, established beyond all doubt (and without it even being necessary to determine whether or not there exists a potential competitive relationship) that the private sector and the public sector are in competition for the operations relating to the abovementioned market sectors.

It is also established that Directive 87/343 has increased the financial burdens on the private sector by introducing the equalization reserve; the public sector on the other hand continues to be excluded from the common rules (the practical result of which is that it is not in substance subject to a real comparable burden).

There exist therefore two sets of rules which are liable to lead to differences in treatment of competing economic operators. It must therefore be determined whether or not the differences are objectively justified.

Justification for the different treatment

15. The defendant institutions essentially put forward two reasons to justify the exclusion of the public sector from the scope of the directive.

The first reason, which is also the only one to be revealed in the preamble to Directive 87/343 (see the second recital), is that the public sector does not require rules for the protection of the insured since it operates with the support and therefore with the financial backing of the State.

The second argument is that it proved *difficult* to include the public sector in the scope of the directive both on account of the diversity of legal status and financial structure of the bodies operating in each of the Member States and on account of the nature of the activities pursued by those bodies, activities which often involve foreign policy choices.

With regard to the first argument I must first of all explain that it is common ground that the Member States finance export credit insurance for risks which are not normally covered by private insurers (political risk for example). In those cases, however, the public bodies are not competing with the private insurers but play a complementary role by offering a service which the market itself cannot provide.

However, in the areas where there is competition, the position is quite different. In those areas it is highly doubtful whether the States can legitimately provide financial backing for public operators. To do so might be incompatible with the rules on public aid and on conduct which the State must adopt with regard to public undertakings or in any event those subject to its influence.

It is true that so far no such incompatibility has been the subject of a Commission decision under Article 90 or Article 93 of the Treaty. However, it is also true that the contrary has not been established either; in its resolution cited above, the European Parliament, having observed that the exclusion of operations transacted for the account of or with the guarantee of the State from the scope of the directive 'perpetuates a difference in treatment between the public and private sector' affirmed that, as regards exports between Member States, 'State guarantees (are) an unacceptable form of aid in trade within the Community'; finally, in the reply to the questions asked by the Court, the Commission confirmed that the applicability of Articles 90 and 92 to financial relations between the States and the bodies in question is a matter which is 'under active consideration' and, while expressing its uncertainty concerning the conditions for the applicability of Article 90(1), it stated that public financial guarantees 'may be relevant for the purposes of Article 92'.

In my opinion unequal treatment among competing economic operators cannot, in general, be justified by a difference in their

situations which is connected with circumstances or conditions whose lawfulness is by no means certain.

The directive does indeed take account of the fact that the public bodies in question act with the financial backing of the State, but on the other hand it says nothing regarding the fact that the competing private operators do not receive similar backing. The directive therefore passes without comment over the fact that the financial intervention of the State is itself discriminatory and distorts competition in so far as it is only for public bodies; that is discrimination which should in turn be justified but for which no objective explanation is given although it would appear to be contrary to the principle of equal treatment between private undertakings and public undertakings set out in Article 90 of the Treaty.

In other words, in my view, in the present case it is sought to do no more than justify one discrimination between competing economic operators by another discrimination between the same operators, for which, however, no justification is given.

Quite apart from any considerations of a legal nature, such a result runs contrary to common sense since it would in fact endorse the lawfulness of twofold distortion to the detriment of private insurers who suffer damage in the first place because they are obliged to compete with operators who receive financial backing from the State, and secondly because that very situation is used by the Council to justify rules which impose on the private sector, but not the public sector, the burdens inherent in establishing reserves.

16. It is perhaps precisely because of that incongruous situation that during the proceedings the defendants have increasingly dwelled on the second reason for deciding to exclude the public sector from the scope of the directive.

In brief, they contended that having regard to the special characteristics of the bodies operating for the account of or with the support of the State, it proved to be impossible to adopt uniform rules in Directive 87/343.

However, that argument too is open to various objections.

First of all, the institutions claimed that what prevented the adoption of such a scheme was the diversity of status and financial structure of the operators in the public sector in the various countries. In particular, the Commission stated that in six Member States (Belgium, Denmark, Italy, United Kingdom, Luxembourg, Portugal) such operators were public bodies, whereas in five Member States (Spain, Ireland, France, the Netherlands, Greece) they were private companies and in one (the Federal Republic of Germany) a mixed public/private consortium. The Commission also

pointed out that in some cases the bodies in question act for their own account.

What the Court was not told was why those characteristics justified the outright exclusion of the public sector from the directive

It is true, of course, that different situations exist in the Member States. However, it is precisely such diversity which a harmonizing directive serves to eliminate and it cannot therefore in itself be regarded as an insuperable obstacle. The Council, when it decided to restrict harmonization to a single category of operators, ought therefore to have justified that limitation — which as I have said distorts competition — by adducing *additional, specific* difficulties other than those which normally exist when differing national rules are harmonized. It is unacceptable for the Council to seek to justify failure to adopt uniform rules by merely asserting that it would have involved tackling dissimilar sets of rules; the Council ought to have specified *why* such intervention was not possible in practice.

In addition, it should be pointed out that at a time when the matter was not in issue the Commission itself had claimed not only that uniform rules were necessary in order to ensure competitive neutrality and transparency, but also that it was *practicable* to extend the harmonized scheme to the public sector (see memorandum cited above). Moreover, as I have mentioned more than once, the European Parliament and the Economic and Social Committee had already expressed similar views. I regard that as clear evidence that there are no real obstacles, even of a technical nature, to the creation of rules which are the same for all the operators concerned.

Having regard to those circumstances, it is not possible in my view to hold that reasons derived from the structure or the status of the bodies in the public sector allowed those bodies to be excluded from the directive. Furthermore, even if it is accepted that the adoption of uniform rules comes up against technical difficulties, those difficulties, which are after all not insurmountable, could not in any event justify keeping discretionary rules in force indefinitely.

With regard to the argument that the choices made by public bodies take account of foreign policy considerations, it is sufficient to point out that those considerations play a part in the market sectors in which private insurers do not operate (long-term risk and political risk) and in where, therefore, there is no competition. However, that does not mean that in other sectors, where there is competition and where political considerations play little or no part, it is not possible or necessary to adopt uniform rules.

In conclusion, Directive 87/343 is, in my view, discriminatory since it excludes indefinitely public sector export credit insurance from the scope of the common prudential rules. Moreover, since such discrimination results in a disadvantage for the private

sector in relation to the public sector, there is also an infringement of Article 90(1) of the Treaty, which is a specific embodiment of the general principle of equality requiring the Member States, and the institutions, to accord equal treatment to private and public undertakings.

Other grounds of unlawfulness of the directive at issue

17. In view of the conclusion reached with regard to the infringement of the principle of equal treatment, only a few very brief observations need be made regarding the other grounds of unlawfulness alleged by the applicants, particularly since the documents before the Court show plainly that the principal criticism on which this action is based is that the directive is discriminatory, whereas the other criticisms are either barely developed or merge with the arguments put forward with regard to the infringement of the principle of equal treatment.

As regards the infringement of Article 90(1) and Article 52 of the Treaty, the applicants claim that the discrimination against the private sector has negative effects on the establishment of private insurance companies. Without having to consider whether there has been an infringement of Article 52 in the present case, I would only observe that, in any event, a necessary pre-condition for that criticism is that the directive at issue be discriminatory and that, therefore, when the Court gives its ruling on the claim for compensation, it need only determine whether the alleged discrimination exists and need not go on to consider the further effects of that discrimination on the right of establishment with regard to the activities in question.

The applicants also claim that the guarantee accorded by the State to public sector insurers constitutes an aid within the meaning of Article 92. I have already observed that it is highly unlikely that the State guarantee is compatible with the Community rules on aids. However, that leads to the conclusion that the alleged discrimination is not objectively justified but does not in itself vitiate the directive. The compatibility of the aid itself with Community rules will in any event have to be verified in accordance with the procedure laid down for that purpose.

Next, with regard to the complaint of misuse of power in so far as the additional guarantees introduced by Directive 87/343 were due not to genuine requirements for the protection of third parties, but exclusively to political pressure brought to bear by one Member State, it is sufficient to point out that that is merely an allegation without any supporting evidence and that it must therefore be rejected.

Finally, with regard to the complaint that the Community institutions acted unlawfully when they failed to adopt uniform rules for the two sectors within the four-year period laid down by Directive 73/239, it suffices to observe that that period is merely indicative and is not intended to impose on the institutions any obligation to take action. Moreover, that is accepted by the applicants themselves who, in their reply, changed

their arguments on this point by claiming that the institutions acted unlawfully by not having adopted, even after the expiry of the four-year period, any measure to bring to an end a situation of unjustified unequal treatment. However, once the institutions adopted an act, Directive 87/343, albeit with contents which are different from those desired by the applicants, they could no longer be accused of failure to act. As of that time, the alleged inequality of treatment relates only to the directive, which positively confirms the difference between the rules applicable to the two sectors, and not to the failure to act consisting in the non-introduction of uniform rules. The complaint of the institutions' unlawful failure to act is therefore the same as, to the point of being subsumed in, the submission concerning the discriminatory nature of Directive 87/343, considered above.

The liability of the Community

18. As from the judgment in *Schöppenstedt* (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975) the Court has held that: 'Where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred' (paragraph 11).[8]

8 — See the judgments in Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209; Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955; Joined Cases 241, 242 and 245-250/78 *DGV* v *Council and Commission* [1979] ECR 3017; Joined Cases 261 and 262/78 *Interquell Stärke-Chemie* v *Council and Commission* [1979] ECR 3045; Joined Cases 116 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497; Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle* v *Council and Commission* [1981] ECR 3211; Case 59/83 *Biovilac* v *EEC* [1984] ECR 4057; Joined Cases 194 to 206/83 *Asteris* v *Commission* [1985] ECR 2815; Case 20/88 *Roquettes Frères* v *Commission* [1989] ECR 1553 and Case 152/88 *Sofrimport* v *Commission* [1990] ECR I-2477.

There can be no uncertainty in the present case regarding the legislative nature of Directive 87/343, a measure which supplements the rules laid down in Directive 73/239 and therefore is part of the Community rules relating to the taking up and pursuit of the business of direct insurance other than life assurance.

However, it must be pointed out that the discretionary power which the Community legislature enjoys in principle when it defines the scope of such rules is strictly limited by the peremptory requirement that it should comply with the principle of equal treatment, a principle which — as is evident from the judgment in *HNL*, cited above — is recognized as a 'superior rule of law for the protection of the individual'.

In the present case not only has there been an infringement of the principle of equal treatment, but that infringement is particularly flagrant. By prolonging indefinitely, by means of Directive 87/343, the exclusion of the public sector from the harmonized rules, the Council completely disregarded the views expressed by the other institutions which had unanimously emphasized both the *necessity* of bringing to an end the situation in which two sets of rules apply, because it is discriminatory and distorts competition, and the *technical possibility* of achieving that objective by simply extending to the public sector the prudential rules already laid down with regard to the private sector; moreover, those opinions were quite consistent with the provisions of the 1973 directive which had envisaged the dual rules as a purely provisional measure to be abolished within four years.

While it is true that that period cannot be regarded as binding, that does not mean that it has no meaning at all; at the very least it shows that in 1973 the Council was well aware of the risks of distortion of competition arising from the absence of uniform rules and therefore considered it necessary to give itself a short period of time within which to carry out the necessary legislative coordination.

Ten years after that period expired, the Council refused to make a start on any coordination in the field, even merely partial and gradual coordination, and confined itself to simply confirming the exclusion of the public sector from the Community rules, and what is more it did so for an indefinite period.

In my view therefore, the Council arbitrarily extended for an indefinite period discriminatory rules which had already been in force for too long, and consequently it 'manifestly and gravely disregarded the limits on the exercise of its powers' (see the judgment in *HNL*, paragraph 6).

Moreover, in the present case the damage arising from the discrimination did not affect 'very wide categories of traders' (see the judgment in *HNL*, at paragraph 7); on the contrary, it affected a limited and well-defined group of undertakings.

I believe that the fact that the private sector was subject to a scheme of onerous financial guarantees, whereas its principal competitor was exempt from that burden, must in any event be regarded as damage which exceeds 'the bounds of the economic risks inherent in the activities . . . concerned' (ibid.).

In conclusion, in my opinion, there are no reasons of general interest in the present case which could justify the Council's decision to prolong indefinitely the dual rules applying to export credit insurance and the difference in treatment affected the interests of individuals which are of importance not only from an economic point of view but also as being interests worthy of protection by virtue of fundamental rules of the Common Market.

Consequently, the directive at issue constitutes a 'flagrant breach of a superior rule of law for the protection of the individual' and is thus such as to cause the Community to incur non-contractual liability.

Damage

19. As emerges from the report annexed to the application, the applicants expressly seek compensation for the damage arising from the entry into force of Directive 87/343, in other words the damage caused by the fact that the equalization reserve laid down in Article 1 of the directive must be established only by private undertakings and not by public undertakings.

The claim for compensation is based on the fact that the private undertakings, precisely because of the competition from public operators, find it impossible to transfer to their premiums, and hence to pass on, the

costs involved in establishing and maintaining the reserve. It follows that those undertakings are forced to bear the full burden, which consequently reduces the return on capital invested.

That reasoning is obviously to a large extent conjectural, although it is based on an argument — the impossibility of passing on the costs — which is entirely plausible in view of the proven competition between the two categories of operators; moreover, the defendants have not adduced any evidence to challenge the correctness of that reasoning.

I consider, therefore, that the applicants have proved the existence of economic damage caused by the entry into force of the directive at issue. With regard to the amount, the Court should in my view request the parties to come to agreement on the amount of damages by a certain date, failing which it will be for the Court to decide.

Conclusion

20. For all the abovementioned reasons, I propose that the Court should:

— declare the application inadmissible;

however, if the claim for compensation is declared admissible;

— declare that the Community is liable for the damage caused by the entry into force of Directive 87/343, leaving the amount of compensation to be determined by agreement of the parties or, should they fail to reach agreement, by a subsequent decision of the Court.