OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 1 December 1987 *

Mr President,
Members of the Court,

A — Facts

1. The two joined cases on which I deliver my Opinion today concern first of all the question whether the Court of Justice of the European Communities has jurisdiction to entertain actions directed against Council regulations in the form they have assumed under the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties.

2. The two applicants and the intervener supporting them are at present the only producers of isoglucose in Spain. They believe that they are discriminated against compared with the other producers of isoglucose in the Community as well as with Spanish sugar producers. The purpose of their action is therefore primarily to have declared void those provisions on the basis of which their production quotas were determined and to obtain fair quotas; in the alternative, they claim compensation for the damage which they have allegedly suffered.

3. The Council of the European Communities, which is the defendant, the Commission, and the Association of Spanish Sugar Producers, which have intervened in support of the Council, take the view that no act has been adopted which may be challenged under Article 173 of the EEC Treaty. It is argued on their behalf that the contested legal provisions were not adopted by a Community institution but by all of the previous Member States and the new acceding Member States. Since they form part of an annex to an act of accession, which is a treaty governed by international law, they constitute provisions of primary law and not of secondary law.

4. Furthermore, it is argued that the contested legal provisions are legislative provisions and not individual decisions of direct and individual concern to the applicants.

5. The Council has therefore requested the Court to rule on the admissibility of the applications as a preliminary issue and to dismiss them as inadmissible.

6. The applicants accordingly request the Court to dismiss the objection of inadmissibility raised by the defendant and to declare the applications admissible.

7. In their view, it follows from Article 8 of the Act of Accession that the provisions of the common organization of the markets in sugar amended by the Act of Accession have remained provisions of secondary law which are subject *inter alia* to the normal rules

* Translated from the German.

regarding judicial review. Those provisions must be regarded as containing individual decisions concerning them since the three Spanish producers of isoglucose formed a numerically fixed group of traders.

8. Since the Act of Accession, in particular its provisions concerning the amendment of secondary law, must be regarded as an act of the Council, the action for damages under Article 215 of the EEC Treaty is also admissible.

9. By an order of 26 March 1987 the Court granted the defendant's application for a ruling on the admissibility of the applications and first limited the oral procedure to the question of admissibility of the applications.

10. I will examine the arguments of the parties in detail below. For the rest, I refer to the Report for the Hearing.

B — Opinion

I — *The action for annulment*

11. The applicants' view that general rules adopted by the present Member States of the European Economic Community in the form of a treaty governed by international law, more precisely in an annex to an act of accession, must actually be regarded as containing an individual decision of secondary legislation which, as an act of a Community institution, is open to challenge under the second paragraph of Article 173 of the EEC Treaty may indeed appear bold.

12. In order to assess the merits of that view it is first necessary to consider the legal nature of Annex I to the Act of Accession, then the question whether the aforesaid provision from Annex I may be attributed to one of the institutions for the purposes of Article 173 of the EEC Treaty and finally, on the question of the substance, whether the contested provision, namely Article 24 of Regulation No 1785/81 [1] as amended by Article 26 of the Act of Accession [2] in conjunction with Section XIV (c) No 2 of the annex thereto, actually constitutes an individual decision with regard to the applicants.

(a) *The legal nature of the aforesaid provision*

13. One of the main issues debated before the Court was the question whether the contested amendment of the market organization for sugar concerned primary law enacted by the Member States or secondary law derived from such law. The view eventually taken by the Council was that the amendment of the market organization was a legislative act of the Member States adopted in the framework of an act of accession and that therefore the provision in question was a legal provision ranking equally with the foundation treaties. In its view, the legality of such a provision cannot be reviewed by the Court since its jurisdiction extends only to reviewing the acts of the Community institutions referred to in Article 173 of the EEC Treaty and not the actions of Member States undertaken pursuant to Article 237 of the EEC Treaty.

14. In assessing the status in law of Annex I to the Act of Accession reference must first be made to the second paragraph of Article 237 of the EEC Treaty. That provision

1 — Official Journal 1981, L 177, p. 4.
2 — Official Journal 1986, L 302, p. 23.

provides that the conditions of admission and the adjustments to the Treaty necessitated thereby are to be the subject of an agreement between the Member States and the applicant State. Whilst, therefore, mention is made of the Treaty adjustments necessitated by the admission of a new Member State, it must be observed that Article 237 of the EEC Treaty does not mention the adjustment of legislation enacted by the Community institutions.

15. The conditions of admission referred to in the second paragraph of Article 237 of the EEC Treaty are to be understood as meaning the derogations of limited duration from the EEC Treaty [3] and no doubt also the obligations contained in Articles 3 and 4 of the Act of Accession requiring the new Member States to accede to certain decisions, agreements or conventions, as well as their obligation to pay their share of capital to the European Investment Bank (Protocol 1 of the Act of Accession).

16. The possibility that the conditions of admission also include amendments of secondary legislation must therefore probably be excluded. That view is supported all the more by the assumption that the conditions of admission must concern rules whose validity cannot be challenged before the Community institutions but possibly only by all the contracting parties through the procedure for revising the Treaty laid down in Article 236.

17. The adjustment of secondary legislation — not by the Community institutions having that competence under the EEC Treaty but by the old and new Member States themselves — therefore takes place in a kind of legal grey area which is not clearly governed by Article 237 of the EEC Treaty. It may, however, be assumed that the States, which are at liberty to adjust the EEC Treaty itself in the way required for accession, must also have the power to make changes to secondary law in the way required to meet the needs of the Community as newly composed.

18. Although Article 27 of the Act of Accession shows that there was no compelling reason for the adjustments of secondary legislation to be carried out by the Member States instead of by the Community institutions normally responsible for such matters, I would still not call in question the legality of Article 26 of the Act of Accession and Annex I thereto, especially since none of the parties involved has raised an objection in this regard. It may have been necessary to proceed in that way for practical reasons. One point is clear, however: Article 237 of the EEC Treaty does not provide — at any rate not unequivocally — that the necessary amendments of secondary legislation are to be the subject of the agreement between the Member States and the applicant State; it leaves that question open.

19. Even if the amendments described were to be attributed to Community primary law, this would still not provide any guidance as to whether all provisions of primary law are actually of equal rank in the hierarchy of provisions of Community law. Since accession treaties are, after all, agreements admitting additional States to a group of members of an existing community, it may be argued that such treaties should only contain the necessary technical adjustments of existing Community law without substantially changing the character of the Community. It would then presumably be necessary to carry out such an amendment pursuant to the procedure laid down in

3 — Observations of the Commission in Case 93/78 *Lothar Mattheus* v *Doego Fruchtimport und Tiefkühlkost eG*; judgment of 22 November 1978 [1978] ECR 2203 at p. 2208.

Article 236 of the EEC Treaty. Consequently, the possibility cannot be excluded that the Member States themselves might enact primary law contrary to the Treaty which would then necessarily be subject to review by the Court, not only by means of an interpretation of the kind constantly undertaken by the Court in proceedings under Article 177 of the EEC Treaty [4] but also in a direct action, be it eventually essentially on the basis of Article 164 of the EEC Treaty.

20. Let us now turn to the Act of Accession itself. According to Article 6, the provisions of the Act may not, unless otherwise provided therein, be suspended, amended or repealed other than by means of the procedure laid down in the original Treaties enabling those Treaties to be revised, in the present case, therefore, by means of an analogous application of the procedure laid down in Article 236 of the EEC Treaty. Such exceptions provided for in Article 6 are contained in Articles 7 and 8 of the Act of Accession. According to those articles, acts adopted by the institutions of the Communities to which the transitional provisions laid down in the Act relate retain their status in law; in particular, the procedures for amending those acts are to continue to apply (Article 7). However, provisions of the Act of Accession the purpose or effect of which is to repeal or amend acts adopted by the institutions of the Communities, otherwise than as a transitional measure, are to have the same status in law as the provisions which they repeal or amend and are to be subject to the same rules as those provisions (Article 8).

4 — For the interpretation of an accession treaty, see the judgment of the Court of Justice of 29 May 1974 in Case 185/73 *Hauptzollamt Bielefeld* v *H. C. König OHG* [1974] ECR p. 607 at 616 *et seq.*

21. Since the amendment of the market organization for sugar by Article 26 of the Act of Accession in conjunction with Section XIV (c) No 2 of Annex I thereto was a permanent [5] amendment, Article 8 of the Act of Accession must be referred to in analysing the status in law of that amendment.

22. In analysing Article 8 of the Act of Accession I find that I cannot agree with the view put forward by the defendant and the Commission, acting as intervener, suggesting that it is nothing more than a procedural provision. The case for that view is weakened by the clear wording of Article 8 which refers to the status in law of the amending provisions of the Act of Accession as well as to the rules applicable to those provisions. Even if the applicable rules may still constitute procedural provisions, it nevertheless seems to me that it is not possible to deny that the statement about the status in law of those provisions has a substantive content. Furthermore, even if the passage on the applicable rules were to be interpreted purely procedurally, I cannot agree with the Council's restrictive interpretation according to which they are only meant to be the rules governing the subsequent amendment of the secondary legislation modified by the Act of Accession. After all, the rules on judicial legal protection could also be included amongst the procedural rules.

5 — The limitation in time of this provision to the months of March to July 1986 ensued from Article 394 of the Act of Accession, which postponed the application of the Community rules introduced for the production of and trade in agricultural products until 1 March 1986, and Article 23 of the regulation on the organization of the markets in sugar, according to which Articles 24 to 32 of the regulation were to apply only until the end of the 1985/86 marketing year.

23. Even if, as a matter of pure logic, it is not to be ruled out that, in a regime like an agricultural market organization, individual provisions may have a higher status in law,[6] the scheme of Articles 6 to 9 of the Act of Accession militates against such an interpretation.

24. The contracting parties would have been at liberty to extend the fundamental rule in Article 6 of the Act of Accession (providing that the Act may be amended only in accordance with the provisions concerning the amendment of the Treaty) to the provisions with which acts of secondary legislation were amended. This the Member States precisely did not do, however, but in Article 7 and Article 8 laid down the aforementioned exceptions to that principle. Consequently, whatever importance the amendments to secondary legislation may have acquired in the course of the accession negotiations, it may not be assumed that those amendments are to be included amongst the 'conditions of accession' (understood in a wider sense) which could be amended only in the ponderous procedure for revising the Treaties, that is to say, to use the Court's words, the 'basic constitutional charter' of the Community,[7] i. e. unanimously and with the approval of the national parliaments.

25. Since, therefore, there is no compelling reason to deduce from either Article 237 of the EEC Treaty or from the contents of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties that all the provisions contained in that Act must be provisions of primary law but rather that the wording of the Act of Accession militates against that conclusion, the firm conclusion must be that Article 24 of the regulation governing the organization of the markets in sugar, in the wording which that article assumed under the Act of Accession, must be regarded as containing, formally at least, a provision of secondary legislation.

(b) *Action of a Community institution*

26. The next question to be examined is whether judicial legal protection against the provision of the regulation governing the organization of the markets in sugar, as so amended, is excluded for the reason that, as a matter of form it was not the Council which acted as one of the Community institutions referred to in Article 173 of the EEC Treaty but the old and new Member States acting together.

27. Having found that in the case of the adjustment of secondary law by Article 26 of the Act of Accession it was the Member States which acted in the place of the institutions envisaged in the EEC Treaty (in this case the Council), having also found that the adjustments of the acts of the institutions by the Act of Accession have the same status in law as the amended provisions and having further found that the adjustments are subject to the same rules as the amended provisions, then the conclusion must be drawn that the acts amended by the Act of Accession are to be attributed in each case to the Community institution which adopted the original act. Indeed, in a comparable legal situation it would also be conceivable for legal protection to be made available in such a way that the trader or

6 — In Austrian law, for example, individual provisions of an ordinary statute may have the status of a constitutional provision, but only by virtue of an express directive in accordance with Article 44 of the Austrian Federal Constitutional Law of 1920.

7 — See the judgment of 23 April 1986 in Case 294/83 *Partie Ecologiste 'Les Verts'* v *European Parliament* [1986] ECR 1339 at paragraph 23.

producer concerned could sue the members of the Community as a whole. However, doubts about the admissibility of such an action under the second paragraph of Article 173 of the EEC Treaty would probably be still greater, especially since the system of legal protection provided for in the EEC Treaty makes no provision for actions by individuals against Member States. But once it is admitted that the Member States have taken the place of the Community institutions responsible for enacting secondary law, the appropriate conclusions must be drawn with regard to legal protection, which in a legal Community like the European Economic Community is, according to the judgment of 23 April 1986 in Case 294/83, comprehensive.

28. My intermediate conclusion is therefore that the applicants' actions for annulment do not fail for being directed against acts whose specific form was determined by the Member States in the Act of Accession.

(c) *The question whether the applicants are concerned by the contested provision*

29. The next question to clarify is whether the other requirements for admissibility laid down in the second paragraph of Article 173 of the EEC Treaty are fulfilled. Since the applicants challenge Article 24 of Regulation No 1785/81 on the organization of the markets in sugar, their action against a provision in a regulation would be admissible only if the provision was of direct and individual concern to them so that it had to be regarded as an individual decision affecting them.

30. requirements laid down by the Court in decisions concerning the question whether applicants challenging acts of general validity are directly and individually concerned by such acts vary in their degree of strictness.[8] Nevertheless, it is hardly possible to doubt that the applicants are individually concerned. Although they are not named in the contested provision, it is clear that they represent two of the existing three isoglucose producers in Spain. Article 24 of the regulation on the organization of the markets in sugar requires the Member States to allocate a quota to each undertaking which produced isoglucose in Spain in 1985 on the basis of production in 1983 and at the same time determines the basic quantities for Spain. It is thus clear that the quotas of Spanish producers of isoglucose may be derived directly from Article 24 of the regulation without the need for action on the part of Spain. This is confirmed by the practice of a number of Member States described by the applicants; in the past some Member States have not determined the isoglucose quotas themselves since in their view they ensued directly from the regulation governing the organization of the market in sugar.

31. That conclusion is not precluded by the fact that under Article 25 of the regulation governing the organization of the markets in sugar the Member States may, under special conditions, transfer quotas from one undertaking to others or reduce quotas. The possibility of transferring or reducing quotas logically presumes that appropriate quotas have been determined in the first place: this has already been done in Article 24 of the regulation. The subsequent transfer or

8 — See the judgment of 14 December 1962 in Joined Cases 16 and 17/62 *Confédération nationale des producteurs de fruits et légumes* v *Council* [1962] ECR 471, the judgment of 5 May 1977 in Case 101/76 *Koninklijke Scholten Honig NV* v *Council and Commission* [1977] ECR 797 and the judgment of 4 July 1983 in Case 231/82 *Spijker Kwasten BV* v *Commission* [1983] ECR 2559.

reduction of quotas cannot affect their original determination; for that reason, the fact that the Spanish Government, by a decision of 23 June 1986, determined the production quotas for the three Spanish producers of isoglucose by reference to Article 24 and 25 of the regulation departing slightly from the values ensuing purely arithmetically from Article 24 of the regulation is unimportant. In any case, the determination of the quotas has been challenged before the national courts so that it is not possible to say whether they will continue to stand.

32. In conclusion I therefore consider the claim for a declaration that Article 24 of the regulation governing the organization of the sugar markets, as amended by the Act of Accession, is void to be admissible.

(d) *The claim for the determination of a fair quota*

33. That conclusion does not apply, however, to the additional claim for an order requiring the Council to determine non-discriminatory quotas. The Court's task in proceedings under Article 173 of the EEC Treaty is to review the legality of acts of the institutions. However, under Article 176 of the EEC Treaty, it is for the institution whose act has been declared void to take the measures necessary to comply with the judgment of the Court. To give specific directions in this regard would be beyond the Court's jurisdiction. [9]

34. The applicants' claim for an order requiring the defendant to determine non-discriminatory quotas is therefore inadmissible.

9 — On this point, see the recent judgment of 17 November 1987 in Joined Cases 142 and 156/84 *British American Tobacco Company Limited and Others* v *Commission of the European Communities* [1987] ECR 4487, paragraph 13.

II — *The claim for an award of damages under Article 215 of the EEC Treaty*

35. On the question of the admissibility of the claims for an award of damages under the second paragraph of Article 215 of the EEC Treaty I can be brief. In objection to the admissibility of these claims it was essentially argued that there was no question of an act of one of the Community institutions but only of an act of the Member States.

36. Since, however, the conclusion was drawn from Article 8 of the Act of Accession that the organization of the markets in sugar, even in the form it acquired under the Act of Accession, is attributable to the Council, it is appropriate to hold the Community liable for the 'notional' action of the Council. Only if there was some reluctance to accept such a fiction would it be necessary to consider whether or not the Community must also be liable for the action of the 'institution' formed by the Member States acting in concert. After all, the Community's liability cannot depend on which institution happened to act for the Community; it is not the institutions themselves which are liable for any wrongful action on their part but the Community as a legal person. Since it is not wholly unknown for the Member States to act for the Community — consider, for example, the measures contained in the various Acts of Accession or the procedure to appoint members of the institutions of the Community — the Community would have to be considered liable for those 'institutions' which are not the institutions of the Community expressly mentioned in Part Five of the EEC Treaty.

37. In my view, therefore, the alternative claims for damages are also admissible.

38. If I therefore propose that the Court should declare that the actions are on the whole admissible, this will be quite in line with the trend of its more recent case-law. It should be pointed out in this regard that, as the Court stated in its judgment of 23 April 1986 in Case 294/83, 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty'.[7] Although that statement referred in that specific case only to an act of the Parliament, I regard it as a general statement which characterizes the European Economic Community as a Community based on the rule of law and having a system of legal protection. Therefore that principle should also apply in a case in which the Member States acted for the Community institutions actually having competence to act.

C — Conclusions

In conclusion, I propose that the Court should rule as follows on the objection of inadmissibility raised by the defendant:

(1) The actions for annulment and the alternative claims for damages are admissible;

(2) The claims for an order requiring the defendant to determine non-discriminatory production quotas are inadmissible;

(3) The decision on costs is reserved.

7 — See the judgment of 23 April 1986 in Case 294/83 *Partie Ecologiste 'Les Verts'* v *European Parliament* [1986] ECR 1339 at paragraph 23.