OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 17 JANUARY 1980 [1]

Mr President,
Members of the Court,

In the proceedings to be dealt with today, Mr Pool, an English calf-breeder, is claiming that the conversion rate for the pound sterling has been determined improperly in regard to the law relating to the common agricultural policy, thereby causing him damage in the sale of his products.

The following brief introduction may make this claim clearer:

Mr Pool is engaged in a sector which comes under the common organization of the market in beef and veal (Regulation No 805/68 of the Council of 27 June 1968, Official Journal, English Special Edition 1968 (I), p. 187). Under Article 3 of that regulation a guide price for calves and a guide price for adult bovine animals are determined for each marketing year. I need not go into detail but this is of importance for Community intervention measures (aids for private storage, buying-in by intervention agencies, price support premiums). Furthermore it is a factor in the calculation of levies on imports from non-Member States (see Regulation No 425/77, Official Journal L 61 of 5 March 1977, p. 1) so it may be said that the market price prevailing within the Community is influenced by the guide price.

The guide price is determined in units of account which must be converted into national currencies since they do not constitute means of payment. To that extent Regulation No 129 of the Council on the value of the unit of account and the exchange rates to be applied for the purposes of the common agricultural policy (Official Journal, English Special Edition 1959-1962, p. 274) which has been repeatedly amended especially by Regulations Nos 653/68 (Official Journal, English Special Edition 1968 I, p. 121) and 2543/73 (Official Journal L 263 of 19 September 1973, p. 1) is of fundamental importance — again I do not need to go into detail since currency problems in the common agricultural market are pending before the Court in a number of other proceedings. Article 1 of this regulation defines the value of the unit of account which plays a part in rules of the common agricultural policy and determines when and how the value of the unit of account may be altered. Article 2 governs the way in which the conversion of amounts which are important in rules on the common agricultural policy is to take place from one currency into another. In principle conversion should take place in accordance with the currency parities notified to the International Monetary Fund; however, if the effective exchange rate diverges from the parity notified to the International Monetary Fund thereby jeopardizing the implementation of agricultural policy rules, then according to this provision it is possible under its terms for exchange rates quoted on the most representative foreign exchange market or markets to be used temporarily. Moreover, Article 3 of Regulation No 129, in the wording amended by Regulation No 2543/73, provides that: "Where monetary practices of an exceptional nature are likely to jeopardize the implementation of the instruments or provisions referred to in Article 1" the Council acting by a qualified majority upon the proposal of the Commission, or the Commission,

1 — Translated from the German

acting within its powers under those instruments or provisions, after consultation with the Monetary Committee, which may take place subsequently in cases of urgency, may make "derogations" from the regulation. Some examples of "monetary practices of an exceptional nature" are put forward, in particular, where a member country of the International Monetary Fund allows domestic fluctuations of the value of its currency beyond the limits laid down by the rules of the Fund or where a country resorts to abnormal exchange techniques such as fluctuating or multiple exchange rates.

Consequently the conversion into national currencies was originally effected in accordance with the parities notified to the International Monetary Fund. The famous disturbances in the currency exchange field in particular from 1971 onwards when the Bretton Woods system was abandoned necessitated the introduction of monetary compensatory amounts in Regulation No 974/71 (Official Journal, English Special Edition 1971 (I), p. 257) which has been repeatedly amended, in particular by Regulations Nos 2746/72 (Official Journal, English Special Edition 1972 (28-30 December), p. 64), 509/73 (Official Journal L 50 of 23 February 1973, p. 1) and No 1112//3 (Official Journal L 114 of 30 April 1973, p. 4). Since upon the accession of the three new Member States in 1973 it was desired to avoid monetary compensatory amounts additional to the accessionary compensatory amounts, for the first time special conversion rates were determined in derogation from Article 2 of Regulation No 129, which in the case of Ireland and the United Kingdom corresponded to the representative rate of the currencies of both of these Member States (Regulation No 222/73, Official Journal L 27 of 1 February 1973, p. 4). Although these conversion rates for the United Kingdom and Ireland were at first uniform, this parity was abandoned with effect from 7 October 1974 by Regulation No 2498/74 (Official Journal L 268 of 3 October 1974, p. 6) and this has remained the position ever since, to a varying degree.

As regards the original Member States, special conversion rates were at first determined in 1973 for guilders and lire (Regulations Nos 2544/73, Official Journal L 263 of 19 September 1973, p. 2, and 2958/73, Official Journal L 303 of 1 November 1973, p. 1). These rules were then generally extended and since the date of Regulation No 475/75 (Official Journal L 52 of 28 February 1975, p. 28), representative rates are applied as conversion rates for all Member States.

Mr Pool, the applicant in these proceedings, thinks that when the Council determined these conversion rates it did not act properly. His major claim is that in spite of the uniform currency area for the United Kingdom and Ireland in existence until the beginning of 1979, representative rates were determined at different levels for the two countries and in a way that assumed the Irish pound to have suffered greater depreciation. This led to producers in the United Kingdom receiving less in national currency than producers in the other Member States including Ireland in particular. This situation, Mr Pool claims, is not compatible with the fundamental rules of the common market, in particular with the prohibition on discrimination contained in Article 40. That is why the applicant has sued the Council for compensation for the damage thereby caused. Since he regards the represen-

tative rate of the Irish pound as being closer to reality, he calculates his measure of damages by taking this rate, which is a more favourable conversion rate for producers, as regards the English market too and for the sales he made on this market. Leaving aside the period from 7 October 1974 to 10 October 1976 in which the difference between the exchange rates was under 10 %, he thus arrives at damages amounting to £9 504 for the period from 11 October 1976 to February 1979. He claims the Council should be ordered to pay this sum in accordance with his application on the basis of Article 178 and the second paragraph of Article 215 of the EEC Treaty.

On the other hand the Council contends that the application should be dismissed as being unfounded.

To my mind the following considerations should be put forward in this case:

1. The errors asserted by the applicant — improper determination of the so-called green pound for the United Kingdom — are allegedly linked with provisions contained in a series of *regulations* which I do not need to recount individually here. These are undoubtedly genuine *legislative* measures since they all concern an indeterminate number of businesses and persons.

As we have heard, the determination of the rates complained of took place on the basis of Article 3 of Regulation No 129 which I referred to earlier. Its decisive prerequisite is that monetary practices of an exceptional nature are likely to jeopardize the implementation of the instruments referred to in Article 1 of Regulation No 129, that is, instruments relating to the common agricultural policy. The possible measures are not defined in further detail in that provision but only paraphrased by the general word "derogations". But it is clear from the legislative context that their object must be to counter any difficulties, that is, to bring about a satisfactory implementation of the common agricultural policy. This includes a very wide scope for discretion as is usual in the case of instruments for the implementation of the common agricultural policy.

In these circumstances — legislative provisions involving choices of economic policy, issued on a wide discretionary basis — where claims for damages are brought against an institution, mere illegality alone does not suffice as a condition precedent for such claims; on the contrary, as has now been made clear in extensive case-law, there must be shown to have been a sufficiently serious breach of a superior rule of law for the protection of the individual (see for example the judgment in Case 5/71 of 2 December 1971, *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 984).

Moreover, little by little this formula has been elucidated. Basically it has been emphasized that liability based on rules of law involving choices of economic policy can only come into consideration in special and exceptional circumstances. The necessary requirement, emphasized in the judgment given a short while ago in Joined Cases 83 and 94/76 (judgment of 25 May 1978, *Bayerische HNL Vermehrungsbetriebe GmbH & Co and Others* v *Council and Commission*, [1978] ECR 1209) is that where wide discretion exists the limits of that discretion must have been manifestly and gravely disregarded. As was recently made clear in the judgment in Joined Cases 116, 124 and 143/77 (judgment of 5 December 1979, *G. R. Amylum N.V. and Others* v

Council and Commission) a finding that a manifestly unfair burden constituting a breach of the prohibition on discrimination does not suffice either. In my opinion on those cases I emphasized that *all* the circumstances of a case and not only *one* aspect such as discrimination have to be examined and that an abuse of discretion tantamount to arbitrary action must be established, or, in other words, the total absence of objective considerations. Following that opinion the Court ruled in like manner in that judgment that errors must be proved which are of such a grave nature that the provision impugned is verging on the arbitrary. In that instance the Court found that that was not the case, not least by reference to typical considerations of agricultural policy.

This case too must therefore be judged by the adoption of these same principles.

2. In support of his claim the applicant has put forward a number of infringements which the Council is alleged to have committed.

(a) In so far as he is relying on an infringement of the prohibition on discrimination, which not only appears in Article 40 (3) of the EEC Treaty but which in the Community legal system may be regarded more as a general legal principle, I see no problem; it has been repeatedly acknowledged in case-law that it is a rule to protect individuals under the law of administrative liability (see the judgment in Joined Cases 83 and 94/76). It is from this viewpoint which is foremost in the applicant's mind that his claim must be dealt with. I can say, then, that the question turns only upon whether it may be considered permissible for different "green conversion rates" to be determined for a uniform currency area such as existed for the United Kingdom and Ireland until the beginning of 1979. When the applicant goes on to speak also, rather incidentally, of discrimination against British producers compared to farmers in other Member States, pointing out that as a result of the representative rates there exists in the Federal Republic of Germany a 40 % higher price level than in the United Kingdom and that despite severe depreciation of the lire the gap between Italian prices and those in other Member States is not so big as in the United Kingdom, then, as he states himself, this is of no further relevance for the purposes of this case since he was not able to provide the necessary data to allow the situations to be compared.

(b) As regards the other illegalities mentioned in the submissions by the applicant these cannot be established in this case because he could not show that rules of law for the protection of the individual under the law of administrative liability are involved or because he could not at least show a manifest and sufficiently serious breach.

(aa) In my opinion this is also true of his assertion that the Council has not actually fixed *common* prices but, by means of special conversion rates, has fixed *national* prices, which is not in accord with the provisions of Article 40 — "any common price policy shall be based on common criteria and uniform methods of calculation". The same holds true for the criticism also to be

mentioned here to the effect that the Council has not in any event made sufficient efforts to produce genuine common prices by bringing the representative rates closer to monetary reality.

The point must be made here that Article 40 by no means prescribes compulsory common prices for the Community but permits types of organization allowing regional price differences. Furthermore, it cannot be disputed that common prices are in actual fact determined in *units of account* which have an inter-relation with one another and constitute a system of common references with a strong co-ordinating effect. At the same time it is obvious that as a result of the marked divergence in currency trends in Member States since 1971 which, like agricultural policy is a matter for Member States, it has become impossible for all producers to maintain the same price level in national currency. This would have required large price reductions in the countries which had revalued, the burden of which could not be placed on the producers and, on the other hand, price increases for the consumers in the countries which had devalued, which would necessarily seem intolerable from the point of view of general economic development. When fixing the conversion rates the Council had to take these considerations into account and, in principle at least, it cannot be criticized for this.

However, if the applicant, realizing that this development is basically inevitable, is mainly complaining about the *extent* of the differences to be found, and of the absence of serious efforts on the part of the Council to get closer to the ideal actually envisaged by the Treaty, then he must himself admit that he has not demonstrated that this was possible to any significant extent without jeopardizing essential interests and that there can therefore be no question at least of a manifest and grave disregard of important principles of the Treaty.

(bb) The same applies to the applicant's comments regarding the proper application of Regulation No 129 and in particular of Article 3 seen from viewpoints other than that of discrimination.

It was argued on this point that the regulation, which was drawn up in very general terms, basically should have been drawn up in greater detail at an earlier stage, but in practice needed at least a regard for certain uniform criteria. Because monetary influences become neutralized after a certain time, the adaptation to the actual monetary situation should occur within a certain uniform period. When representative rates are fixed these should certainly be kept in as close a relation as possible with the money market and with the monetary situation. In any event it must take place in the most neutral way possible — hence the involvement of the Monetary Committee — that is, according to the criterion of exceptional monetary practices of which Article 3 of Regulation No 129 gives three examples. On the other hand this must not lead to national price manipulation since any problem of structural policy must not be solved in this way but, in so far as market forces will not allow it, by rules regarding aids if need be.

To my mind it is possible in this connexion too to express serious doubts as to whether the rules referred to by the applicant are to be regarded as rules for the protection of the individual which may be relevant for claims regarding administrative liability. Nor does it seem to me to have been proved that the requirements I have referred to may be

deduced so clearly from Regulation No 129. In fact it is difficult to imagine that in this complex area with its various rapidly changing developments — one immediately thinks of the violent short-term fluctuations in the pound — rigid rules, with regard, for example, to transitional periods, or any other automatic mechanisms could ever exist. Even Gilsdorf, an expert in this area of law, says in his treatise on monetary compensation from the legal viewpoint which was referred to in the proceedings (Volume 21 of Schriftenreihe des Instituts für Landwirtschaftsrecht der Universität Göttingen) how extraordinarily difficult it is to develop precise legal criteria for the application of Article 3 of Regulation No 129. It must not be overlooked here that Regulation No 129 and the amending regulations were adopted under Article 43 of the EEC Treaty. They therefore constitute an important instrument for the implementation of *agricultural policy* and consequently, when applying them, it seems inconceivable not to give recognition to considerations specially concerned with agricultural policy; which is what the interpretation regarded as correct by the applicant seems to suggest.

On no account therefore can the Council be accused of a grave error of discretion verging on the arbitrary because in applying Regulation No 129 it has taken into account not only monetary viewpoints but also considerations of agricultural policy.

3. If one therefore focuses one's attention upon the criticism with regard to the *discrimination* under which British producers are supposed to have suffered compared to the Irish owing to the adoption of different conversion rates for the green pound, one must first recall that the applicant founds this criticism upon the fact that on the one hand both countries formed a common currency area at the time in question and on the other hand producers farming in both countries found themselves in exactly the same situation as regards the price increases caused by the devaluation of the pound, so that the different calculation of the conversion rate for the green pound which directly affected income levels and led to distortions in competition could not therefore be justified at all.

The Council, on the other hand, thinks that there were objective reasons for differentiation which at least rule out the accusation that it took *arbitrary* measures. Since actions in pursuance of the common agricultural policy were involved the Council thinks that the aims of Article 39 had to be borne in mind. This might be done with varying emphasis, in other words, one aim or another might be given priority for a time, which has been repeatedly affirmed in case-law, whilst taking into account the whole agricultural situation. Since there is clearly a major difference in the importance of agriculture and particularly beef production in the United Kingdom and Ireland, it must be regarded as permissible when determining the conversion rate for Ireland to pay more attention to securing a satisfactory income for agricultural producers whilst rather ensuring reasonable consumer prices in the United Kingdom.

Against this the applicant argues that this ostensible necessary balancing of interests — producer income on the one hand and consumer prices on the other — can only be attempted if common prices are determined in *units of account*; however, when converting them into national currencies it is not permissible to take territorial peculiarities into account as well. Otherwise if, for example, regard were actually had to the economic situation in a country and therefore to its national economic policies, distortions would be allowed and results produced which would be incompatible with the principles of Article 40 — price policy on the basis of common criteria and uniform methods of calculation. But if the considerations adopted by the Council are not regarded *a priori* as unacceptable it must be borne in mind in this case that the circumstances referred to have always existed but there have been divergent conversion rates only from a given date and to quite a varying degree with the result that agricultural prices differed in the United Kingdom and Ireland by 15 % in the 1976/77 marketing year, in the following year by 18 % and in the 1978/79 marketing year there was even a difference of 20 %. On the other hand it is at least desirable and it must be proved that any divergences correspond exactly to what must be regarded as essential with regard to the factors to be taken into account (such as varying levels of production).

(a) As regards this argument one might be tempted to counter the applicant's reasoning by referring to the judgment in Case 138/78 (judgment of 21 February 1979, *Hans-Markus Stölting* v *Hauptzollamt Hamburg-Jonas,* [1979] ECR 713). As the Court will know, it held that green exchange rates were justified by the requirements of a common agricultural policy. The adoption of agricultural exchange rates may possibly involve advantages and disadvantages which may appear as discrimination. It remains true however that the green exchange rates serve to remedy monetary situations which, in the absence of Community measures, would lead to much more serious and general discrimination. Possibly, then, the matter should be viewed from the standpoint that when green rates are fixed a certain amount of discrimination seems quite acceptable provided it remains less than the discrimination which would otherwise occur as a result of chaotic monetary developments.

In view of the fact that regulations such as concern us in these proceedings are only adopted unanimously and that green exchange rates cannot be brought closer to monetary reality against the wish of a government concerned, another general consideration to be borne in mind on this point is that it would hardly be acceptable to give British producers compensation from Community resources in the nature of deficiency payments by way of claims for administrative liability in order to make up for the adoption by the British Government at Community level of conversion rates which in pursuance of the requirements of economic policy take more account of the interest of consumers than of producers.

Nevertheless I should not like to assume that these two considerations are likely by themselves to solve this case satisfactorily.

(b) Upon a closer examination of the applicant's reasoning one may indeed start to question his reference to the prohibition on discrimination because it is permissible to doubt whether English and Irish producers are actually in a *comparable* position.

I recall here the Council's observations — not challenged by the applicant — upon the different income situation of English farmers on the one hand and Irish on the other which is presumably attributable to different structures. Furthermore when the applicant says that owing to actual devaluation of the pound the cost situation has been influenced in the same way, namely by increases in costs, we must not forget that the different green exchange rates also provide for a certain amount of compensation. In actual fact the smaller devaluation in the United Kingdom results in the prices of other agricultural products also being lower and, in so far as these prices are to be considered as *cost* factors, calf breeders in the United Kingdom are in a more favourable position than those in Ireland.

(c) But of more importance are considerations which actually go beyond the prohibition on discrimination and the question of what degree of differentiation is permissible in this connexion on the basis of objective facts, without the prohibition on discrimination actually being infringed.

In fact in a claim for administrative liability like the one before us an approach restricted to the aforesaid rule for the protection of individuals should not prevail. Rather the question should be asked whether, even if some discrimination is indeed discernible, there have not been objective deliberations accompanied by differentiated treatment, which at least rule out any question of such a manifest and grave disregard for discretionary limits as to verge upon the arbitrary. This is particularly clear from the recent isoglucose levy judgments (116, 124 and 143/77). In those cases it was already clear after the preliminary ruling in Cases 103 and 145/77 that the production levies complained of were obviously inequitable under the prohibition on discrimination. Nevertheless it was held — and considerations of agricultural policy were not the least of the reasons — that the requirements for a claim for administrative liability on grounds of the illegality of the legislation were not satisfied since a comprehensive view of the case led to the conclusion that there was an absence of grave errors such as would make the treatment of the isoglucose producers appear arbitrary.

If we are to follow those cases it is difficult to deny that the Council has pointed out some quite objective considerations of some weight to support the measures which it adopted. As I said before, instruments adopted under Article 3 of Regulation No 129 are in the nature of decisions of agricultural policy and are therefore to be worked out according to a sequence of ideas such as is typical of such decisions. An example appears in Article 39 (2) of the EEC Treaty, according to which when the common agricultural policy is worked out account must be taken of the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole. This means that the *whole* economic situation must be taken into account; what matters therefore is the combined situation of both producers and consumers and not only the individual position of a few

members of either. Thus in the adoption of special measures like those under Article 3 of Regulation No 129 over and above the balancing of interests of producers and consumers necessarily required by Article 39, which can often be only inadequately achieved when *common* prices are fixed it is entirely justifiable to lay the stress on different interests according to the Member State concerned. The Council clearly acted on this basis. There can be no disputing that its remarks upon the position of agriculture in the total economy and in particular upon cattle breeding in Ireland on the one hand and the United Kingdom on the other are impressive. I will not recapitulate them now but I refer to page 10 of the defence and the appendices to that pleading. The important point made there is that Ireland is predominantly a producing and exporting country whilst the United Kingdom may be categorized as a consumer country. This should be borne in mind together with the fact that before accession the United Kingdom pursued a policy of low consumer prices, changes in which required by the Treaty have been considerably hampered by the economic difficulties between 1973 and 1977. Thus the greater emphasis placed on consumer interests when the green exchange rates for the United Kingdom were determined cannot be considered to be mistaken or clearly inappropriate. If a conversion rate resulted which not only took account of serious national interests in the context of an economic policy and a policy of combating inflation approved by the Community but also took into account the interests of the common agricultural policy by influencing the volume of production in the United Kingdom, then to my mind it is not permissible to hold that such an act verges on the arbitrary. If this is basically right, the applicant's reference to the divergent trend of the various green exchange rates and his view that the disparities must at least be required to reflect exactly the extent of the differences recorded in the relevant factors (such as the production deficit in the United Kingdom) cannot lead to any other conclusion. To that extent there is simply insufficient evidence of any manifestly improper manipulation. In actual fact the applicant has not shown that the Community measures to determine conversion rates have clearly gone beyond the requirements of the situation at the appropriate time nor has he made it clear that development in the economic situation gave no cause to vary the divergences between the green pounds as time went by.

4. In summing up I say this: it may be hard to suppress a feeling of disquiet and there may be justification for some misgivings; the efforts of the Commission to achieve solutions more suited to the common market cannot therefore be too strongly approved and correspondingly the Council cannot be too energetically encouraged not to turn a deaf ear to such proposals in the interests of maintaining a genuine common market; be that as it may, there is no escape from the conclusion in this case that the exceptionally strict requirements laid down by case-law for a claim for administrative liability based on the illegality of legislation are not satisfied.

In spite of everything that has been said there is an absence in this case of any sufficiently serious breach of a superior rule of law for the protection of the individual; accordingly no further comments are required on the extent of the alleged damage or on the problems of the chain of causality.

5. I therefore suggest that the application be dismissed as unfounded. As far as the costs are concerned, however, I think it is right that account should be taken of the fact that the subject-matter of the case is extraordinarily complex, and that it was not surprising that it gave rise to misgivings. Therefore the parties should bear their own costs under the first paragraph of Article 69 (3) of the Rules of Procedure.