product, even though the intervention measures actually adopted have been limited to private-storage aid and have not taken the form of public buying-in operations. As the triggering of intervention measures depends on the development of the market price by comparison with the basic price, the latter constitutes an essential factor for the management of the common organization of the market, with the result that it was permissible to decide that monetary compensatory amounts for pigmeat were to be calculated from a fraction of that basic price corresponding to the minimum buying-in price laid down by Regulation No 2759/75 and, later, to 90% thereof.

3. The function of monetary compensatory amounts is to counteract the difficulties which might arise for the proper working of the common organizations of the market as a result of currency instability and — as matters now stand — divergences between the representative rates used in the common agricultural policy and the conversion rates on the market. Since the objectives pursued by import levies, on the one hand, and 'accession' compensatory amounts, on the other, do not coincide with that function, monetary compensatory amounts for pigmeat could be calculated in a manner which differed from the methods adopted for calculating the import levy and the 'accession' compensatory amounts applicable to the same product.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 14 May 1985 *

Mr President,
Members of the Court,

A. The applicants in the action on which I am giving my views today are seeking damages for the allegedly illegal application by the European Economic Community of monetary compensatory amounts for pigmeat.

The applicants are French pig-farmers from Brittany and the Pyrenees. Mr Surcouf is claiming FF 70 541 and Mr Vidou FF 74 136 on the following grounds:

The application of monetary compensatory amounts to pigmeat infringes the prohibition on discrimination under Article 7 of the EEC Treaty and the objectives of the common agricultural policy as set out in Article 39 (1), namely to ensure a fair standard of living for the agricultural community and to stabilize markets. Furthermore, they argue, the conditions for the

* Translated from the German.

application of monetary compensatory amounts to pigmeat, laid down in Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States, [1] were not satisfied. The regulation aims to safeguard the unity of the market and to standardize price levels, which are threatened by currency fluctuations. Compensatory amounts may not be higher than the levels essential for offsetting the effects which currency measures have on the prices of basic products.

The applicants submit that, far from observing those principles, the European Economic Community, by introducing and thereafter maintaining monetary compensatory amounts for pigmeat, distorted patterns of Community trade and competition to the detriment of French producers.

They state that under Article 1 (2) of Regulation No 974/71, monetary compensatory amounts may be applied to products covered by intervention arrangements under the common organization of agricultural markets. That requirement is not met in the case of the common organization of the market in pigmeat (Regulation (EEC) No 2759/75 of the Council of 29 October 1975), [2] because no intervention price has ever been fixed. Under that organization of the market the application of intervention measures is merely optional; there have been no intervention purchases since 1971. Monetary compensatory amounts were calculated by reference to a notional purchase price which was not used in practice.

1 — Official Journal, English Special Edition 1971 (1), p. 257.

2 — Official Journal 1975, L 282, p. 1.

Even the basic price fixed annually, from which the purchase price was derived, cannot be regarded as an intervention price, in the applicants' view, because it serves merely as a 'warning signal' to the Commission to investigate whether intervention measures should be introduced.

The applicants argue that if monetary compensatory amounts could have been applied at all, they should have been calculated, as was the case with import levies and compensatory amounts, under Article 75 of the 1972 Act of Accession, on the basis of the quantity of feed grain required for the production of pigmeat.

All in all, they claim, the Community institutions have blatantly and significantly exceeded the limits of their authority.

The applicants estimate the damage on the basis of the monetary compensatory amounts for pigmeat from the Netherlands prevailing at the commencement of the action.

Their arguments centre primarily on the granting of monetary compensatory amounts on the exportation of pigmeat from the Netherlands to France. Only in their reply do the applicants touch on the question of charging monetary compensatory amounts on imports into the Netherlands, but without making any detailed submissions on the subject.

Monetary compensatory amounts came to 5.8% of the theoretical price calculated by the Commission, or FF 49.20 per 80-kilogram carcase. That subsidizing of imported Dutch pigmeat gave rise to a corresponding decline of prices on the French market. On the basis of their average output of meat in the last five years

the applicants therefore estimate the damage at FF 52 253 and FF 54 916 respectively.

In addition, the applicants claim to have suffered consequential damage by being prevented from improving their financial liquidity, their working plant or their productivity. They estimate that damage to be 35% of the direct damage.

Both the direct damage and the consequential damage are directly attributable to the application of monetary compensatory amounts.

The defendant, the European Economic Community, represented by the Council and the Commission, considers the claims for damages unjustified. Both institutions claim that the action should be dismissed.

They consider that the arguments based on Articles 7 and 39 of the EEC Treaty cannot be upheld. Although it is true that Article 7 prohibits any discrimination on grounds of nationality, that prohibition is not infringed in the present case because the distinctions between products are drawn, not in accordance with nationality but with area of production. The Council and Commission argue that individual traders cannot derive any rights from Article 39 of the EEC Treaty, because it is a provision encompassing a variety of goals within the common agricultural policy, in the realization of which the Community institutions enjoy a broad margin of discretion.

They further contend that the preconditions laid down by Regulation No 974/71 for the application of monetary compensatory amounts are satisfied. Under Article 1 (2) monetary compensatory amounts are applicable to products covered by intervention arrangements under the common organization of agricultural markets. Regulation No 2759/75 on the common organization of the market in pigmeat contains intervention measures. Article 3 of that regulation specifies the following intervention measures:

(i) aid for private storage,

(ii) buying-in by intervention agencies.

The Council and Commission point out that Regulation No 974/71 of the Council requires no more than *provision for* intervention measures; there is no need for their actual application or for the existence of an intervention *price*. Whilst it may be true that no further intervention purchases have occurred since 1971, nonetheless the Community has, on several occasions, intervened in the market in pigmeat with aid for private storage. That was sufficient to guarantee the price level in the market in pigmeat considered appropriate by the Community.

No disruption of the market in pigmeat had been demonstrated by the applicants, and indeed, the Council and Commission claim, no such disruption is apparent. The production of pigmeat, both in States having a weak currency and in those with a strong currency, exhibits an upward trend.

The Council and Commission submit that the application of monetary compensatory amounts was in fact necessary in order to counteract any disruption of the market in the face of the divergent developments in Member States' currencies. Failure to introduce such amounts would have led to a disruption of the intervention system and distorted patterns of trade. Monetary compensatory amounts had to be applied in order to offset price differences brought about by the application of 'green' exchange rates to agricultural products. The level of monetary compensatory amounts is thus derived from the green exchange rates on a quasi-mathematical basis.

The applicants' evaluation of the damage is regarded by the Council and Commission as completely theoretical. Nowhere is there any indication of how they arrive at the sum of FF 49.20 as the alleged subsidy on every single pig carcase from the Netherlands.

Even if the application of monetary compensatory amounts to pigmeat had no legal authority, the Council and Commission maintain that it still does not follow that the applicants are entitled to damages under the second paragraph of Article 215 of the EEC Treaty. A finding that a legal instrument such as the regulation in question is invalid is not sufficient *per se* to render the Community liable. According to the consistent case-law of the Court of Justice, the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. Such, however, is not the case here.

B. My opinion on the claims for damages is as follows.

As mentioned earlier, the Court of Justice has consistently held that the Community, when adopting legislation, does not incur liability unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. [3] Hence the first point to be considered is whether the application of monetary compensatory amounts to pigmeat was, in point of fact, unlawful, and whether a serious breach of a superior rule of law for the protection of the individual has occurred. It may then also be necessary to consider whether the applicants have proved that they have suffered damage which is attributable to an illegal act on the part of the Community.

1. Legality of applying monetary compensatory amounts to pigmeat

(a) Regulation (EEC) No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States empowers Member States to apply monetary compensatory amounts in commercial transactions involving certain agricultural products. Under Article 1 of the regulation the application of monetary compensatory amounts is conditional on a Member State's allowing the exchange rates of its currency to fluctuate by a wider margin than the one permitted by international rules, which is determined on the basis of the parity of the currency of the Member State concerned as declared to, and recognized by, the International Monetary Fund. That option, however, was to be exercised only where application of such monetary measures would lead to disturbances in the trading of agricultural products. That authorization was originally intended as a provisional measure to combat the threats to the proper functioning of the common agricultural market posed by abnormal short-term capital influxes. In the subsequent period, [4] monetary instability led to the introduction for the agricultural sector of special conversion rates, designed to ensure the stability of prices for agricultural products. The use of those representative rates, which

3 — Judgment of 25 May 1978, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209, p. 1224.

4 — The first to be affected were the 'new'-Member States, by Regulation No 222/73 (Official Journal 1973, L 27, p. 4); then the Netherlands, by Regulation No 2958/73 (Official Journal 1973, L 303, p. 1); and finally all Member States, by Regulation No 475/75 (Official Journal 1975, L 52, p. 28).

generally deviated from the actual rates of exchange, led — in terms of the national currency — to disparate price levels in the various Member States. In order to neutralize the effect of those disparities on trade in agricultural products within the Community, the use of monetary compensatory amounts continued.

At an early stage Regulation No 1112/73 [5] re-defined the reference figures for the calculation of monetary compensatory amounts; whereas Regulation No 974/71 referred to the difference between the parity of the currency of the Member State concerned as declared to, and recognized by, the International Monetary Fund, on the one hand, and the arithmetic mean of the exchange rates against the United States dollar, on the other, the criterion used thereafter was the difference between the conversion rate used under the common agricultural policy and the conversion rate [6] resulting from the 'central rates'.

It may therefore be observed that the role of monetary compensatory amounts has changed since their introduction; although originally conceived as a means of neutralizing short-term currency fluctuations, they were later used to compensate for the different price levels of agricultural products within the Community which resulted from the application of disparate representative conversion rates to the standard agricultural prices expressed in European units of account (and later in European Currency Units — ECU). [7]

Because the role of monetary compensatory amounts has changed, as seen above, and because there have been frequent amendments of Regulation No 974/71 — Regulation No 855/84, much cited in these proceedings, represents the 14th amendment — caution is needed when applying to the present case the Court's earlier judgments on monetary compensatory amounts. In each case it is necessary to ascertain which version of Regulation No 974/71 was at issue in each of the earlier decisions, and the monetary and legal context of the regulation at the relevant time. That is especially true of findings of the Court which are based on a 'system of standard prices'; expressed in European units of account or European Currency Units, that system certainly exists, but in terms of national currency it has gradually been discarded. Today, indeed, agricultural prices are actually differentiated according to region, period and product category, on account of the different structures of the representative rates for agricultural products. Thus the margin by which the representative rates deviate from the central rates (or their estimated equivalent, where central rates are not available — as in the case of free-floating currencies) varies from currency to currency. Furthermore, the representative rates are amended at different times in the various Member States, and sometimes differ according to the product involved; even the price ratio between certain agricultural products will sometimes vary from one Member State to another. I shall not discuss further the question whether such differentiation of agricultural prices according to region, period and product category is permissible, because it is not the subject of the present case. I would merely point out that the third subparagraph of Article 40 (3) of the EEC Treaty requires that 'Any common price policy shall be

5 — Official Journal 1973, L 114, p. 4.

6 — That applies to currencies which 'floated' together but which *inter se* kept within a maximum 'spread' of 2.25 %. The arrangements for completely freely floating currencies was somewhat more complicated; see Article 2 (1) of Regulation No 974/71 as amended by Regulation No 1112/73.

7 — See P. Gilsdorf, *Der Währungsausgleich aus rechtlicher Sicht*, Cologne 1978, p. 22 *et seq.*, the author considers that monetary compensatory amounts have ceased to be provisional measures for preventing currency-related upheavals, and describes them as virtually a component of the common organization of markets.

based on common criteria and uniform methods of calculation'; the Treaty makes no mention of a 'standard price'.

In its judgment of 21 February 1979 the Court approved the use of the 'green' conversion rates, at least in the context of the co-responsibility levy for milk products.

In reply to the question whether the use of 'green' rates did not infringe the prohibition on discrimination under Article 40 (3) of the Treaty on the grounds that they could lead to unequal burdens in relation to the monetary situations of the Member States at any given time, the Court ruled as follows:

'Although in certain transactions the application of these exchange rates may possibly involve advantages or disadvantages which may appear as discrimination, it nonetheless remains true that in general such application serves to remedy monetary situations which . . . would result in much more serious, obvious and general discrimination.

Although it is not without certain drawbacks, the adoption of the system of the so-called green exchange rates is therefore justified by the prohibition on discrimination and the requirements of a common agricultural policy.' [8]

Under Article 1 (2) of Regulation No 974/71 monetary compensatory amounts may be applied:

'(a) to products covered by intervention arrangements under the common organization of agricultural markets;

(b) to products whose price depends on the price of the products referred to under (a) and which are governed by the common organization of [the] market or are the subject of a specific arrangement under Article 235 of the Treaty.'

(b) Since the applicants consider the use of monetary compensatory amounts to be illegal primarily because there is no provision for an intervention price in the common organization of the market in pigmeat, the first point to be examined is whether the conditions for the application of such amounts to pigmeat are met.

Regulation No 2759/75 of the Council of 29 October 1975 on the common organization of the market in pigmeat contains pricing arrangements (Title I). Article 3 provides as follows:

'The following intervention measures may be taken to prevent or mitigate a substantial fall in prices:

— aid for private storage,

— buying-in by intervention agencies.'

In contrast to most other market arrangements, however, intervention measures do not operate automatically but must, pursuant to Article 4 (6), be adopted in accordance with the Management Committee procedure under Article 24 of the regulation. That can occur when the Community market price for pig carcases stands, and is likely to remain, at less than 103% of the basic price. That basic price is fixed before 1 August every year, and is valid from 1 November of that year. The basic price is used to determine the buying-in price for pig carcases of standard quality at which the intervention agencies intervene on the market if need be. Article 5 (1) of the regulation as amended by Regulation No 1423/78, [9] provides for a spread of between 78% and 92% of the basic price. The buying-in price must be fixed within that band, in accordance with the

8 — Judgment of 21 February 1979, Case 138/78 *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713, p. 723 *et seq.*

9 — Official Journal 1978, L 171, p. 19.

procedure laid down in Article 24, that is to say the Management Committee procedure.

The second intervention measure specified for the common organization of the market in pigmeat, namely aid for the private storage of pigmeat, is at present governed by Regulation No 2763/75 of the Council of 29 October 1975 laying down general rules for granting private storage aid for pigmeat, [10] and by Commission Regulation No 1092/80 of 2 May 1980 laying down detailed rules for granting private storage aid for pigmeat. [11] According to a statement submitted by the Commission, to which the applicants do not demur, there were 24 instances of aid for private storage during the period under consideration, which temporarily removed a total of 512 776 tonnes of pigmeat from the market.

At this intermediate point my conclusion is that intervention measures for the common organization of the market in pigmeat are *provided for* and are also applied in practice. The express stipulation in Article 1 (2) of Regulation No 974/71 is thus met and therefore the condition for the application of monetary compensatory amounts seems to me to be satisfied.

In so far as the applicants persist in their view that monetary compensatory amounts could not be applied because no intervention price existed and because no pigmeat had been bought-in by the intervention agencies since 1971, the following remarks should be made:

Under Article 1 (2) of Regulation No 974/71 it is sufficient that intervention arrangements should be *provided for* as part of the common organization of agricultural markets. That is undoubtedly the case here. Were the Community to decide to intervene on the pigmeat market by having meat bought in by the intervention agencies, then a purchase price would have to be fixed within the band laid down by Article 5 (1) of Regulation No 2759/75. Since intervention operations would then be based on that price, I have no hesitation in describing it as an intervention price.

On the other hand, the applicants are interpreting the term intervention arrangements too narrowly when they assert that intervention may be said to occur only if an intervention agency *buys-in* meat. The common organization of the pigmeat market in fact makes provision for two distinct intervention measures; indeed, it seems to give preference to intervention in the form of aid for private storage. The third recital in the preamble to Regulation No 2759/75 reads as follows:

'... [intervention measures] may take the form of buying-in by intervention agencies; ...however, aid should also be provided for private storage since such aid least disturbs the normal marketing of products and can help to reduce the volume of buying-in by intervention agencies; ...to this end provision should be made in particular for the fixing of a basic price at which intervention measures may come into operation, and the conditions governing intervention should be specified'.

In the long term, moreover, the differences between the two forms of intervention measure are insignificant. The object of intervention arrangements is merely to provide temporary relief for the market, not to eliminate definitively the products removed from the market. Owing to the limits on their storage life it is inevitable

10 — Official Journal 1975, L 282, p. 19.
11 — Official Journal, 1980, L 114, p. 22.

that they must later be put back on the market. That applies as much to aid for private storage as it does to buying-in by intervention agencies; the latter measure leads to 'public' storage of pigmeat, which has to be sold by the intervention agencies at a later stage subject to the terms contained in Article 6 of Regulation No 2759/75.

Since, in the opinion of the Community institutions, it was largely sufficient to stabilize the market in pigmeat by means of intervention in the form of aid for private storage, the necessary conclusion is that the intervention and pricing controls on that market worked properly. In that respect I agree with the observations of an expert in agricultural law, who made the following observations on the common organization of the market in pigmeat, under the heading 'Current Problems':

'Over the past years sporadic grants of aid for private storage have proved their worth as a temporary arrangement for supporting the market with a limited financial outlay. No intervention purchases on the part of Member States have occurred in the Communities since 1971. On the whole, the Community's pigmeat market under the prevailing system of a common organization may be regarded as a stable one.' [12]

It is thus, in principle, permissible to apply monetary compensatory amounts to pigmeat. The same conclusion may be indirectly inferred from the judgment of 6 October 1982, [13] in which the Court had to rule on the retroactive issue of documents for the collection of monetary compensatory amounts on lard. In that judgment the Court confined itself to considering whether the retroactive issue of a control copy was permitted and, in examining the formal issue, tacitly took for granted the applicability of monetary compensatory amounts to products governed by the common organization of the market in pigmeat.

(c) I now turn to the calculation of monetary compensatory amounts on pigmeat.

The applicants further regard the actual calculation of the monetary compensatory amounts as unlawful, on the grounds that they were computed on the basis of a notional purchase price which does not exist in practice. In the context of regulating trade with non-member countries, too, they submit that pigmeat is treated as a product derived from cereals. That has been recognized by the Community legislature for the future calculation of monetary compensatory amounts as well, since as from 1 January 1985 pigmeat is considered to 'rank as a product derived from cereals'. [14]

The first point to be observed in this regard is that, according to a graph which was submitted by the Commission and not contested by the applicants, the basis for the calculation of monetary compensatory amounts laid down by the Community institutions was consistently — apart from one quarter in 1983 — much lower than the market price for pigmeat. That was due to the method of calculation, which was initially — in 1971 — linked to the buying-in price for pig carcases as laid down in the second subparagraph of Article 5 (1) of Regulation No 121/67, and which fixed the basis of calculation at 92% of the basic price. [15] Later, the basis of calculation

12 — O. Gottsmann, *Der Gemeinsame Agrarmarkt*, Section III A 3, p. 4.

13 — Judgment of 6 October 1982, Case 302/81 *Alfred Eggers & Co.* v *Hauptzollamt Kassel* [1982] ECR 3443.

14 — Third subparagraph of Article 2 (1) of Regulation No 974/71 as amended by Council Regulation (EEC) No 855/84 of 31 March 1984 on the calculation and the dismantlement of the monetary compensatory amounts applying to certain agricultural products (Official Journal 1984, L 90, p. 1).

15 — See Regulation No 641/71 of the Commission of 26 March 1971, Journal Officiel 1971, L 73, p. 10.

was fixed at the minimum buying-in price, that is, first 85% and then 78% of the basic price. As far as the period covered by the present proceedings is concerned, the initial basis of calculation under Regulation No 1517/78 of 30 July 1978 [16] was equal to 78% of the basic price; however, Council Regulation No 2025/83 of 18 July 1983 [17] inserted the following paragraph 3a into Article 2 of Regulation No 974/71:

'The monetary compensatory amounts for products in the pigmeat sector shall be calculated on the basis of 90% of the lower limit of the buying-in price applicable to pig carcases.'

The basis of calculation for monetary compensatory amounts is therefore 70.2% of the basic price fixed each year.

The basis for calculating monetary compensatory amounts, and hence their level in the case of pigmeat, have therefore declined steadily. This downward movement has culminated, temporarily, in the adoption of Council Regulation No 855/84, under which pigmeat *ranks* as a product derived from cereals for the purpose of calculating monetary compensatory amounts between 1 January 1985 and 31 October 1987.

However, the applicants' reference to the rules on trade with non-member countries, the special provisions on trade with the new Member States, or the new method of calculation for monetary compensatory amounts which took effect from 1 January 1985 is not such as to establish that the old method of calculation was unlawful. The new method of calculation introduced by Regulation No 855/84 'on the calculation and the dismantlement of the monetary compensatory amounts applying to certain agricultural products' [18] is one of a series of measures which seek the *dismantlement* of such amounts and are, at the same time, connected with an adjustment of representative rates. Its context is thus quite different from that of the method of calculating monetary compensatory amounts during the period material to these proceedings.

The calculation of import levies and export refunds, too, must be viewed in a different context from that of monetary compensatory amounts. In the first place, import levies are composed of various elements — including, admittedly, a component determined by the quantity of feed grain required — and in the second place, the rules governing trade with non-member countries serve objectives other than those of monetary compensatory amounts. Monetary compensatory amounts are designed to compensate for the differing price levels — when prices are expressed in national currency — which occur within the Community's uniform price system; on the other hand, the calculation of import levies allows consideration also to be given to other factors, for example the need to protect Community agriculture from external influences, and the interests of world trade in general. [19]

The same may be said of the applicants' reference to Article 25 of the 1972 Act of Accession. The compensatory amounts, which were applied as part of the process of adapting the agricultural prices of the new Member States to the prices in the original Member States, served on a temporary basis to compensate for price differences which had to be progressively removed. The method of calculation used in that context sheds no light on whether the calculation of monetary compensatory amounts in general is legal, because the issue here is concerned with quite different areas of legislation.

16 — Official Journal 1978, L 178, p. 65.
17 — Official Journal 1983, L 199, p. 11.
18 — Official Journal 1984, L 90, p. 1.

19 — See judgment of 15 October 1980, Case 4/79 *Société Coopérative 'Providence Agricole de la Champagne'* v *ONIC* [1980] ECR 2823, p. 2845 *et seq.*

At all events, the applicants have not proved that the Community institutions are generally obliged to regard pigmeat as a product derived from cereals.

(d) *Infringement of Article 39 of the EEC Treaty*

The applicants further consider the application of monetary compensatory amounts to pigmeat to be an infringement of the objectives of the common agricultural policy as set forth in Article 39 (1) (b) and (c) of the EEC Treaty, namely to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture, and to stabilize markets. The applicants do not, however, specify in what way they regard the application of monetary compensatory amounts to pigmeat as running counter to those objectives.

The first remark to be made on that contention is that Article 39 of the Treaty sets out a whole series of agricultural-policy objectives which the Community institutions are required to achieve. In that connection, 'it need only be observed first of all that, as the Court has stated on numerous occasions, the institutions must reconcile the various aims laid down in Article 39, which does not allow any one of those aims to be pursued in isolation in such a way as to make the attainment of other aims impossible'. [20] The Community institutions therefore enjoy a margin of discretion in the achievement of those Treaty objectives.

The applicants have made no submissions to show that the price-fixing machinery used in the organization of the market in pigmeat runs counter to the aim of ensuring a fair standard of living for persons engaged in agriculture. The Community fixes an annual basic price for pigmeat of standard quality; should the market price fall below the level set by Article 4 of Regulation No 2759/75, namely 103% of the basic price, intervention measures may be taken to support the price. The applicants have not asserted that the fixing of the basic price is evidence *per se* of a failure on the part of the Community institutions to observe their obligation to ensure a fair standard of living for persons engaged in agriculture.

It remains to be considered whether the application of monetary compensatory amounts to pigmeat might be inconsistent with the requirement of stabilizing the market. It should be pointed out that it is precisely the monetary compensatory amounts which serve to counteract any disruption of the market as a result of the application of different representative rates which deviate from the actual rates of exchange. Monetary compensatory amounts therefore also help to achieve precisely the objective laid down by Article 39 (1) (c) of stabilizing markets.

A further point to be made is that the Court has ruled that the Commission and the Management Committee enjoy a wide margin of discretion in determining whether there is a threat of disruption to agricultural trade. In reviewing the legality of the exercise of such discretion the Court must confine itself to examining whether it contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion. [21] No evidence of such a wrongful act or omission on the part of the Community institutions may be perceived in the present case. Since the representative rates had deviated from the central rates during the period in which the monetary compensatory amounts were applied, there

20 — Judgment of 6 December 1984, Case 59/83 *SA Biovilac BV* v *Commission* [1984] ECR 4057, paragraph 16 of the Decision.

21 — See judgment of 20 October 1977, Case 29/77 *Roquette* v *France* [1977] ECR 1835, p. 1842.

was a risk of disruption to trade. Furthermore, the Community kept within the bounds of what was strictly necessary, inasmuch as the basis on which it calculated the monetary compensatory amounts was, as a rule, lower than the market prices for pigmeat. In addition, the introduction of the 'neutral margin' (see B 2 below) means — even for appreciated currencies — that the price difference due to the representative rates is only partly compensated.

(e) *Infringement of the prohibition of discrimination under Article 7 of the EEC Treaty*

A further objection raised by the applicants is that the prohibition on discrimination under Article 7 of the Treaty is infringed by the application of monetary compensatory amounts to pigmeat.

Article 7 prohibits '... without prejudice to any special provisions contained [in this Treaty] ..., any discrimination on grounds of nationality ...'.

In my opinion the application of monetary compensatory amounts to pigmeat does not constitute discrimination, and certainly not discrimination on grounds of nationality. The provisions governing the application of monetary compensatory amounts are connected, not with the nationality of the traders but only with the currency area in which they operate. Moreover, the difference in the treatment of traders from different currency areas cannot automatically be construed as discrimination. Difference in treatment would not constitute a violation of the principle of non-discrimination unless it appeared to be arbitrary. [22] There is, however, no evidence here of any arbitrary difference in treatment of that kind. On the contrary, the application of monetary compensatory amounts is designed precisely to redress a different sort of disparity, namely a disparity due to the application of representative rates for agriculture which deviate from the actual rates of exchange and lead to price levels which differ from one Member State to another. Thus, one disparity in treatment is, so to speak, supposed to be neutralized by another — at least to some extent.

(f) *Intermediate conclusion*

At this point I should like to record a further intermediate conclusion, namely that the application of monetary compensatory amounts to pigmeat does not represent illegal conduct on the part of the Community institutions, still less a serious infringement of a superior rule of law serving to protect individuals. Even if those conditions were satisfied, however, it would have to be borne in mind that damage attributable to an injustice committed by Community institutions in the course of legislation cannot, according to the case-law of the Court, give rise to a claim for damages under the second paragraph of Article 215 of the Treaty except in special circumstances. That restrictive approach derives from the principle that, in reaching a decision, the legislature must not always be impeded by the possibility of claims for damages if it has grounds for adopting, in the public interest, legal provisions which may affect the interests of individuals. It follows that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation. [23]

22 — Judgment of 24 October 1973, Case 43/72 *Merkur-Außenhandels-GmbH* v *Commission* [1973] ECR 1055, p. 1073.

23 — See judgment of 25 May 1978, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others* v *Council and Commission of the European Communities* [1978] ECR 1209, p. 1224: it was common ground that the Community institutions had acted illegally.

The conditions in which the Community would incur non-contractual liability under the second paragraph of Article 215 of the EEC Treaty are therefore not satisfied.

2. Damage alleged by the applicants

However, for the sake of completeness in appraising the applicants' thesis I shall, in conclusion, consider whether the applicants, have, in any event, furnished evidence or proof of the existence of damage.

In calculating the damage suffered, the applicants refer to a positive rate of monetary compensation, amounting to 5.8% in the case of pigmeat from the Netherlands. On that basis they arrive at an export premium of FF 49.20 on a carcase of 80 kilograms. The result was, allegedly, that the French market price for pigmeat fell by the same amount. The applicants estimate that half of that amount was borne by them, while the other half was absorbed by the other traders. They then multiply one half of FF 49.20 by their average production figure of 1 000 pigs per year over the past five years.

In calculating the damage alleged, however, the applicants disregard the fact that the conversion of the standard price for pigmeat into the national currencies is based not on the actual rate of exchange for those currencies but on a so-called 'representative rate' for agriculture, which sometimes still varies from product to product. In order to establish whether the applicants can have incurred any damage at all as a result of the fact that the application of monetary compensatory amounts enabled Netherlands pig breeders to market pigmeat at lower prices than their French counterparts, I would put to you the calculation annexed to this Opinion:

Since the applicants have based their assessment of the damage on carcases of 80 kilograms, I shall do likewise in my example. Like the applicants, I shall base my calculations on the prices and rates prevailing at the time when this action was brought and the basic price for pig carcases of standard quality fixed by the Council for the period from 1 November 1983 to 31 October 1984.

Where the basic price is 2 053.87 ECU per 1 000 kilograms, the price of an 80-kilogram carcase amounts to about 164 ECU. Converted into national currency on the basis of the representative rates for pigmeat, it is equal to FF 1 112 or HFL 445.

If a Netherlands pig-farmer now exports that carcase to France, seeking to obtain the equivalent of HFL 445 in French currency, he must charge a price of about FF 1 208. That is the price obtained by applying the actual conversion rate between the Netherlands guilder and the French franc at that time. The reason for applying the actual rate here is that the Netherlands exporter cannot, of course, transfer the sale proceeds to the Netherlands at the notional agricultural rate, but must use the open-market rate.

If we compare those figures, we see that the price which the Netherlands pig-farmer must charge in order to receive the equivalent of HFL 445 is FF 1 208, which is FF 96 more than the price of FF 1 112 which a French breeder needs to obtain in order to sell an 80-kilogram carcase at the basic price. It is that price differential, which is the consequence of applying representative rates for agriculture which deviate from the current rates, thus leading in terms of national currency to disparate price

levels, that the application of monetary compensatory amounts is intended to compensate for — at least in part.

If one inserts into the calculation the monetary compensatory amount on meat from domestic pigs (whole or half carcases), which means a refund to the Netherlands exporter of about HFL 18.13, then the Netherlands price falls from HFL 445 to 427. If that sum of HFL 427 is then converted into French francs at the actual rate, the result is a price of FF 1 159, which the Netherlands trader must obtain in order to receive in Dutch guilders the equivalent of 164 ECU, that is, the price of an 80-kilogram carcase calculated by reference to the basic price. That price is still about FF 47 more than the sum which a French trader must obtain in order to realize 164 ECU.

The above calculation demonstrates that the monetary compensatory amounts offset not all but only about half of the competitive disadvantage to which traders in the Netherlands are exposed. [24] The fact that the actual differences in price level are only partly compensated for is, in the present instance, due to the fact that Council Regulation No 652/79 of 29 March 1979 on the impact of the European monetary system on the common agricultural policy [25] introduced the idea of a franchise or neutral margin for Member States with an appreciated currency. As a result, not every deviation between the conversion rate used for the purposes of the common agricultural policy and the conversion rate derived from the central rate was taken into account for the calculation of monetary compensatory amounts; instead, that actual monetary deviation is reduced by the 'neutral margin'. That 'neutral margin' amounts to 1% in the case of Member States which levy monetary compensatory amounts on imports and grant them on exports — the 'strong-currency countries'.

If I now compare the applicants' submissions on the assessment of the damage suffered by them with my own calculations, I reach the following conclusion:

Even if monetary compensatory amounts are applied, Dutch pigmeat is still more expensive in France than pigmeat produced in France itself, because those amounts only partly compensate for the difference between the two national price levels. Thus, if Dutch pigmeat is necessarily more expensive in France than the French product, in spite of the application of monetary compensatory amounts, I fail to see how pig-farmers in France could have suffered damage from the application of those amounts. The most that can be said is that monetary compensatory amounts have the effect of preventing the open-market price for pigmeat in France from being raised to the level in the Netherlands, thereby depriving French traders of an additional profit. That possible loss of profit cannot, however, be regarded as damage, because the French traders are not entitled to demand that the profit should be guaranteed to them by the Community. It is the Council which determines the level of income to be guaranteed to farmers, and it does so by fixing both the prices — in this case the basic price for pigmeat of standard quality — and the representative rates of exchange for agricultural products. Here, too, the Community institutions must be

24 — Comparable calculations at other points within the five-year period produce comparable results.

25 — Official Journal 1979, L 84, p. 1.

allowed some latitude, so that consideration may be given to general price trends, currency movements, and the income levels of persons engaged in agriculture.

Since the applicants have therefore failed to furnish conclusive evidence of damage incurred by themselves, it is unnecessary to analyse the other incongruities in their assessment of that damage. Suffice it to mention the following:

The applicants assess the monetary compensatory amounts for pigmeat imported into France from the Netherlands as being 5.8% of a notional price. However, the Commission fixes monetary compensatory amounts, not as percentages but as flat rates, expressed in national currency, per unit of weight. Moreover, monetary compensatory amounts are subject to fluctuations, so that it is not clear where the percentage figure given by the applicants comes from. The applicants also claim damages in respect of a period of five years before the commencement of the proceedings, and they thereby include the period from 6 April to 12 October 1981 even though, as they themselves state, no monetary compensatory amounts were applied to Dutch pigmeat during that time. That may explain why, although the applicants claimed compensation for the damage supposedly incurred by them over the last five years, the actual sums which they mention are, according to their own calculations, accounted for on the basis of their pigmeat production of just the last three years.

Furthermore, the applicants fail to explain the criteria according to which they estimate the consequential damage to themselves at precisely 35% of the direct damage.

C. Since, therefore, the granting of monetary compensatory amounts on the exportation of pigmeat from the Netherlands is not illegal, and since, furthermore, the applicants have failed to show evidence of damage, I propose that:

the application should be dismissed; and

the applicants should be ordered to pay the costs of the proceedings.

APPENDIX

(A) Representative rate for pigmeat, valid on 1 November 1983:

1 ECU = FF 6.77297 [26] = HFL 2.70981 [27]

(B) Actual rate on 4 November 1983: [28]

1 ECU = FF 6.87689 = HFL 2.53280
FF 1 = HFL 0.36831
FF 2.71513 = HFL 1

(C) Basic price for pig carcases of standard quality [29] (1 November 1983 until 31 October 1984):

2053.87 U per 1 000 kg

(D) Monetary compensatory amounts for meat from domestic pigs (whole or half carcases) from the Netherlands: [30]

HFL 22.66 per 100 kg

(E) Carcases of 80 kg at the basic price of:

164.31 ECU = FF 1 112.86 (Basic price for France)
= HFL 445.25 (Basic price for Netherlands)

(F) Basic price for carcases in the Netherlands (HFL 445.25), converted into French francs at the actual rate on 4 November 1983:

FF 1208.91 = Basic price + FF 96.05

(G) Basic price for carcases in the Netherlands minus monetary compensatory amounts:

HFL 445.25 — 18.13 = HFL 427.12

(H) Carcases of 80 kg at the basic price for the Netherlands minus Netherlands monetary compensatory amounts, converted into French francs at the actual rate on 4 November 1983:

HFL 427.12 = FF 1 159.68
= Basic price for France + FF 46.82

26 — Regulation No 1626/83, Official Journal 1983, L 160, p. 6.
27 — Regulation No 1223/83, Official Journal 1983, L 132, p. 33.
28 — Official Journal 1983, C 298, p. 1.
29 — Regulation No 1599/83, Official Journal 1983, L 163, p. 55.
30 — Regulation No 3032/83, Official Journal 1983, L 300, p. 1.