In Case 106/81

JULIUS KIND KG, supply butcher, of 12 Mercatorstraße, 4048 Grevenbroich 1, Federal Republic of Germany, represented by Dietrich Ehle, of Messrs Ehle, Feldmann, Schiller and Eyl, Rechtsanwälte, Cologne, 13 Mehlemer Straße, 5000 Cologne 51, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34B Rue Philippe-II,

applicant,

v

EUROPEAN ECONOMIC COMMUNITY, represented by:

Council of the European Communities, represented by Bernard Schloh, Adviser in the Legal Department, and Arthur Brautigam, Administrator in that department, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of Legal Affairs at the European Investment Bank, 100 Boulevard Konrad-Adenauer,

and

Commission of the European Communities, represented by Jörn Sack, a member of its Legal Department, with an address for service in Luxembourg at the office of O. Montalto, a Member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

supported by

the GOVERNMENT OF THE FRENCH REPUBLIC, represented by Gilbert Guillaume, Director of Legal Affairs at the Ministry for Foreign Relations, acting as Agent, assisted by Alexandre Carnelutti, Secretary of State for Foreign Affairs, acting as Deputy Agent, with an address for service in Luxembourg at its Embassy,

intervener,

APPLICATION for compensation for damage under Article 178 and the second paragraph of Article 215 of the EEC Treaty based on the non-contractual liability of the Community.

THE COURT

composed of: J. Mertens de Wilmars, President, G. Bosco, A. Touffait and O. Due (Presidents of Chambers), P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe, T. Koopmans, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and issues

I — Facts and procedure

The applicant, who imports fresh mutton and lamb from the United Kingdom into the Federal Republic of Germany, claims that it has incurred damage attributable to the establishment of the common organization of the markets in the sector of mutton and lamb, and in particular to the way in which prices for mutton and lamb of British origin have developed as a result.

A — The position of the market in mutton and lamb in the Community prior to the entry into effect of Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the market in "sheepmeat" and goatmeat (Official Journal L 183, p. 1)

Production and consumption of mutton and lamb vary widely within the Community.

(1) Before 1973, the date of the Community's first enlargement, the sector was dominated by one Member State, France, where production and consumption of mutton and lamb was high (production being insufficient to meet demand, however, as production amounted to 122 000 tonnes a year and consumption to 163 000 tonnes a year in 1972; source: Statistical Office of the European Communities). Mutton and lamb, regarded in France as quality or even luxury products, were sold at prices yielding, in relative terms, a very considerable profit on a market which was protected by national legislation.

In the other Member States mutton and lamb, unlike beef, veal, pigmeat or poultrymeat, were regarded as products of minor importance and their markets were relatively little organized. Since production was insignificant (between 200 and 13 800 tonnes a year in 1972)

and consumption low (between 3.5 and 17 000 tonnes a year in 1972; source: Statistical Office), those Member States frequently obtained their supplies from external markets (especially the United Kingdom) and exported their local production (the Federal Republic of Germany and the Benelux countries, in particular) to the profitable French market. In those Member States the main characteristics of the market were thus attractive consumer prices (due, in particular, to the fact that supplies were brought in from external markets) and a relatively high return on local production (owing to the fact that producer prices were based largely on the prices quoted in France).

(2) The accession of the United Kingdom, Ireland and Denmark in 1973 greatly altered the situation by extending the mutton and lamb markets to include two Member States which were major producers (224 500 tonnes a year in the United Kingdom and 45 000 tonnes a year in Ireland in 1972; source: Statistical Office) and major consumers (527 700 tonnes a year in the United Kingdom and 33 200 tonnes a year in Ireland in 1972).

Consumer habits in the new Member States differed considerably from those on the French market. *Per capita* consumption was higher (7.6 and 7.3 kilograms per year per person in the United Kingdom and in Ireland, as against 4.3 kilograms in France), at prices which were considerably lower, making mutton and lamb an everyday consumer product.

Moreover, the markets were organized along opposite lines of economic policy: while France relied on strict control of import levels in order to maintain high returns for producers based on consumer prices which the consumer was prepared to pay having regard to the "quality" image of mutton and lamb, the United Kingdom, which had a large trade deficit in spite of high production, had opted for a liberal policy on imports (from New Zealand, in particular) and low consumer prices, often fixed by the government, guaranteeing domestic producers' incomes by means of a system of production subsidies combined with an import levy (known as a "deficiency payment").

It thus became essential to introduce at Community level a common organization of the markets in mutton, lamb and goat's meat owing to the differences in the organization of the markets in mutton and lamb in the three main Member States concerned, the effects of which on the free movement of goods within the Community had been criticized by the Court in its judgment of 25 September 1979 (Case 232/78 *Commission of the European Communities* v *French Republic* [1979] ECR 2729).

B — Principal features of the machinery set up by Regulation No 1837/80

The common organization of the market in mutton and lamb was introduced by Regulation No 1837/80 of 27 June 1980 (Official Journal L 183, p. 1). That common organization differs in many respects from the traditional schemes introduced by the other common organizations of markets.

In the first place, the newly-created common organization may be altered or adjusted on 1 April 1984 pursuant to Article 34 of Regulation No 1837/80.

In the second place, protection of the Community market had been assured by allowing wide scope for voluntary restraint agreements between the Community and non-member countries, the conclusion of which is made, by Article 35 of Regulation No 1837/80, a prerequisite for the implementation at Community level of the organization of the markets.

Lastly, although under the common organization there is a uniform basic price for all of the territory of the Community, the provisions concerning the reference and intervention prices are based on a division of the Community market into six regions [1] and include numerous ways of modifying the intervention measures envisaged in order to allow for the progressive adjustment over four years of production structures and prices in the various Member States.

The main features of the common organization of the market in mutton and lamb may be summarized as follows:

(1) Each year a basic price valid throughout the Community and a reference price for each of the six regions of the Community are laid down. The regionalized reference prices are to be fixed for subsequent years so as to ensure "the achievement of a single Community reference price by the convergency of national reference prices in equal annual steps over four years" (Article 3 (4) (ii)). After that period has elapsed, therefore, there must be a single Community reference price representing a uniform upper limit for supporting producers' income. (A first step towards harmonization has since been made by Council Regulation (EEC) No 900/81 of 1 April 1981 fixing for the 1981/82 marketing year the basic price, the intervention prices and the reference prices for sheepmeat, published in Official Journal L 90, p. 28).

The uniform basic price is fixed at 345 European currency units per 100 kilograms (Article 31 of Regulation No 1837/80). The regional reference prices vary from 293 ECU per 100 kg for the United Kingdom to 345 ECU per 100 kg for France and 375 ECU per 100 kg for Italy. In calculating them, account was taken of the prices prevailing on those markets prior to the entry into effect of the common organization (the reference year being 1979).

(2) Pursuant to Articles 39 and 43 (3) (a) of the EEC Treaty, a system of production aid is established (Article 5 of the regulation) in the form of a premium payable "per ewe". The premium represents the difference between the regional reference price and the market price recorded in the production region. Although the system applies in all the regions, only the United Kingdom and Ireland benefited from it during the 1980 to 1981 marketing year. In the other regions the aid was not put into effect owing to the favourable development of prices.

(3) Various intervention measures, such as private storage aid or the purchase of carcases by the national intervention agencies, are provided for in Article 6 (1) of the regulation. Implementation of such measures is subject to market prices from 15 July to 15 December of the year in question being lower than the

1 — (1) Italy, (2) France, (3) the Benelux countries, Denmark, and the Federal Republic of Germany, (4) Ireland, (5) the United Kingdom and (6) Greece.

intervention price, which is fixed at 85% of the seasonally adjusted uniform basic price, or 293.2 ECU (Article 31 of the regulation) and to a request to that effect being submitted by the Member State after it has recorded the changes in the prices for mutton and lamb in its area (Articles 7 and 8 of the regulation).

(4) Article 9 (1) of the regulation provides that in those regions where the intervention agencies do not make purchases, the Member State concerned may pay a variable slaughter premium when the prices recorded on the representative market of that State are below a "guide level" corresponding to 85% of the basic price. Article 31 (1) of Regulation No 1837/80 fixed the basic price for the 1980 to 1981 marketing year at 345 ECU per 100 kg. The guide level is therefore in principle 293.2 ECU. However, the basic price is seasonally adjusted pursuant to Article 32 of the regulation and the guide level may vary as a result.

The premium is equal to the difference between the guide level and the market price recorded in the Member State in question.

The United Kingdom made use of that provision during the 1980 to 1981 marketing year. Because the regionalized reference price had been fixed for 1980 on the basis of market quotations in 1979 (the reference year) at 293 ECU, an amount very close to the guide level fixed for the Community (293.2), subject to seasonal adjustments of the latter the smallest fluctuation in quotations for mutton and lamb in the United Kingdom enabled the variable slaughter premium to come into operation. The influence on economic conditions in the market of the sharp rise in the value of the pound (an increase of 30% from 1980 to 1981) by comparison with the European currency unit, together with other factors, made it necessary to pay the premium in order to ensure that British producers received an income of 293 ECU per 100 kg, the regionalized reference price which had been fixed by the Council.

In order to prevent the variable slaughter premium from operating as an export subsidy when mutton and lamb are exported outside the region within which the premium has been paid, Article 9 (3) provides that an amount equivalent to the premium which has already been paid is to be charged on meat leaving the territory of the Member State concerned. That amount is generally designated by the English term "claw-back". [1]

C — The applicant's economic situation

The applicant is a German undertaking which has specialized since 1893 in the fresh meat trade. Since mid-1965 it has systematically built up a market for fresh lamb from the Federal Republic of Germany and from the United Kingdom. Until the entry into force of Regulation No 1837/80 its activities consisted essentialy in supplying the markets of continental Europe with British-slaughtered lamb at prices which it describes as "favourable" compared with the average prices prevailing in the continental Member States of the Community.

According to the applicant, German consumer habits and the fact that the

1 — Translator's note. The English term "claw-back" is used *verbatim* in the French and German texts of the judgment, German being the language of the case

German consumer is prepared to pay only a limited price for mutton make the applicant's market in the Federal Republic of Germany dependent on the availability of supplies of good-quality meat at a relatively low price, a possibility which is offered only by the British market, where until 1980 prices were considerably lower than those prevailing in the other Member States.

After the entry into force of Regulation No 1837/80 the applicant noted a considerable rise in purchase prices for exports of British meat.

The applicant summarizes the changes as follows:

Date	Purchase price	Selling price
1 year before the entry into effect of the organization of the markets: 19 October 1979	115 pence per kg	DM 6.39 per kg
1 month before the entry into effect of the organization of the markets: 19 September 1980	130 pence per kg	DM 6.64 per kg
3 months after the entry into effect of the organization of the markets: 20 January 1981	188 pence per kg	DM 10.04 per kg
5 months after the entry into effect of the organization of the markets: 20 March 1981	196 pence per kg	DM 10.64 per kg

The result was a significant reduction in the applicant's turnover because its customers werde not prepared to maintain their purchases in view of the changes in price. A consequence of this was that the applicant was forced to reduce the working hours of its staff because it was unable to find other sources of supply of similar quality and price, especially in the Federal Republic of Germany where domestic production was not sufficiently high.

The applicant attributes these developments in its business to the entry into effect of the common organization of the markets in mutton and lamb, and particularly to the incidence on the purchase price of British carcases of the amount levied on meat exported from the United Kingdom (the claw-back) by virtue of Article 9 (3) of Regulation No 1837/80 in order to compensate for the effect of the variable slaughter premium.

On 5 February 1981 the applicant placed its difficulties before the Commission and asked it to submit as soon as possible to the Council of Ministers a proposal that Article 9 of Regulation No 1837/80 be suspended, or at least amended. As an interim measure it asked the Commission to suspend collection of the amount pursuant to Article 33 of Regulation No 1837/80.

In a letter dated 3 March 1981 the Commission displayed "some understanding" of the applicant's situation, but declined to act upon its request.

By application lodged at the Court Registry on 4 May 1981 the applicant brought an action before the Court of Justice under Article 178 and the second paragraph of Article 215 of the EEC Treaty seeking compensation from the Community for the loss it claimed to have incurred.

The Commission and the Council of the European Communities lodged statements in defence at the Court Registry on 21 and 22 July 1981 respectively, in which they contended that the application was unfounded.

On 28 September 1981 the applicant submitted a reply in which it adhered to the conclusions formulated in its originating application.

The Commission and the Council submitted their rejoinders on 30 October and 24 November 1981 respectively.

By application lodged at the Court Registry on 25 August 1981 the Government of the French Republic requested leave to intervene in support of the defendant's conclusions pursuant to Article 37 of the Protocol on the Statute of the Court. By an order of 16 September 1981 the Court decided, after hearing the views of the Advocate General, to allow the intervention.

The Government of the French Republic submitted its statement in intervention on 3 December 1981.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

1. Julius Kind KG (a limited partnership), the applicant, claims that the Court should:

Order the defendant to pay the applicant DM 375 000 together with interest thereon at the rate of 10% calculated from the date on which the application was lodged;

Declare that the defendant is obliged to make good to the applicant all the further damage which the applicant has continued to incur after 31 March 1981 owing to the fact that pursuant to the authority contained in Article 9 (3) of Council Regulation (EEC) No 1837/80 in conjunction with Article 4 of Regulation (EEC) No 2661/80 of the Commission of 17 October 1980 (Official Journal L 276, p. 19) a charge was made in intra-Community trade in mutton and lamb between the United Kingdom and Germany, and the fact that the Commission unlawfully failed to suspend the charging of that amount pursuant to Article 33 of Regulation (EEC) No 1837/80 for as long as and to the extent to which no intervention measures are applied in the other regions of the common market;

Order the defendant to pay the costs.

2. The Council of the European Communities, defendant, contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs.

3. The Commission of the European Communities, defendant, contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs;

As a precaution, in the event of the Court's incidentally declaring Article 9 of Council Regulation No 1837/80 to be invalid either in whole or in part, hold at the same time and in accordance with the second paragraph of Article 174 of the EEC Treaty that that declaration does not affect payments of the variable slaughter premium made prior to the date of the judgment or the charging, on exportation from British territory, of an amount equal to that premium;

In addition, having regard to the importance of this case, decide the case in plenary session.

4. The Government of the French Republic, intervening, contends that the Court should:

Dismiss the application;

Order the applicant to pay the costs, including those of the intervener.

III — Submissions and arguments of the parties

A — *Julius Kind KG* describes how its economic situation has changed recently and goes on to give a brief description of the intervention machinery introduced by Regulation No 1837/80.

It considers that the charging of the amount provided for in Article 9 (3) of Regulation No 1837/80 (the claw-back) is the main cause of the deterioration of its economic situation. Its pernicious effects on intra-Community trade have been compounded, moreover, by two factors:

the rise in the value of the pound compared with the European currency unit; and

the Commission's suspension under Article 33 of Regulation No 1837/80 (by the adoption of Regulation (EEC) No 3191/80 of 9. 12. 1980 (Official Journal L 332, p. 14) which was extended by Regulation (EEC) No 932/81 of 6. 4. 1981, (Official Journal L 95, p. 14) of the claw-back in trade with non-member countries. The suspension made it much more advantageous for non-member countries than for Member States to obtain supplies direct from the United Kingdom and this gave rise to deflections of trade and, in the applicant's case, to the loss of some of its customers, in particular in Switzerland, who had been accustomed to obtaining supplies of British meat from the applicant rather than directly from the United Kingdom market.

The applicant concludes that the Community's management of the intervention machinery in the sector of mutton and lamb is discriminatory, creates deflections of trade and distortion of competition and it is contrary to the principle of Community preference. In a letter to the Commission dated 5 February 1981 the applicant sought to bring about a change in the system of management. Since this approach met with no success the applicant considers itself entitled to have recourse to legal action.

1. First, the applicant considers its action based on the second paragraph of Article 215 of the EEC Treaty to be admissible. It submits that it has incurred and will continue to incur substantial, immediate and foreseeable losses as a result of the unlawful conduct of the Council and Commission of the European Communities. It points out that it has no legal remedy, however, apart from an action based on non-contractual liability, whereby it may establish the existence of such unlawful conduct. It does not meet the conditions of admissibility for an application for annulment, cannot bring an action for failure to act and, lastly, not being itself liable to the claw-back (for which the exporter from the United Kingdom is responsible) it is unable to bring proceedings enabling it to have submitted to the Court a question for a preliminary ruling on the validity of the provision

adversely affecting it. Moreover, the applicant points out that resort to the last-mentioned form of proceedings in order to gain access to the Court would be artificial and would not enable the Court to adjudicate upon the damage sustained. The applicant therefore considers that the application for compensation which is provided for in the second paragraph of Article 215 is the most logical remedy available to it because it enables a decision to be given on both the validity of the Community provisions and compensation for the loss incurred at one and the same time.

Finally, the applicant submits that the case-law of the Court, as illustrated in particular by its judgments of 2 March 1977 (Case 44/76 *Milch-, Fett- und Eier-Kontor GmbH* v *Council and Commission of the European Communities* [1977] ECR 393) and 2 June 1976 (Joined Cases 56 to 60/74 *Kurt Kampffmeyer Mühlenvereinigung KG and Others* v *Commission and Council of the European Communities* [1976] ECR 711) confirms that under the second paragraph of Article 215 the Court may establish not only the damage incurred so far but also the future damage should the institutions pursue their unlawful conduct.

2. As to whether its action for compensation is well-founded the applicant maintains that its application satisfies the five conditions which have been laid down by the Court for recognition of the right to compensation.

(a) That damage has been incurred is unquestionable. In the first place it cannot be denied, according to the applicant, that the damage incurred far surpassed the economic risk ordinarily attached to trade in fresh lamb in the Federal Republic of Germany. In the second place the introduction of the common organization of the market in question produced in this case the opposite effect to that which traders were entitled to expect: instead of greater freedom of movement for goods, financial obstacles were raised at frontiers within the Community and there was a general deterioration in the conditions of trading in mutton and lamb.

The applicant considers that when the Community introduced the common organization of the market in mutton and lamb it "had regard exclusively to the interests of French producers and the interests of British producers and consumers" to the detriment of other Community nationals.

The applicant maintains that the truth of this allegation is illustrated in the way in which Community prices were fixed, for in defiance of the criteria which were laid down in Article 3 (2) of Regulation No 1837/80 French market prices were adopted as the sole standard of reference with regard to the basic price, and in the case of the reference price for the United Kingdom the prices prevailing on that market prior to the 1980 marketing year were deliberately over-estimated. The reference price for the United Kingdom was fixed pursuant to Article 31 of that regulation at 293 ECU, that is to say, 52 ECU less than the French price; yet the applicant considers that actual prices on the British market were considerably lower. The applicant sees as evidence of this trend in the United Kingdom market the fact that the Commission fixed the variable slaughter premium — and thus the amount of the claw-back — at 115.027 ECU per 100 kg (Regulation No 3108/80 of the Commission of 28 November 1980, Official Journal L 324, p. 68) which corresponds to a real

market price in the region of 178 ECU per 100 kg.

On that point it is not possible, according to the applicant, to rely on the effect of the deficiency payments as an explanation for the normally low prices for British meat during the marketing years prior to the entry into force of Regulation No 1837/80. The applicant relies on a table published by the Meat and Livestock Commission in support of its argument that the effects of the deficiency payment of export prices were negligible except, surprisingly, in 1980, when the common organization of the market was introduced.

The figures to which the applicant refers are, in so far as they relate to the United Kingdom, as follows:

Year	No of weeks per year in which a subsidy was granted	Exports of sheep and lambs in 000s of tonnes	Average annual subsidy in pence per kg of slaughter-meat	
1973	0	27.3	0	
1974	17	26.5	2.7	
1975	24	33.5	2.9	
1976	2	32.7	0.1	Average: 1.4
1977	6	44.6	0.2	
1978	4	41.6	0.1	
1979	16	40.9	3.6	
1980	42	36.9	22.6	

The combined effect of these factors was to cause the applicant substantial commercial losses, as evidence of which it gives the number of carcases which it has marketed weekly and which has fallen from about 6 000 to 3 000 lambs on average.

(b) The action taken by the Council and Commission is unlawful and shows a manifest disregard of a number of superior rules of law for the protection of individuals.

As far as the Council's action is concerned, it failed in adopting Article 9 (3) of Regulation No 1837/80 to fulfil the obligation to state reasons which is set out in Article 190 of the Treaty. It is maintained by the applicant that inasmuch as the latter provision is principally designed to safeguard the rights and interests of those to whom the legislative measures are addressed it constitutes a superior rule of law for the protection of individuals. The sense and purpose of the special intervention scheme constituted by the variable slaughter premium coupled with the claw-back are incomprehensible — in the light of the other mechanisms provided for in Article 6 of the regulation — and no statement of reasons whatever is given to explain them. The absence of such a statement is a particularly serious matter in this instance because the variable slaughter premium "is, apparently, one of the provisions which are of great importance in the management of the common organization of the markets".

The provision in question manifestly disregards the fundamental principle, laid down in Articles 9, 12, 13 and 16 of the Treaty, that charges having an effect equivalent to customs duties are prohibited in trade between Member States. The Council may not derogate

from the provisions of those articles. In its judgment of 20 April 1978 (Joined Cases 80 and 81/77 *Société Les Commissionaires Réunis Sarl* and *Sarl Les Fils de Henri Ramel* v *Receveur des Douanes* [1978] ECR 927) the Court held that in the agricultural sector the principle applies as a condition for the achievement of a single market within the Community. In its judgment of 25 September 1979 (Case 232/78 *Commission of the European Communities* v *French Republic* [1979] ECR 2729) the Court even pointed out expressly that special measures intended to organize the market in mutton and lamb must not be allowed to operate in such a way as to prevent "the Treaty provisions relating to the elimination of restrictions on intra-Community trade from having full force and effect" (paragraph 7 of the decision). The fact that this charge levied at the border takes the legal form of an agricultural intervention measure makes it no less unlawful under Community law because the claw-back has the three characteristics of a charge having an effect equivalent to a customs duty, namely:

It is collected on the crossing of a border;

It has the effect of a tax;

The charge increases the cost of the product on which it is levied.

According to the applicant it is wrong, and irrelevant in law as regards its nature as a charge levied at frontiers, to consider that the claw-back is an economically neutral measure. The fact is that any aid restricted by region necessarily distorts the conditions of competition. That is particularly true in the present case owing to the fact that since the variable slaughter premium takes the form of a consumer subsidy which is paid on production or slaughter it prevents the formation of genuine market prices in the United Kingdom. The claw-back, by contrast, is designed to restrict the advantages of the slaughter premium to the British market alone: apart from partitioning the market, therefore, it has the effect of compelling traders in other Member States of the Community to participate in financing intervention measures which are of advantage exclusively to British nationals.

The provision in question may also be regarded as a measure having an effect equivalent to a quantitative restriction on trade, which is prohibited by Article 30 of the Treaty. The statistics drawn up by the Association of British Abbatoir Owners Limited (sent to the ABAO Sheepmeat Exporters in a letter dated 25 August 1981) show clearly that while British exports to non-member countries remained at a satisfactory level trade with Member States fell sharply in June and July 1981 compared with the same period in 1980. The recovery of the variable slaughter premium is, therefore, certainly capable of "hindering, directly or indirectly, actually or potentially" intra-Community trade.

The provision in question constitutes a breach of the prohibition of discrimination set out in Article 40 (3) of the Treaty inasmuch as it accords very different treatment, on the one hand, to traders in continental Europe and Britain, and on the other hand to German and British consumers who as a result of an intervention measure are being offered the same product at very different prices.

Article 9 (3) of Regulation No 1837/80 infringes Article 43 (3) (b) of the Treaty according to which the creation of a common organization of the markets must "ensure conditions for trade within the Community similar to those existing in a national market". In this case the introduction of the claw-back has partitioned the market and seriously disturbed an existing market which functioned perfectly well between the United Kingdom and Germany up to the date of the entry into force of Regulation No 1837/80.

Similarly, the Council may be considered to be at fault inasmuch as when it drafted the common organization it failed to have regard to the provisions of Article 43 (3) (a) of the Treaty by introducing individual schemes which were discriminatory on the pretext of fulfilling its obligations to provide "equivalent safeguards for the employment and standard of living of the producers" laid down in that provision. The applicant points out that the term "equivalent safeguards" does not necessarily imply that previous national prices must be permanently maintained and that in any case the safeguards apply only to "producers" and not consumers. The applicant maintains, however, that the system of slaughter premiums is "manifestly intended" to ensure that British consumers are able to purchase lamb cheaply. Article 9 (1) and (2) of Regulation No 1837/80 does not, therefore, correspond to the meaning of Article 43 (3) (a) of the Treaty, and Article 9 (3), concerning the claw-back, infringes that provision since the objective of ensuring "equivalent safeguards" may certainly not be achieved at the expense of an inviolable principle of law such as the elimination of obstacles to trade in a common organization of a market.

As far as the conduct of the Commission is concerned the cause of complaint is that it did not suspend, as the applicant requested in its letter of 5 February 1981, the claw-back in intra-Community trade, as it was empowered to do under Article 33 of Regulation No 1837/80, and as it has done under Regulation No 3191/80 in the case of trade with non-member countries.

In the circumstances the Commission had a legal obligation towards the applicant to take such action in accordance with the principles of Community preference, equal treatment and non-distortion of competition. In the applicant's opinion that obligation meant that the Commission was bound to suspend the claw-back in intra-Community trade, or at least to reduce the amount thereof until such time as the Court holds Article 9 of Regulation No 1837/80 to be invalid, in order that its effects should be reduced to the minimum.

The applicant submits that the Commission's failure to take such action amounts to a breach of the principle of Community preference inasmuch as the fact that there is no claw-back in the case of exports to non-member countries encourages, from the point of view of both British producers and buyers in non-member countries, exports outside the Community instead of encouraging the disposal of Community produce primarily on the intra-Community market. Apart from disturbing the pattern of trade, such a situation distorts competition to the detriment of traders in the Community who find themselves compelled to finance, by means of the claw-back, the activities of traders in

non-member countries who are thus transformed from customers into competitors. The Commission's argument to the effect that suspending the claw-back in the case of non-member countries is necessary as a temporary measure to create the effect of an export refund does not, in the applicant's opinion, make the Commission's conduct lawful. Article 17 (2) of Regulation No 1837/80 provides, in accordance with the principle of equal treatment, that the export refund is to be the same for the whole Community. Yet the result of the Commission's decision not to operate the claw-back is, both in law and in fact, the creation of an export refund which benefits exclusively British producers and encourages them to sell their produce on markets in non-member countries in defiance of the principle of Community preference.

In the long term, therefore, such discrimination between traders in the Community, and hence between consumers, is liable to lead to a decrease in Community consumption resulting in over-production, for the disposal of which intervention measures will be required, thus increasing the drain on the Community's budgetary resources.

The applicant concludes that it must "necessarily" be inferred from the principle of Community preference that the Commission was under a duty under Article 33 of Regulation No 1837/80 to place traders in other Member States in a similar position to that acquired on the markets of non-member countries by traders in the United Kingdom and, in order to do so, to suspend the claw-back in the case of exports between Member States.

(c) The applicant maintains that the loss it has incurred is almost exclusively the result of the increase in the cost of British mutton and lamb in consequence of the claw-back upon exportation. It concedes that the rise in the value of the pound compared to the Deutschmark affects price formation. Nevertheless, it considers that such distortion is not liable to reduce the volume of trade to any appreciable extent and that, moreover, Community law has the appropriate means for dealing with such an effect — for instance, a monetary compensatory amount may be introduced or parities may be adjusted. For that reason the applicant considers that its losses are essentially attributable to the claw-back and that the situation may be remedied by repealing Article 9 (3) of Regulation No 1837/80, or by suspending the claw-back pursuant to Article 33 of the same regulation or, finally, by altering the conditions under which the charge may be levied by amending Article 9 (1) and (2) (the provisions governing payment of the variable slaughter premium).

It adds that in general terms it may be said that the whole machinery set up by the Community has been thrown out of balance by fixing at too high a level prices which have been determined, as described above, in order to satisfy the interests of certain categories of producers (the French, in particular) to the detriment of other traders.

(d) The applicant submits that the manifest and serious infringement of superior rules of Community law by the

Community institutions — the existence of which it considers it has demonstrated — is in itself sufficient to amount to a fault for which the Community is liable. It adds that awareness of the wrongful conduct of the Community institutions emerges clearly from the fact that the Commission "states in various parts (of its defence) that it did not propose the adoption of the provisions contained in Article 9 of the regulation".

(e) In order to meet the fifth requirement, namely that the damage must be quantifiable, the applicant submits to the Court a statement of the losses it has suffered, drawn up by the Düsseldorfer Treuhand-Gesellschaft Altenburg und Tewes AG, which has advised it for 53 years and is therefore particularly well placed to judge the way in which its business has developed.

Its report is based on the following factors:

Income and expenditure for the years 1976 to 1979, based on the annual balances sheets;

A calculation of the extra expense incurred between January and March 1981, compared with that incurred for the same period in 1980;

On the basis of those figures, estimates for the period between 20 October 1980 and 30 December 1980 (the first months of operation of the common organization of the market, for which period the applicant has no "concrete figures").

A comparison of these figures shows that during the first three months of 1981 the quantities which were imported fell considerably, whilst there was a substantial increase in purchase prices.

The report goes on to calculate the loss incurred during the period in question, on the basis of:

The drop in turnover;

The reduction of the profit margin; and

The reduction of the company's utilization of its production capacity with the consequenes of that reduction on running costs.

The applicant concludes from the foregoing that its losses amount to DM 375 000, after it has deducted half of the actual losses incurred in order to exclude two causes of damage which the applicant does not intend to impute to the Community; commercial risk and exchange risks attributable to the development of the parity of the pound in relation to the Deutschmark.

The applicant submits that on those grounds its application for compensation should be allowed.

As to the Commission's subsidiary claim concerning the Court's power to restrict, pursuant to the second paragraph of Article 174 of the Treaty, the effects of a declaration that Article 9 of Regulation No 1837/80 is invalid, the applicant takes the view that the second paragraph of Article 174 does not apply in actions for damages and that in any case it must be assured that its claim for compensation for damage will not be adversely affected.

B — The *Council of the European Communities* reviews the political background to the adoption of Regulation No 1837/80 before going on to describe its provisions and the operation of the common organization of the markets during the first marketing year, 1980 to 1981.

Replying to the argument put forward by the applicant, the Council deals first with the question of admissibility and then with the substance of the case.

1. In so far as admissibility is concerned the Council has decided not to raise a preliminary objection under Article 91 of the Rules of Procedure of the Court. However, it points out that the applicant's choice of remedy is not the right one and that its application for compensation is an artifice.

The Council points out first that underlying the action for damages is an attempt by the applicant to have the validity of the claw-back measures reviewed by the Court, a purpose for which the proper procedure is that for obtaining a preliminary ruling under Article 177 of the Treaty.

The Council then challenges the applicant's claim that it is unable to make use of the procedure under Article 177. Numerous examples are to be found in the case-law of the Court of questions referred to it for a preliminary ruling by a civil court or tribunal called upon to decide a dispute concerning the purchase price of a product (for instance, the judgment of 5 July 1977 in Case 114/76 *Bela-Mühle Josef Bergmann KG* [1977] ECR 1211). Contrary to the applicant's submission, therefore, it was not essential for the administrative measure prescribing the claw-back to have been addressed to it directly in order for it to be able to initiate proceedings in the course of which a question might be referred to the Court for a preliminary ruling.

The Council also emphasizes that the applicant is endeavouring by means of its action for damages to challenge the very structure of the common organization of the market in mutton and lamb, in particular the intervention measures which may be varied according to the production regions. It is the opinion of the Council that such an action may not be brought in the form of proceedings based on the second paragraph of Article 215 of the Treaty and may be based only on an application for annulment. The applicant's choice of remedy is therefore open to objection and was selected solely in order to evade the restrictions concerning applications for annulment which prevented it from making use of the latter remedy.

2. The Council considers that the application is based on complaints which are unfounded.

(a) As far as the alleged lack of a statement of reasons is concerned the Council wishes to point out that it does not consider that disregard of the obligation to state reasons constitutes a sufficiently serious breach of a superior rule of law for the protection of the individual within the meaning of the case-law of the Court of Justice. Therefore, even if the Court were to consider that the statement of reasons was inadequate that would not necessarily entail recognition of liability on the part of the Community.

Furthermore, the Council considers that a clear indication of the adequacy of the reasons given for introducing the claw-back is to be found in the closing words of the second recital in the preamble to Regulation No 1837/80 as well as in the general background to the regulation. The claw-back is inseparable from the slaughter premium, which is clearly defined as being an alternative to the other intervention measures provided for by the regulation. The need for introducing the claw-back is itself explained in unambiguous terms. The claw-back which comes into operation upon exportation from the area within which the slaughter premium was granted is designed to avoid the emergence of distortions of competition and disturbances in relation to the prices fixed in other production regions. That aim, and the way in which it relates to the other intervention measures provided for in Regulation No 1837/80, were clearly set out, moreover, in the seventh recital in the preamble to Council Regulation (EEC) No 2644/80 of 14 October 1980

laying down general rules for intervention with regard to the sheepmeat and goatmeat sector (Official Journal L 275, p. 8), which was adopted prior to the entry into force of Regulation No 1837/80, the basic regulation. The Council is therefore of the opinion that it has satisfied the obligation to state reasons as defined by the Court in its judgment of 12 July 1979 (Case 166/78 *Government of the Italian Republic* v *Council of the European Communities* [1979] ECR 2575).

(b) In reply to the applicant's allegation that the system established by Regulation No 1837/80, in particular the claw-back, is unlawful, the Council submits the following arguments.

The Council considers that the real point of law at issue in the present case is whether or not regional aid may be granted in the context of a common organization of the markets. The Council takes the view that Community law does allow for such a possibility provided that the machinery is adopted on the basis of objective criteria (which was the case, in view of the peculiarities of the various national markets in mutton and lamb prior to the entry into effect of the common organization), and provided that the effects produced by the system of regional aid are geographically confined to the area in receipt of the aid. As far as those requirements are concerned the Council points out that under the agricultural law of the Community there are a number of systems, such as that of the variable slaughter premium and the claw-back, under which a financial benefit is granted which must be repaid in certain cases. That is so, for example, in the sector of beef and veal where there is a slaughter premium for adult bovine animals (introduced by Council Regulation No 870/77 of 26 April 1977, Official Journal L 106, p. 14) which is repaid to the national intervention agency if the animals are exported outside the zone in which the premium is granted, by means of the payment of an "equal amount" which is collected under the conditions laid down in Commission Regulation No 926/77 of 29 April 1977 (Official Journal L 109, p. 4). (Both regulations have since been renewed.)

In the present case, in view of the variety of ways in which the national markets were organized previously, the Council maintains that it had no option but to introduce a common system which allowed for these regional differences at the beginning but whose aim was to achieve uniform prices gradually over a period of four years.

In support of its argument the Council relies on Article 39 (2) (b) of the Treaty which expressly provides that account is to be taken of the need to effect the appropriate adjustments by degress.

The Council contends that its approach is clearly explained in Articles 3 (4) (ii) and 34 of Regulation No 1837/80; the result was to put into effect, at the first stage, a new combination of rules for stabilizing the markets combining the features of a "classical" intervention system with those specific to the British system of deficiency payments. Thus regional prices were fixed pursuant to Article 3 (4) (i) of Regulation No 1837/80 on the basis of the market prices recorded during 1979, the year of reference, (or on the basis of estimates for 1980). As far as the special case of the United Kingdom was concerned, at the request of the British representative the Council fixed a reference price for Region 5 at "a level slightly higher" than

that obtained by theoretical calculation in order to take into account the effects of the closure of the French mutton and lamb market on the movement of British prices during the marketing years preceding 1980.

In its judgment of 25 September 1979 (Case 232/78 *Commission of the European Communities* v *French Republic* [1979] ECR 2729) the Court declared that that partitioning of the French market was unlawful and had a damaging effect on the determination of British prices. The Council therefore considers that it adhered to the Court's decision inasmuch as it fixed the British prices at a slightly higher level, and points out that in any case this rectification by way of increase was in accordance with the adjustments referred to in Article 3 (4) (ii) of Regulation No 1837/80 which are designed to achieve uniform prices within the common organization of the market.

In view of these considerations it is clear, according to the Council, that notwithstanding the special regional provisions, which are destined to disappear, the scheme introduced by Regulation No 1837/80 bears the same characteristics in all the Member States and is inspired by a clear-cut aim to achieve uniformity. It is therefore wrong to maintain, as does the applicant, that the machinery introduced by Article 9 of the regulation is unlawful *vis-a-vis* Community law by reason of the fact that it is geographically restricted to one or more regions in the Community.

In this connection, the Council first of all denies that the claw-back may be regarded as a charge having an effect equivalent to customs duties which is prohibited by the Treaty and by the case-law of the Court (Joined Cases 80 and 81/77, cited above). On the contrary, the claw-back is an economically neutral measure the purpose of which is to offset the slaughter premium paid to the producers, from which it is inseparable. Failure to recover the premium would have the effect, by contrast, of subsidizing exports in a manner which is prohibited by Article 92 (1) of the Treaty and would bring down prices in other production regions, distort competition and precipitate intervention buying on those markets in order to maintain the regional prices at the level of the price which is guaranteed to local producers. It is therefore vital that an unusual advantage which is given by reason of special local conditions to British producers and consumers should not be extended without good reason to traders in other regions of the Community where the conditions for payment of the variable slaughter premium are not met owing to the satisfactory state of the market.

The Council also rejects the complaint that the system at issue is discriminatory. In the first place, producers in the Community have a guaranteed minimum income throughout the Community of 293 ECU; if there is discrimination, therefore, it must be against consumers. In that respect, the Council wishes to point out that a difference in treatment does not signify discrimination unless it is based on an arbitrary distinction, which is not the case here. A common organization of the markets based on a single market and uniform prices can be

established only gradually, especially when differences in actual consumer prices prior to the entry into effect of the common system were as marked as in the case of the market in mutton and lamb. The Council endeavoured to reduce the disparities by providing for the introduction of uniform prices by means of adjustments by degrees over a period of four years. The differences in price levels referred to by the applicant are merely the result of these objective differences and may not therefore be regarded as discriminatory.

The Council points out in this respect that under Community law there are other systems which distinguish objectively between consumers and yet are not for that reason discriminatory. That is true, for instance, of the system for disposing of butter at reduced prices which was introduced by Council Regulation No 269/79 of 25 June 1979 (Official Journal L 161, p. 8).

Lastly, the Council rejects the argument to the effect that the system in question infringes Article 43 (3) (b) of the Treaty which requires newly-created common organizations of markets to ensure conditions for trade within the Community similar to those existing in a national market.

It observes, first, that this obligation is not one designed for the protection of individuals, and whilst failure to comply with it may affect the validity of the measure in question it cannot give rise to liability on the part of the Community.

Secondly, the Council believes that it is justified in maintaining that there is no such infringement and that the system in question is designed, on the contrary, to meet the requirements of Article 39 (2) (b) of the Treaty which requires the appropriate adjustments to be effected by degrees. The Council wishes to emphasize once more the very wide range of national systems which existed previously and the interests of economy which made it imperative for the Council, both in order to avoid distortions of competition and serious economic consequences for producers and in order to husband the limited economic resources of the Community budget, to construct an intervention system which combined the traditional intervention machinery with elements taken from the deficiency payment system.

3. Lastly, the Council is of the opinion that the application does not meet the requirements of substance laid down in the second paragraph of Article 215 and defined in the case-law of the Court.

The Council interprets the decision of the Court in its judgment of 4 March 1980 (Case 49/79 *Richard Pool* v *Council of the European Communities* [1980] ECR 569), and in particular paragraph 8 of that decision (at p. 580), as requiring that in any application for compensation the applicant must first provide *prima facie* evidence that he has in reality suffered the damage he claims to have suffered, in the absence of which the Court will be unable to review the validity of the legal measure which is alleged to have been the cause of the damage.

In this regard, the Council considers that neither proof nor *prima facie* evidence of the existence of the alleged damage has been supplied, for the applicant has merely produced a general estimate based on "hypothetical statements".

The applicant is in fact challenging the minimum price which is guaranteed in the general interest by the Council for producers in Region 5 (the United Kingdom). Yet that price was fixed by the Council in the light of the special features of the British market in mutton and lamb within the "wide discretion" which, as is recognized by the Court, it enjoys in implementing the common agricultural policy and the effects of which, even if harmful to individuals, do not create liability on the part of the Community (judgment of 25 May 1978 in 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).

The Council is also of the opinion that the applicant is not justified in questioning the lawfulness of Regulations Nos 3191/80 and 932/81, whereby the Commission suspended the claw-back in trade with non-member countries for the 1980 to 1982 marketing years. Those measures, which do not concern the applicant, were adopted by the Commission after evaluating the situation in regard to exports of mutton and lamb from the Community in order to compensate for the temporary absence of implementing provisions applicable to export refunds for mutton and lamb. Assessing the need for such measures is a matter for the Commission within its powers of administration, and cannot depend on the views of an individual trader.

The Council concludes that the real cause of the loss which the applicant claims to have incurred is not to be found in the implementation of the common organization of the markets introduced by Regulation No 1837/80 but in the abolition of the previous national market organizations. The truth is that the combined effect of the various national systems allowed the applicant on the one hand to take advantage of the deficiency payments system, which had the same effect as an export subsidy, and on the other hand to discover in the German market a profitable market for its low-priced purchases, benefiting from prices in continental Europe which were considerably higher owing to the prices obtaining on the French market.

In fact the applicant would like to have the claw-back suspended whilst the variable slaughter premium continues to be paid to British producers out of public intervention funds so as to preserve a situation characterized by favourable prices such as that which existed prior to the entry into effect of the common organization of the market. As to that, the Council observes that there is no provision or principle of Community law which compels it when introducing a common organization of the market to preserve, for the benefit of a trader, the advantages which resulted from the combined effect of two national intervention systems.

C — The *Commission of the European Communities* first reviews the material and legal situation of the market in mutton and lamb before and after the entry into effect of the common organization of the markets in the sector of mutton and lamb.

1. Its analysis shows that the entry into effect of the common organization of the markets entailed a number of difficulties in adaptation and yet, against all expectations, was characterized by

widespread price stability and little recourse to intervention save in Region 5, the United Kingdom, where a fall in prices was recorded.

As far as trade with non-member countries is concerned, the Commission notes that the flow of imports has been successfully stabilized as a result of the rapid conclusion of voluntary restraint agreements, but that exports originating in the Community, which means exports from the United Kingdom, in fact fell alarmingly and, since there was no export refund scheme, led the Commission to order the temporary suspension of the claw-back in respect of goods destined for non-member countries (Regulations Nos 3191/80 and 932/81).

As far as the flow of trade between Member States is concerned the Commission observes that trade in British mutton and lamb destined for other Member States which are not producers (the Benelux countries and the Federal Republic of Germany) has fallen considerably. The reason, according to the Commission, is to be found in the fact that the guide level (85 % of the basic price) upon which payment of the variable slaughter premium depends was fixed at too high a level. Since the basic price is close to the French price British mutton and lamb is marketed in the United Kingdom, as a result of the slaughter premium paid to producers, at a price which represents 85 % of the French price. Taking into account the cost of transport and marketing such prices make export to markets in the Benelux countries and Germany unattractive for British producers since the prices on those markets are lower than the French prices. That is why the Commission considers that it is necessary to reduce the guide level to 80 % of the basic price in order to bring about a reduction in the slaughter premium, thereby making markets in continental Europe other than the French market more attractive again for traders who obtain supplies from the United Kingdom. The Commission recently submitted a proposal to the Council along those lines.

However, the Commission considers that such adjustments do not imply any criticism of the claw-back mechanism, which it claims is economically neutral. Changes in monetary parities within the Community and certain seasonal factors have, in its view, had a more influential role in the evolution of the various regional markets under the new common organization of the market in mutton and lamb.

The Commission points out in that context that recent alterations of monetary parities (the fall of the pound on the exchange markets and the revaluation of the Deutschmark) are liable to improve conditions on the intra-Community market in British mutton and lamb considerably, especially as in the absence of the charging of monetary compensatory amounts under the organization of the markets in mutton and lamb such currency movements have direct repercussions on export prices.

2. Next, the Commission denies any non-contractual liability on its part. It notes that it is alleged in the application that the Commission's failure to suspend the claw-back under Article 33 of Regu-

lation No 1837/80 constitutes unlawful conduct.

The Commission points out that an application of that nature must be based on the proposition that there has been, on the part of the institution alleged to be at fault, a failure to fulfil a binding legal obligation. That is not the case here since no provision — and particularly not Article 33 of Regulation No 1837/80 — compels the Commission to suspend the claw-back. Had it suspended the claw-back, moreover, the Commission would have deprived a provision drawn up by the Council of its meaning, a circumstance which is legally unacceptable and which would in the long run disturb prices on regional markets in the Community to such an extent that the applicant would be the first to suffer.

3. The Commission goes on to argue that the applicant has failed to demonstrate either the existence of a sufficiently serious breach of a superior rule of law designed to protect it, or the existence of arbitrary conduct on the part of the Community institutions. Yet the Court has consistently held (in particular in its judgment of 5 December 1979 in Joined Cases 116 and 124/77 *G. R. Amylum NV* and *Tunnel Refineries Limited* v *Council and Commission of the European Communities* [1975] ECR 3497) that such evidence is a *conditio sine qua non* for an application for compensation for damage based on the adoption of defective legislative measures to succeed.

In the first place, the Commission states, the claw-back may not be regarded as a charge having an effect equivalent to customs duties prohibited by the Treaty. The claw-back, which is an economically neutral measure and has no influence on the price system outside the production area in which the slaughter premium is paid, has nothing in common with the charges condemned by the Court in Joined Cases 80 and 81/77, which concerned import charges designed to discourage imports of Italian wine into certain Member States. The Commission points out the failure to operate the claw-back, on the contrary, would have converted the slaughter premium into an export subsidy which is prohibited by the Treaty.

Furthermore, to regard the claw-back system as discriminatory is to overlook the function of the slaughter premium created by the Council in order to reconcile gradually the national situations which existed before the entry into effect of the common organization. The introduction of the slaughter premium was not aimed at conferring a special advantage on certain producers but at avoiding, whilst adhering to the aims of the common agricultural policy as laid down by the Treaty, any sudden drop in the consumption of mutton and lamb on the main Community market at a time when the Community was unable to reduce the traditional flow of imports of mutton and lamb from non-member countries without failing in its international commitments (in particular within the framework of the General Agreement on Tariffs and Trade) and when the Community budgetary resources were not sufficient to support the wholesale adoption of a system of consumer subsidies, which would in any case entail risks, in all the Member States.

In the Commission's view the disparities between the situations on different mutton and lamb markets in the Community compelled the Council to authorize certain special systems to operate on sections of markets within the framework of the new common organ-

ization in order to avoid widespread disturbance of the market in mutton and lamb.

Community law recognizes the principle of such special systems, in particular in Article 42, concerning the granting of aid by the Council, and Article 43 (3) (a) of the Treaty which imposes the binding requirement that any common organization of the markets must offer safeguards for the employment and standard of living of the producers concerned equivalent to those which they enjoyed under the previous national organizations. In view of the constraints described above to which the Community legislature is subject the only acceptable solution was thus a system composed of diversified regional prices, adjusted by means of the claw-back in order to maintain the strictly regional nature of the measures which had been adopted.

The Commission does not deny that such a system (the transitional nature of which is clearly stated, the date on which it is to end being 1 April 1984, the date on which the regional prices are to be subsumed into a uniform price) gives rise to inequalities in treatment between traders. But it emphasizes that the measures are objectively justified, are necessary in order to achieve the aims of Article 39 of the Treaty and do not constitute arbitrary rules.

At the same time the Commission rejects the complaint that suspending the claw-back in respect of exports to non-member countries constitutes a breach of the principle of Community preference. The Commission wishes to emphasize that the suspension is a temporary measure (as is clearly indicated in Regulations Nos 3191/80 and 932/81) which is justified because no common policy on exports has been drawn up by the Council. The maintenance of the flow of exports of British meat to their traditional markets forms a vital element in the equilibrium of the intra-Community market in general and of the British market in particular, so that were such exports to collapse the Community institutions would have a duty to adopt the measures necessary to ensure the revival of them.

The Commission observes in that regard that to dispute the economic choice that the measure represents is to cast doubt upon all measures designed to encourage exports in agriculture and to challenge the validity of the export refund schemes.

The Commission expresses grave doubts, in any case, as to the existence of the alleged loss of access to the markets in non-member countries asserted by the applicant. The Commission considers that the applicant's explanations concerning its Swiss export market constitute evidence that it began to sell British mutton and lamb on that market only during the months immediately following the entry into effect of the common organization of the market. The Commission states that the reasons for this drive for custom remain "obscure" as far as it is concerned, but it suggests that the explanation is to be found in where the applicant's commercial interests lay during that particular period: when it found that the claw-back had been effected in respect of exports to non-member countries from the date of the entry into effect of the common organization (with the result that selling prices for British meat on the Swiss market suddenly rose) the applicant discovered in this market a profitable way of disposing of the meat

stocks it had purchased in the weeks prior to the entry into effect of Regulation No 1837/80.

The Commission maintains that its description of these commercial phenomena serves to show that the Community institutions were well-advised to suspend the claw-back in respect of exports to non-member countries in order to halt the increase in the price of exported British meat and to bring to a stop the resulting decline in trade.

As to the losses for which the applicant claims compensation the Commission "protests vigorously" against its method of calculating them and challenges the substance of the applicant's claim to have incurred substantial losses as a result of the Community's legislative action. The Commission emphasizes that the applicant was in no way entitled to have "a situation characterized by deflections of trade and national export subsidies" made permanent and that if British mutton and lamb could not be sold in Germany at their market price that circumstance was attributable only to the attitude of German consumers and price levels on the British market.

The Commission points out that the applicant's argument concerning the supposed causal link between the introduction of the common organization and the loss said to have been incurred contains inconsistencies. The applicant blames first the intervention mechanism in Article 9 of Regulation No 1837/80 (in the application) and then the method whereby regionalized prices are fixed (in the reply).

The Commission considers that is has refuted the argument concerning the effects of the mechanism introduced under Article 9: payment of the variable slaughter premium is objectively justified and the claw-back, which is an economically neutral measure, is necessary for the survival of the whole common organization.

As far as the fixing of prices is concerned the belief that the regionalized reference price was fixed solely on the basis of the interests of French producers is erroneous. The Italian and Greek reference prices, for instance, are considerably higher than the French price, and as for the prices for Regions 3 and 4 (Northern Europe and Ireland), they were determined on the basis of traditional export patterns from those markets to France. The United Kingdom price is the only one which was fixed taking into account another criterion in addition to the previous market price, namely the trend which would ordinarily have been followed on that market had the measures restricting imports on the French market not prevented British meat from gaining access to that profitable market.

The Commission generally underlines the fact that the implementation of a common price policy is possible only if it is based on the upper average of the previous prices, for if it is not, it ceases to be realistic for the producers. The increase in the British prices was therefore inevitable, although the Council sought to moderate its effects by fixing different prices which could be gradually aligned with each other over four years, with the result that other regional prices, including those in Region 3, [1] rose in relation thereto. It would have been unrealistic not to realize that the business of some traders might be affected by that, especially as some of them, like the

1 — The Benelux countries, Denmark and the Federal Republic of Germany

applicant, had enjoyed unusually advantageous trading conditions in the past owing to the disparity between the previous national systems. The Commission emphasizes, on the one hand, that the applicant had no right to have the previous situation maintained and, on the other hand, that without the implementation of the measures provided for in Article 9 of Regulation No 1837/80 the effects of the common organization of the markets would have brought the British price to the same level as the average price on the Continent, a circumstance which would have had at least as great an influence on the applicant's business as the present, and temporary, claw-back.

4. Lastly, the Commission submits *ex abundanti cautela* observations on what the consequences might be if in the Court's decision in the case, Article 9 of Regulation No 1837/80 were considered to be invalid.

The Commission takes the view that such a decision would, by virtue of Article 176 of the Treaty, produce binding effects for the Community institutions beyond the scope of the present dispute.

The Commission states that it is certain that the application will not succeed. Nevertheless, it draws the Court's attention to what the effects, and the economic and administrative repercussions, of such a decision would be if the Court did not exercise its option of deciding, pursuant to the second paragraph of Article 174 of the Treaty, that the measures which have been adopted in the past in order to implement the provisions which are declared invalid were not to be affected by such invalidity.

D — The *Government of the French Republic* considers that the applicant has chosen the wrong remedy and submits that in any case the application must be dismissed as unfounded.

1. The French Government observes, first, that although the applicant's conclusions are in the form of an application for compensation, their true purpose is to obtain from the Court a review of the validity of the claw-back system introduced by the Council. In support of this observation the French Government notes that the submissions upon which the application is based are aimed at demonstrating the unlawfulness of the action of the Community institutions. The application is therefore a "disguised" application for annulment which fails to have regard to the system of legal remedies established by the Treaty.

Nevertheless, it should be noted that the French Government does not maintain that the application is inadmissible.

2. As far as the substance of the case is concerned the French Government states that the application in question is based on non-contractual liability and is brought in order to challenge a legislative measure involving choices of economic policy. According to consistent case-law of the Court such an application may not be regarded as well founded unless, in the first place, it is established that the measure which gave rise to the damage was of an unlawful nature and, in the second place, the applicant furnishes proof of the existence of a sufficiently serious breach of a superior rule of law for the protection of individuals. In addition to those preconditions governing the existence of liability on the part of the Community a further requirement has emerged from the case-law of the Court, namely that for the applicant to succeed in its claim the Court must ascertain whether in the circumstances of the individual case there is damage and whether it was caused by the conduct of the Community.

The French Government then endeavours to show that in introducing the claw-back system the Council neither failed to fulfil its obligation to state the reasons for its action nor infringed the provisions of the Treaty, in particular those prohibiting the imposition of charges having an effect equivalent to customs duties in trade between Member States.

(a) The duty to state reasons which is laid down in Article 190 of the Treaty was entirely satisfied in this instance. The second recital in the preamble to Regulation No 1837/80 shows clearly that the variable slaughter premium must, in order to avoid "disturbance in competition" liable to affect the stability of markets in other production regions in the Community, be offset by the charging of an amount equivalent to that premium when mutton and lamb are exported outside the territory of the Member State concerned.

The statement of reasons thus indicates, in accordance with the requirement laid down in a consistent line of decisions of the Court, the general circumstances which led to the adoption of the provision in question together with an outline of the aims which the provision is intended to achieve.

In addition, the French Government expresses "grave doubts" as to whether any inadequacies in the statement of reasons for a legislative measure of general application may constitute "a sufficiently serious breach of a superior rule of law for the protection of individuals".

(b) As to the infringements of the Treaty which the applicant claims to detect in connection with the Council's adoption of Article 9 (3) of Regulation No 1837/80, the French Government considers that the Council in no way breached the restrictions placed by the Treaty or by general principles of law on the exercise of the discretion enjoyed by the Community authorities in implementing the common agricultural policy.

The common organization of the market in mutton and lamb introduced by Regulation No 1837/80 was the result of a compromise achieved in the face of widely differing market situations which were characterized by opposite choices of economic policy made by the Member States prior to the entry into effect of the common system.

In the light of the situation the Council was compelled to be selective in order to reconcile the vital interests of producers and consumers and this led the legislature to give temporary priority to some of the aims ascribed by Article 39 of the Treaty to common policies in the agricultural sector.

In the circumstances the Council chose, in order to take into account the particular characteristics of the original national markets, to set up machinery for stabilizing the markets which could be varied from region to region, and the effects of which were to be tempered by the fact that uniform prices were to be achieved gradually in order to avoid "dramatic consequences for producers in some regions". In the opinion of the French Government, moreover, the Court has already accepted the principle that a gradual approach such as this may be used when common policies are established, as may be seen in the judgments of 5 July 1977 (Case 114/76 *Bela-Mühle Josef Bergmann KG* [1977] ECR 1211), 2 July 1974 (Case 153/73 *Holtz & Willemsen GmbH* v *Council and Commission of the European Communities* [1974] ECR 675) and 21 February 1979

(Case 138/78 *Hans Markus Stölting* [1979] ECR 713) and the Court has also held that in the various elements of a common organization — including measures for stabilizing the markets — a temporary absence of uniformity and geographical restrictions, if based on objective criteria, are not unlawful. (See Case 153/73, cited above.)

By establishing in the case of the United Kingdom a scheme for stabilizing the market based on deficiency payments coupled with the claw-back in respect of exports from that production region the Council did not introduce a charge having an effect equivalent to customs duties in trade between Member States. On the contrary, it sought to avoid a sudden increase in prices for consumers on the most important market in the Community whilst ensuring that regionalized scheme did not disturb the natural formation of prices on the other markets in the Community.

The French Government points out in this connection that the two stabilization mechanisms which were provided for by Regulation No 1837/80 (intervention on the one hand and the slaughter premium on the other) are, because of the existence of such objective differences, mutually exclusive and have opposite effects in the way in which they operate. Intervention has a tendency to "draw" market prices upwards whilst the slaughter premium has the effect of bringing down consumer prices. It was therefore essential, in order to avoid mutual disturbances between the various regional markets, for the two systems of stabilization to be insulated from each other by means of the claw-back in respect of the export of mutton and lamb from one production region to another. If payment of the slaughter premium could not be offset by the claw-back the result would have been to subsidize exports from the United Kingdom, thus bringing down prices — and therefore producers' income — on the continental markets and precipitating the implementation of intervention measures costly for the Community budget and, moreover, liable to benefit British meat which had already at the advantage of a production premium paid by the Community.

The effect of subsidizing exports is highlighted, moreover, by the decision of the Community institutions to suspend the claw-back in trade with non-member countries in order to maintain the traditional patterns of export for British mutton and lamb. The claw-back thus constitutes, in trade between Member States, the indispensable complement to the slaughter premium without which the latter would seriously disturb the functioning of the common organization. It cannot, therefore, be regarded as a charge having an effect equivalent to customs duties.

In short, the claw-back makes it possible to ensure equal conditions of competition for producers in the different regions in the Community by bringing the prices of products for which the variable slaughter premium has been paid back to a level at least equal to that of the guide level, or 85% of the uniform basic price.

The French Government considers, therefore, that the claw-back which is an essential feature of the newly-established common organization, is in any event compatible with the provisions of the Treaty and, moreover, with all the provisions of the common organization, which:

Guarantee a fair income for producers by means of either intervention measures (Article 6) or the variable slaughter premium (Article 9);

Stabilize the markets and eliminate any discrimination between producers by means of the claw-back;

Guarantee conditions similar to those on a national market by facilitating price convergence as far as possible.

The French Government considers it necessary to emphasize in that context that recovery of the premium has not affected the situation on the British market. According to the statistics for 1980 to 1981 supplied by the French Government British production fell in general terms (21 000 tonnes less than the preceding marketing year) but exports from the United Kingdom to other markets in the Community rose considerably (an increase of 14% in January 1981, that is to say, 4 790 tonnes compared with 4 192 tonnes for the same period in 1980), especially to France (5 620 tonnes for the first four months of 1981, compared with 83 tonnes for the same period in 1980). Such a development is remarkable in view of the abolition of the deficiency payments (the amount of which was not recovered on exportation) and the considerable rise of the pound during that period. In the opinion of the French Government that development of the British market is proof of the absence of influence of the claw-back on the flow of trade between Member States. Since February 1981, admittedly, British exports have fluctuated somewhat; nevertheless, it should be observed that exports to non-member countries show a drop (39%) which is greater than that for exports to the other Member States (36%) and that the fluctuation is attributable to two features of the current economic situation: the decrease in British production, on the one hand, and the reduction in imports from New Zealand on the other (a drop of at least 40 000 tonnes for the 1980 to 1981 marketing year), a reduction which led to an increase in the consumption of local mutton and lamb.

The French Government observes, however, that the entry into effect of the common organization influenced the pattern of trade in British meat within the Community considerably. The influence is attributable to the opening of the French market to direct imports from the United Kingdom, thus eliminating deflected imports of those products via the Federal Republic of Germany or the Benelux countries. This resulted in a decrease in the traditional trading relationships of certain dealers, such as the applicant, but, the French Government observes, Community law and the decision of the Court of Justice place no obligation on the Community institutions, when constructing or implementing a common agricultural policy, to guarantee the continuance of traditional trading relationships established under the market conditions existing prior to the entry into effect of the common system (see the judgment of 13 November 1973 in Joined Cases 63 to 69/72 *Wilhelm Werhahn Hansamühle and Others* v *Council of the European Communities* [1973] ECR 1229), and 2 June 1976 in Joined Cases 56 to 60/74 *Kurt Kampffmeyer Muhlenvereinigung KG and Others* v *Commission and Council of the European Communities* [1976] ECR 711).

3. As to the loss which the applicant claims to have incurred the French Government considers that the latter has failed to prove, or even to supply *prima facie* evidence of, either the existence of the losses which it claims to have incurred or the existence of a causal link between the conduct of the institutions which is the target of its criticism and the alleged damage. As a result, and in accordance with a consistent line of decisions of the Court, the latter is not required to review the legality of the measures at issue and the application must be dismissed as unfounded.

The French Government considers that the applicant is merely accusing the Council of having placed it in a situation which is less advantageous than that which it enjoyed previously. However, it has been established in the judgments of the Court in Joined Cases 63 to 69/72 and Joined Cases 56 to 60/74, cited above, as also in the judgment of 4 October 1979 (Case 238/78 *Ireks-Arkady GmbH* v *Council and Commission* of the European Communities [1979] ECR 2955), that an individual may not ask the Court, in the guise of an application to have a Community regulation declared invalid, to maintain in existence a situation which is economically advantageous for him but prejudicial to the public interest.

Furthermore, the application cannot result in payment of compensation for, in the opinion of the French Government, the applicant has failed to furnish proof, as required by the case-law of the Court, that the losses it has suffered are in excess of those reasonable limits within which individuals are required to accept without compensation certain harmful effects on their economic interests as a result of Community regulations, even if the latter are invalid, and are therefore disproportionate, or proof that the disproportion affects the general interest and not merely its individual interests (see the judgment of 5 December 1979 in Joined Cases 116 and 124/77 *G. R. Amylum NV and Tunnel Refineries Limited* v *Council and Commission of the European Communities* [1979] ECR 3497, and 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, and Joined Cases 63 to 69/72, cited above).

IV — Oral procedure

At the sitting on 5 May 1982 oral argument was presented by Dietrich Ehle, Rechtsanwalt, for Julius Kind KG; by Bernard Schloh, acting as Agent, assisted by Arthur Brautigam, acting as Assistant Agent, on behalf of the Council of the European Communities; by Jörn Sack, acting as Agent, on behalf of the Commission of the European Communities; and by Noël Museux, Assistant Director of Legal Affairs at the Ministry for Foreign Affairs, assisted by Alexandre Carnelutti, Deputy Agent, on behalf of the Government of the French Republic.

The Advocate General delivered his opinion at the sitting on 9 June 1982.

Decision

1 By application lodged at the Court Registry on 4 May 1981 Julius Kind KG, a supply butcher established in Grevenbroich in the Federal Republic of Germany, brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the loss suffered by its business as a result of the provisions of Article 9 (3) of Council Regulation (EEC) No 1837/80 of 27 June 1980 on the common organization of the markets in "sheepmeat" and goatmeat (Official Journal L 183, p. 1) in the case of lamb imported from the United Kingdom and as a result of the provisions contained in Article 1 of Commission Regulation (EEC) No 3191/80 of 9 December 1980 on transitional measures concerning non-recovery of the variable slaughter premium for "sheepmeat" and goatmeat products exported from the Community (Official Journal L 332, p. 14) in the case of its exports or opportunities for exports to non-member countries.

2 The applicant seeks compensation amounting to DM 375 000, the loss which it considers it incurred between 20 October 1980, the date of the entry into effect of the common organization of the markets in mutton and lamb and goat's meat, and 31 March 1981, together with interest at 10% to run from the date on which its application was lodged. Finally, it requests from the Court a declaration that it is also entitled to compensation for losses incurred by it after 31 March 1981.

3 The action based on non-contractual liability brought by Julius Kind KG is founded upon the alleged unlawfulness of Article 9 of Council Regulation No 1837/80 and Commission Regulation No 3191/80.

4 Before the entry into force of Regulation No 1837/80 the markets in mutton and lamb in the Community differed widely from one Member State to another. According to the applicant, that situation enabled it to import from the United Kingdom mutton and lamb at prices which were commercially attractive by reason of the agricultural policy of the United Kingdom and, in particular, by reason of the subsidies (hereinafter referred to as "deficiency payments") paid by it to its producers.

5 The common organization of the markets introduced in 1980 is intended to assimilate the markets in the different Community regions gradually in order to achieve a uniform market and a uniform system of prices. Regulation No 1837/80 divides the States of the Community into five regions, now six, following the accession of Greece, by virtue of Regulation No 3446/80, for each of which there has been fixed a different reference price. This reference price is used to calculate a premium payable per ewe under Article 5 of the regulation, which is intended to "offset the loss of income which may result from the establishment of the common market organization". Article 3 (4) (ii) provides, however, for the establishment of a single Community reference price by the end of a transitional period of four years.

6 Regulation No 1837/80 fixes a seasonally adjusted basic price uniform throughout the Community. It is in relation to that basic price that intervention measures provided for in Articles 6 to 9 may be adopted. Apart from private storage aid Member States may choose between two intervention schemes: the purchase of fresh mutton and lamb by intervention agencies, and the payment of a variable slaughter premium.

7 Finally, subject to certain conditions Article 17 of the regulation empowers the Council to draw up general rules for granting export refunds which are to be the same for the whole Community.

8 Within the general context of those regulation the provisions challenged by Julius Kind KG may be described as follows:

9 Article 9 (1) of Regulation No 1837/80 provides that in the regions where there are no purchases by intervention agencies "the Member State or Member States concerned may pay a variable slaughter premium for sheep when the prices recorded on the representative market or markets of the Member State or Member States concerned are below a 'guide level' corresponding to 85% of the basic price. The guide level shall be seasonally adjusted in the same way as the basic price". According to Article 9 (2) the amount of that premium is to be equal to the difference between the guide

level and the market price recorded in the Member State or Member States concerned. Article 9 (3), to which Julius Kind KG takes particular objection, provides that the necessary measures are to be taken to ensure, in the event of payment of the premium referred to in paragraph (1), that an amount equivalent to that premium is charged for the mutton and lamb products referred to in Article 1 (a) when those products leave the territory of the Member State concerned. The amount equivalent to the slaughter premium, which is charged on exports, is commonly known as the "claw-back". Lastly, by virtue of Article 9 (5) expenditure incurred under those arrangements is to be deemed to form part of intervention for the purpose of regularizing agricultural markets.

10 Commission Regulation (EEC) No 3191/80, for its part, provides in essence that from 10 December 1980 until 31 March 1981, by way of derogation from Article 9 (3) of Regulation No 1837/80, there is to be no claw-back in respect of the export of the products in question from the Community.

11 Those are the provisions which, in the applicant's view have altered its economic situation. The introduction of the claw-back and the amount thereof, have increased export prices for meat from the United Kingdom. The applicant maintains that its turnover has thereby been reduced and its costs have had to be spread over a smaller number of transactions since some of its clients are no longer prepared to continue to buy from it in view of the trends in prices. The applicant also criticizes the Commission for failing to suspend the claw-back in respect of exports to Member States of the Community and for having practically barred it from the market in non-member countries which, as a result of Regulation No 3191/80, find it more advantageous to obtain their supplies of mutton and lamb direct from the United Kingdom.

12 As, in this case, a choice of economic policy which is reflected in legislative measures adopted by Community institutions is being challenged, it should be borne in mind that the Court has consistently held that the Community does not incur liability on account of such measures unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. Taking into consideration the principles in the legal systems of the Member States governing the liability of public authorities for damage

caused to individuals by legislative measures, the Court has declared that in the case of Community legislative measures characterized by the exercise of a wide discretion which is essential for the implementation of the common agricultural policy, the Community does not incur liability otherwise than, exceptionally, where the institution has manifestly and gravely disregarded the limits on the exercise of its powers.

The conclusions in the application based on the alleged unlawfulness of the Council regulation

The statement of the reasons on which the regulation in based

13 Julius Kind KG claims that the Council failed to provide an adequate statement of the reasons upon which its decision to introduce the intervention system described in Article 9 of Regulation No 1837/80 and, in particular, the claw-back system, was based.

14 That submission must be rejected. As far as the system of legal remedies is concerned the requirement of a statement of the reasons upon which measures adopted by the institutions are based is designed to enable the Court to exercise its powers of review of the legality of such measures in the context of Article 173 for the benefit of individuals to whom that remedy is made available by the Treaty. Nevertheless, any inadequacy in the statement of the reasons upon which a measure contained in a regulation is based is not sufficient to make the Community liable.

15 In this instance, moreover, the statement of the reasons upon which Regulation No 1837/80 is based satisfies the requirements of Article 190 of the Treaty. The second recital in the preamble to the regulation indicates clearly, with reasons, the various forms which the intervention measures in favour of producers of mutton and lamb may take. The same recital states expressly that in order to avoid "all disturbance in competition" an amount equivalent to the variable slaughter premium is to be recovered in the case of export of meat and animals from the territory of the Member State in which producers are paid that premium.

The other submissions

16 In its three further submissions Julius Kind KG claims that the provisions contained in Article 9 of Regulation No 1837/80, and in particular those contained in Article 9 (3) which lay down the claw-back system:

are in breach of the prohibition, laid down in Articles 9, 12, 13 and 16 of the Treaty, of the introduction in trade between Member States of charges having an effect equivalent to customs duties;

fail to meet the requirement, laid down in the second subparagraph of Article 40 (3) of the Treaty, that the common organization of agricultural markets must exclude any discrimination between producers or consumers within the Community;

and, finally, are in breach of the rule set out in Article 43 (3) (b) of the Treaty which requires the common organization to ensure conditions for trade similar to those existing in a national market.

17 While those criticisms are expressed in various ways and are based on different provisions of the Treaty they all challenge, on similar grounds, the machinery of the common organization of the market in mutton, lamb and goat's meat established by Council Regulation No 1837/80. A few general observations serve to illustrate the extent of the alleged breaches of law relied upon by the applicant, and hence the replies to be given to its criticisms.

18 The Council's intention of "attaining the objectives of Article 39 of the Treaty and, in particular, ... stabilizing the markets and ensuring a fair standard of living for the agricultural Community concerned", and to achieve "a single market based on a common price system", which is set out in the recitals in the preamble to Regulation No 1837/80, is expressed in the fixing of a uniform basic price for fresh or chilled sheep carcases. The intervention price which was adopted for purchases by the intervention agencies, and the guide level used in calculating the variable slaughter premium, each correspond to 85% of the basic price. Consequently, although, in order to take into account the different market situations in the Member States prior to the entry into force of the regulation, intervention methods may differ, the price level which causes them to come into operation remains the same.

19 It is true that because of the disparities in prices on the mutton and lamb markets in the Member States before its entry into force Regulation No

1837/80 makes provision for reference prices which differ between the five (and later six) regions into which the Member States are divided and that those reference prices are used in order to calculate the premiums payable per ewe. However, in the first place that situation is a temporary one because Article 3 (4) (ii) of the regulation provides for the achievement of a single Community reference price by the convergence of national reference prices in equal annual steps over four years and because Article 24 (1) provides that after the Commission has submitted a report and a proposal, the Council is to take before 1 April 1984 such appropriate measures as are required to ensure the functioning of the common organization of the market and in particular of the intervention and premium systems. In the second place, far from precluding any form of gradual approach in achieving the common organization of agricultural markets Article 39 (2) of the Treaty provides *inter alia* that "in working out the common agricultural policy and the special methods for its application, account shall be taken of . . . structural and natural disparities between the various agriculture regions" and of "the need to effect the appropriate adjustments by degrees".

20 It is in the light of those observations that each of the three submissions made by Julius Kind KG and analysed above must be examined.

21 First, within the framework of a regulation, namely Regulation No 1837/80, the provisions of which, according to Article 34 thereof, are to be reviewed before 1 April 1984, the charge on exports provided for by Article 9 (3) of that regulation is inseparable in principle from the intervention system which is made up of payment of the variable slaughter premium in Community regions where buying-in is not practised by the intervention agencies. Therefore, the charge does not constitute, as the applicant maintains, a charge having an effect equivalent to a customs duty but is in reality intended to offset exactly the effects of the slaughter premium, thereby enabling products from the Member States or regions in which the premium is paid to be exported to other Member States without disturbing their markets. If there were no claw-back, offers emanating from a Member State which applies the slaughter premium might be made on markets in other Member States at prices appreciably lower than those obtaining in the latter and might bring, through a fall in prices, the intervention measures which the Community would thus in fact be called upon to finance for a second time, albeit perhaps in another form.

22 Secondly, as regards the submission alleging discrimination it should be recalled that different treatment may not, as pointed out in the judgment of the Court of 13 June 1978 (Case 139/77 *Denkavit* [1978] ECR 1317), be regarded as discrimination prohibited by Article 40 (3) of the Treaty unless it appears to be arbitrary, or in other words, as stated in other judgments, devoid of adequate justification and not based on objective criteria.

23 The analysis set out above of the common organization of the markets in mutton and lamb shows that the intervention methods provided for in Regulation No 1837/80, the introduction pursuant to Article 9 of that regulation of a slaughter premium and of the claw-back, and the rules for determining the amount of that premium, are based on objective criteria. The intervention price, in the case of purchases made by a body authorized for the purpose and the guide level, in the case of payment of a slaughter premium, are identical. As already stated, each Member State chooses from the intervention methods provided for by the regulation the one which appears to it to be the most appropriate.

24 In those circumstances and in view of the discretion enjoyed by the Council in implementing a common organization of the markets which is still developing and taking into account the responsibilities which are entrusted to it by Articles 39 and 40 of the Treaty in order to determine which methods appear to it most suited for the purpose of ensuring the gradual achievement of a uniform market, the fact that intervention methods vary from region to region in the Community, and the consequences of such variation do not amount to discrimination.

25 Furthermore, as far as the discrimination of which the applicant claims to have been the object is concerned it must be remembered that its business benefited, until the entry into effect of the common organization, from the differences which existed between the situations on the various markets in the Community and that this enabled it, because the deficiency payments system did not include any compensatory payment on export, to import lamb from the United Kingdom at a relatively low price, at least when economic circumstances were favourable. However, although Article 39 of the Treaty designates in particular the stabilization of markets as an objective of the common agricultural policy, the concept of stabilization does not extend to the maintenance of positions established under previous market conditions,

as the Court has already stated in its judgment of 13 November 1973 (Joined Cases 63 to 69/72 *Wilhelm Werhahn Hansamühle and Others* [1974] ECR 1229).

26 In its last submission Julius Kind KG raises the objection that Article 9 of Regulation No 1837/80 fails to meet the requirement, set out in Article 43 (3) (b) of the Treaty, that the common organization of agricultural markets must ensure conditions for trade within the Community similar to those existing in a national market.

27 As already stated, Regulation No 1837/80 aims to achieve, by degrees, a uniform market for the Community, and the Council may not be criticized for adopting this gradual approach in view of both the differences which characterized the national markets before the introduction of the common organization and the means adopted by the Community institution to achieve its aim. More precisely, the introduction of the claw-back is designed to ensure the harmonization of prices in trade between Member States and to prevent artificial disparities between the prices of products in the exporting Member State and those in the importing Member State from creating distortions in this trade and obstructing the machinery for regulating and unifying the markets which has been established by the regulation. Thus the regulation, and in particular Article 9 thereof, is designed to ensure conditions for trade within the Community similar to those existing in a national market.

28 The submission is therefore no more well-founded than the preceding ones.

The conclusions in the application relating to the alleged unlawfulness of the Commission regulation.

29 The applicant claims that the Commission offended against the principles of Community preference and non-discrimination by suspending, in the case of exports to non-member countries, by means of Regulation No 3191/80 of 9 December 1980 (Official Journal L 332, p. 14), collection of the amount referred to in Article 9 (3) of Regulation No 1837/80 without at the same time suspending collection of that amount in trade between Member States.

30 It is stated in the recitals in the preamble to Commission Regulation No 3191/80 that it has been found that the charging of an amount equivalent to the variable slaughter premium for sheep on exports from the territory of the Member State concerned "gives rise to appreciable difficulties for export of the products in question from the Community". Pursuant to Article 33 of Council Regulation No 1837/80, which provides that "the Commission may adopt appropriate measures to facilitate the transition from the system in force in each Member State before the application of this regulation to the system established by this regulation", Article 1 of Regulation No 3191/80 provides as has been stated, that notwithstanding Article 9 (3) of Regulation (EEC) No 1837/80, the amount referred to therein is not to be charged on export of the products in question from the Community.

31 Inasmuch as Julius Kind KG complains that a similar suspensory measure has not been adopted for exports from one Member State to another, its application is unfounded. There is no provision in the Treaty and no general principle of Community law which requires measures based on the needs of exports to non-member countries to be extended to trade between Member States. On the contrary, for the reasons already indicated suspension of the claw-back in respect of exports from a Member State in which producers are paid the variable slaughter premium to another Member State where that premium is not paid could disturb the Community markets in mutton, lamb and goat's meat which Regulation No 1837/80 is designed to stabilize.

32 In so far as Julius Kind KG seeks to argue that the Commission's suspension of the claw-back on exports from the Community damaged its exports to non-member countries, inasmuch as Regulation No 3191/80 made it more advantageous for such countries to obtain their supplies directly from a country such as the United Kingdom in which the slaughter premium and, therefore, the claw-back were applied, it must be noted that one of the conditions governing liability on the part of the Community is that the applicant seeking compensation must have actually suffered damage.

33 In this instance the applicant's allegations to the effect that the suspension of the claw-back on exports to non-member countries deflected trade to its

detriment since its customers — the Swiss, in particular — transferred their custom to British suppliers, are devoid of substance.

34 An examination of both the file on the case and the statements made by the applicant at the hearing show that it had not built up any firmly established market in the countries which were not members of the Community. In the case of the Swiss market, in particular, which is the sole concrete example given of the expansion of its business outside the Community, the applicant has acknowledged that it did not seek to penetrate the Swiss market until September 1980. Nor has it been established, or even, in fact, maintained, that the applicant had acquired regular customers there before the introduction of Regulation No 3191/80. As a result it must be held that the applicant has failed to furnish even the beginnings of proof in support of its allegations that the Commission's conduct caused it to incur a loss and that it is not necessary to determine whether the other conditions governing liability on the part of the Community are met.

35 As a result of the foregoing the application for compensation for damage made by Julius Kind KG must be dismissed.

Costs

36 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including those of the intervener in support of the defendant.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs, including those of the intervener.**

Mertens de Wilmars Bosco Touffait
Due Pescatore Mackenzie Stuart O'Keeffe
Koopmans Everling Chloros Grévisse

Delivered in open court in Luxembourg on 15 September 1982.

For the Registrar
H. A. Rühl
Principal Administrator

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 9 JUNE 1982 [1]

Mr President,
Members of the Court,

1. This action has been brought against the Council and the Commission by a German undertaking, Kind, which imports and markets fresh meat from the Federal Republic of Germany and the United Kingdom. That undertaking seeks compensation for the loss it claims to have incurred as a result of the introduction by Council Regulation No 1837/80 of 27 June 1980 of a special export levy, and the failure on the part of the Commission to suspend that measure.

It will be remembered that the regulation established the common organization of the markets in mutton, lamb and goat's meat, the organization being based principally on the rules governing prices (a Community basic price, regionalized reference prices and prices recorded on representative markets in the Community), on the granting of a premium to producers to offset a loss of earnings resulting from the introduction of the common organization of the

1 — Translated from the Italian