No 846/80, that is to say in relation to the ECU and taking account of the franchise of 1.50 points, without prejudice, however, to rights definitively conferred on operators by individual decisions adopted by the competent national authority between 1 and 25 April 1980.

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

Delivered in open court in Luxembourg on 19 May 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 16 MARCH 1982

My Lords,

Staple Dairy Products Limited is an English company engaged in international trade in dairy products. The Intervention Board for Agricultural Produce is the authority responsible under United Kingdom law for the payment to traders of sums of money payable by the European Economic Community under the Common Agricultural Policy.

Between 1 April 1980 and 26 April 1980 the company exported quantities of dairy products from the United Kingdom to other Member States of the European Economic Community. At that time the pound sterling had appreciated against its representative rate to a degree such that positive monetary compensatory amounts had to be paid for trade in most sectors of agricultural products, including the dairy sector.

Article 2 (1) of Council Regulation No 974/71 of 12 May 1971 on Certain

Measures of Conjunctural Policy to be taken in Agriculture following the Temporary Widening of the Margins of Fluctuations for the Currencies of Certain Member States, OJ 1971, 257 (as introduced by Council Regulation No 1112/73 of 30 April 1973, OJ 1973, L 114/4) sets out a formula, which I shall call "the basic formula", for calculating monetary compensatory amounts not only for Member States whose currencies were aligned in the so-called "snake" (later superseded by the European Monetary System) but also for Member States whose currencies were not so aligned. The basic formula is summarized in the Court's judgment in Case 154/73 *Becher* v *Hauptzollamt Emden* (1974) ECR 19 at p. 25, paragraph 5, in these terms: "the compensatory amounts for the products in question shall be equal to the amounts obtained by applying to the prices the percentage difference between the parity of the currency of the Member State concerned and the arithmetic mean of the market rates during a period to be determined".

Between 1974 and 1976 the basic formula was amended so as to make provision for the deduction of a "franchise", finally set at the rate of 1.5 percentage points, from the sum calculated in accordance with the basic formula, in the case of currencies, such as that of the United Kingdom, which were not aligned in accordance with the "snake" and which had depreciated. (See Council Regulations No 2497/74 OJ 1974, L 268/5, No 475/75 OJ 1975, L 52/28, No 557/76 OJ 1976, L 67/1). The basic formula was further amended by Article 3 of Council Regulation No 652/79 of 29 March 1979, OJ 1979, L 841 which introduced the European Currency Unit (or ECU) into the system for fixing agricultural prices, and thereupon made a change in the system of franchises. It provided, inter alia, for the deduction of a franchise, at the rate of 1.5 points, from the sum calculated in accordance with the basic formula, in the case of floating currencies (including the pound sterling) whether they had depreciated in relation to their representative rates or not. By Article 5, that Regulation was to apply from 9 April to 30 June 1979. Its period of application was extended until 31 March 1980 by Article 1 of Council Regulation No 1264/79 of 25 June 1979, OJ 1979, L 161/1.

On 18 February 1980 the Commission submitted to the Council a proposal for a Council Regulation on, inter alia, monetary compensatory amounts which included provisions for the deduction of a franchise of 1.5 points in the case of Member States applying negative compensatory amounts, and one point in respect of positive compensatory amounts (OJ 1980, C 576 dated 7 March 1980). A further proposal was made by the Commission on 20 March 1980 that Regulation No 652/79 should continue to apply until 30 June 1980. On 2 April 1980, shortly after the expiry of Council Regulation No 652/79, the Commission made Regulation No 846/80, OJ 1980, L 91/1 which entered into force on 7 April 1980. This recited the legislative history of monetary compensatory amounts, and the changes brought about by Regulation No 652/79 through the

introduction of the ECU into the common agricultural policy and in the system of franchises. The recitals also recorded that it had proved impossible for the Council to adopt, before the end of March 1980, legislation to prolong the system embodied in Council Regulation No 652/79 and

"in order to avoid a hiatus in the system resulting, in particular, in an increase or a reintroduction of monetary compensatory amounts for certain Member States, it appears necessary, in view of the overriding public interest and as a precautionary measure pending a final decision on the matter by the Council, to continue to apply the system in its present form, to wit, the calculation of monetary compensatory amounts in relation to the ECU and taking into account the franchises provided for by Regulation (EEC) No 652/79".

Accordingly, the Commission set out in that Regulation monetary compensatory amounts assessed on the basis of Council Regulation No 652/79.

The Court is told that "between 1 April 1980 and 26 April 1980 the defendants have paid to the plaintiffs monetary compensatory amounts on their aforesaid exports, after making a 1.5% point deduction".

The Court is not told what proportion of the exports, effected by the company between 1 April and 25 April 1980, took place before 7 April 1980, and could not for that reason be affected by Commission Regulation No 846/80. The Commission contend that transactions during the first week are in any event covered by the legislation in force at 30 March 1980.

On 18 April the Commission made a further Regulation (No 967/80 OJ 1980, L 103/1) fixing monetary compensatory amounts on the same basis, but to take account of currency changes which had occurred.

On 26 April 1980 there entered into force Council Regulation No 1011/80 of 23 April 1980, OJ L 108/3, which provided in Article 1 that

"With effect from 1 April 1980 the date '31st March 1980' appearing in the second subparagraph of Article 5 of Regulation (EEC) No 652/79, shall be replaced by '30th June 1980' without the individual rights acquired by operators being thereby affected".

In an action in the Commercial Court in London the Company as Plaintiffs contended that for the period after 31 March 1980 the franchise of 1.5 points should not have been deducted; and that Commission Regulation 846/80 was invalid in so far as it purported to provide for the deduction of a franchise. The judge who heard the case took the view that its resolution depended upon the validity of Commission Regulation No 846/80 and the interpretation of Article 1 of Council Regulation No 1011/80. Accordingly he asked this Court to rule upon three questions. The first asks whether the competent authorities in the United Kingdom (the Defendants) were bound in respect of transactions undertaken between 1 April and 26 April 1980 to pay monetary compensatory amounts without deduction of a franchise of 1.5 points. The second asks whether Commission Regulation No 846/80, adopted after the period of application stated in Regulation No 652/79 as amended, is invalid

in that it purported to deduct the franchise from the relevant monetary compensatory amounts before Council Regulation No 1011/80 was published. The third calls for an interpretation of Article 1 of Council Regulation No 1011/80, for the purpose of determining whether an enterprise which had exported dairy products from the United Kingdom to other Member States between 1 April and 26 April 1980 had acquired rights, of the kind preserved by the final phrase in that Article.

The Commission attaches great importance to the second question which has been argued as a matter of constitutional significance in relation, broadly, to the Commission's duties and powers for the management of the common agricultural policy in a situation where there has been a failure by the Council to act and the consequential creation of a "legal vacuum", and more narrowly, in relation to monetary compensatory amounts. In my opinion, however, it is more convenient to begin with the third question since the validity of Commission Regulation No 846/80 does not fall for decision if Council Regulation No 1011/80 is valid and does not protect what the company claims to be acquired rights.

The company's case essentially is that it completed transactions between 1 April and 26 April (perhaps more correctly 25 April) when no legislation was in force providing for the deduction of the franchise. Accordingly it acquired rights to be paid monetary compensatory amounts without deduction of the franchise. Article 1 of Council Regulation No 1011/80 preserved those acquired rights so that the deduction of the franchise was unlawful. If Article 1 did not protect such acquired rights it would have retroactive effect on transactions completed before it came into force and is accordingly invalid.

Legislation which seeks to deal with transactions which have already been completed is undesirable and may be invalid. It cannot, however, be said that as a matter of Community law such legislation is always invalid.

In Case 98/80 *Racke* v *Hauptzollamt Mainz* (1979) ECR 69 at page 86 the Court held valid a Regulation which applied to transactions in wine which had taken place shortly before the publication of the Regulation, and which had not previously been subject to the system of monetary compensatory amounts. The Court stated the proposition of law in these terms:

"Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."

It is thus exceptional for this kind of retroactive legislation to be valid. As I read the Court's judgment it must be necessary, rather than just convenient or desirable, that the legislation should be made retroactive in order to achieve its aim. The Court will not uphold the validity of legislation affecting transactions which have been completed unless the intention to do so is clear, the purpose is justified and the legitimate expectations of interested parties are protected.

The history of the legislation to which the Court has been referred makes it

clear that the system which was in force on 31 March 1980 (as a result of Council Regulation No 652/79) was different from that which had applied following Council Regulation No 974/71, which laid down the basic formula for calculating monetary compensatory amounts. The "franchise" or deduction had been introduced, apparently, to avoid distortions arising but also as part of a long-term policy of phasing out monetary compensatory amounts where possible. The ECU had replaced the unit of account for the purpose of the common agricultural policy. The European Monetary System had replaced the "snake". In theory once Regulation No 652/79 ceased to apply an attempt could have been made to reinstate the system previously in force though whether such a course would have been possible at all seems doubtful, and, at the least, it would have been extremely difficult in view of the changes which had occurred since 1971. No reason, however, has been suggested as to why there should be a return to the position before Regulation No 652/79 came into force. Moreover since there is no doubt that the Council had power to reinstate the provisions of Regulation No 652/79 prospectively, even less has been suggested to justify a different system for the short period between the end of the period of validity of Regulation No 652/79 and the coming into force of Regulation No 1011/80.

Once it is clear that the Council intended to reinstate Regulation No 652/79 prospectively, even if on a modified basis, and for a limited period, everything seems to point to the need to maintain the continuity in the interim. The alternative is uncertainty, if not chaos. For some Member States new or increased monetary compensatory amounts might have to be fixed; there might be a significant interruption in the maintenance of the level of agricultural prices; the distortion of the Community pricing mechanism would affect eligibility to receive or liability to pay monetary compensatory amounts. Accordingly, although it is regrettable that Regulation No 652/79 was not extended for an interim period before it expired, pending any agreement as to change, so that traders and Government agencies would know clearly where they stood, it seems to me that it has been shown in this case that once it was decided to continue the system in force prospectively, it was necessary and in the public interest to apply it also to the short interim period which had passed, subject to legitimate expectations being respected.

Despite the persuasive arguments put forward by the company's counsel, it does not seem to me possible to reach the conclusion that traders could legitimately have expected that the franchise would disappear at the end of March 1980. The franchise had been in existence in one way or another since 1974: it was by 1980 a well-established feature of the system of monetary compensatory amounts and no proposal for its abolition had been made. The Commission had in February and in March 1980 put forward proposals, the least extensive of which was that the existing system should continue until June 1980. In my opinion the trader

could legitimately expect that the amount of the franchise would not be changed retroactively. That was not done. He was not, in my view, legitimately entitled to expect that the franchise would not be applied at all. Accordingly, it does not seem to me that it can be said that legitimate expectations were not duly respected if the franchise was continued, even if retrospectively.

It is also said that the Council is in breach of Article 190 of the EEC Treaty in that it failed to give the reasons on which the Regulation, and in particular its retroactive effect, were based.

It is obviously much better that reasons should be stated in the Regulation itself as Article 190 requires. On the other hand it seems to me that reasons may be incorporated by reference, or may appear from the legislative context in which a new regulation appears (the latter being recognized by the Court in Case 92/77 *An Bord Bainne* v. *Minister for Agriculture* (1978) ECR 495 at page 515, paragraph 36). What is important is that the person concerned should be in no reasonable doubt as to the reasons why the regulation has been framed as it has. The recitals to Council Regulation No 1011/80 do not give details. They do, however, record that "experience gained from the application of that Regulation (No 652/79 as amended) until 31 March 1980 is such that the Regulation may be extended until 30 June 1980". That experience must justify, if it justifies an extension at all, the extension from 31 March 1980, rather than from the date of publication of the Regulation. Moreover, if one looks at the history of the legislation it seems clear that continuity of the franchise, even if in a form modified from time to time, is essential if the kind of disruptions indicated above are not to occur, and that this is the reason why it was necessary to make the Regulation retroactive. This conclusion is, to my mind, reached even without reference to the recitals of Commission Regulation No 846/80. However, whether or not that is valid, it seems to me permissible to have regard to its recitals. The views there stated, were as a fact held by the Commission and they explain the need to avoid a break in the continuity.

Accordingly I take the view that Council Regulation No 1011/80 was valid, whether or not the company is right as to the construction of the words in Article 1 of that Regulation, namely "without the individual rights acquired by operators being thereby affected".

At first glance there seems much force in the company's argument that the right to have the transaction dealt with in accordance with the law in force at the time is an acquired right which cannot be affected by the reinstatement of the franchise system. The difficulty I find about the argument is that it is said to apply to all transactions which were effected during the period from 1 April to 25 April 1980. If this were so, the franchise could never be deducted in respect of any transaction; so far as the franchise is concerned, the provision in Article 1 of Council Regulation No

1011/80, substituting 30 June 1980 for 31 March 1980, would have no content. If the reference to acquired rights was incapable of a narrower meaning, I would accept this argument, since clearly other provisions of Regulation No 652/79 could still be reinstated so that Article 1 would not be devoid of content. In my opinion, however, the reference to acquired rights is capable of a narrower meaning in relation to the franchise. The starting point is the reference to "individual rights". This seems to me to indicate that one looks to see whether particular rights have been acquired pursuant to special arrangements. If they have, they stand. Thus if an agency has agreed to pay the monetary compensatory amount expressly waiving the franchise, or has agreed that the full amount should be paid in any event, or has made a decision to that effect which was communicated to the company and acted upon, then any rights arising from such an agreement or decision are not affected by the retroactive reinstatement of Regulation No 652/79. Such an agreement might be implied by conduct when the full amount was paid without any indication that there was a possibility of a clawback. Whether there has been such an agreement or decision conferring acquired rights is of course for the national court to decide.

I do not consider that the case relied on by the company (Case 74/74, *CNTA* v *Commission* [1975] ECR 533) leads to the conclusion that the wider construction is correct, since that case is dealing with legitimate expectations rather than acquired rights, which, as the Commission points out, are different concepts.

Accordingly, although articles which introduce retroactive provisions should be strictly scrutinized, and those which seek to preserve acquired rights should, so far as possible, be supported, I am of the opinion that the individual rights which are protected, so far as the deduction of the franchise is concerned, are those resulting from individual agreements made with national authorities or decisions made by them on which the trader has acted, whereby the trader is assured that whatever the position in law no franchise will be deducted.

The monetary compensatory amount fixed by the Commission had to be paid unless the Regulation was set aside as being erroneous in law. Since Council Regulation No 1011/80 was valid, it cannot now be said that the monetary compensatory amounts in fact paid were paid on a basis wrong in law, unless a special agreement or decision of the kind I have referred to was made by the defendant in the main action.

On this basis, the question whether the Commission had power to fix monetary compensatory amounts as it did in Regulation No 846/80, taking into account the franchise and applying the ECU, becomes academic. If the Court is of the same view it seems to me that it is not necessary for the Court, and indeed may be undesirable, to consider that

question. In case the Court should come to the opposite conclusion, it seems to me that I should express my views briefly on the alternative basis contended for by the Commission, namely that it had power and the duty in any event to do what in did.

It does not seem to me desirable or necessary to consider on a broad generalised basis whether in the maintenance of the common agricultural policy, the Commission can act "to fill a vacuum" if another institution does not make a new Regulation on the expiry of existing legislation which only that institution is empowered to make. Such a broad question raises matters of importance which would have to be considered in a wider context than that of monetary compensatory amounts, and which have not been fully ventilated by parties other than the Commission. The question is a narrower one viz., in view of the changes which had occurred in the monetary structure, in rates of exchange and in the administration of monetary compensatory amounts since 1971, was the Commission bound or entitled to take into account the changes introduced by Regulation No 652/79, when exercising its duty and power to fix monetary compensatory amounts under Regulation No 974/71?

The Commission has, in a careful written and oral analysis of the position, showed the dilemma it was in. I would, for my part, accept that unless the ECU was used and the franchise taken into account, distortions and interferences with the price mechanism would occur which would seriously impair the implementation of the policy, that in 1980 it was in a real sense impossible, or at the very least difficult and confusing, to seek to turn the clock back and to apply the legislation in existence before Regulation No 652/79 came into force, and that the difficulties and price distortions could not simply be corrected by an inverse application of the coefficient fixed in Article 1 of Regulation No 651/79. It does not seem for this purpose to matter whether the resulting position is characterised as "a legal vacuum" or not.

The difficult question is whether, even assuming this impossibility or great difficulty, the Commission had power to take the franchise into account, since the Regulation which made deduction of the franchise lawful had ceased to have effect. The Commission is entitled to refer to the Court's recognition of the wide margin of discretion which the Commission has in fixing monetary compensatory amounts under Regulation 974/71, and to its duty to ensure the proper administration of the policy adopted by the Community. It must, however, in my view show a more solid basis for the power it claims in this particular case. I am not satisfied on the arguments which have been advanced that "the principle of continuity" or Regulation No 974/71 gave it that power. The latter, (in Articles 3 and 6) authorizes the Commission to make rules to implement the system established by Article 1 but it does not give power to

fix monetary compensatory amounts other than on the basis spelt out in that Regulation. Nor am I satisfied that Article 155 of the EEC Treaty gives the Commission that power. This provides that "in order to ensure the proper functioning and development of the Common Market, the Commission shall — ensure that the provisions of this Treaty and the measures taken by the Institution pursuant thereto are applied". Those words cannot in my view justify the Commission's application of a Council measure which has ceased to have effect. The fishery conservation cases on which the Commission relied (Case No 804/79 and Case 124/80) seem to me to be dealing with a different situation. They recognize that Member States may not take action without the approval of the Commission where the Council failed to take measures falling within its power. To assert a power in the Commission to operate a particular system on the basis of legislation which has ceased to apply seems to me to be going further, and I do not read the Court's judgment as warranting that step. There may be situations where the Commission's duty and power would enable it to continue for a short period to administer a scheme under legislation which falls to be renewed, but has not been renewed in time, but after hesitation in the light of the pragmatic arguments put forward by the Commission and the French Government, I am of the view that any such power does not permit the making of the regulation which was made in this case. It may be said that the Commission should expressly have such an interim power. That is not a matter for these proceedings.

Accordingly, if I had not come to the view that Council Regulation No 1011/80 was valid, I would have been of the opinion that the Commission did not have power to continue by its own Regulation, the application of a Council Regulation which had come to an end. The lack of such a power, indeed, gives support to the argument that it was necessary and justified that the Council should deal with the situation which had arisen, by retroactive legislation.

For these reasons I am of the opinion that the questions posed by the Commercial Court should be answered as follows:

(a) Council Regulation (EEC) No 1011/80 has the effect of authorising and requiring the competent authorities in the Member States to make a deduction of 1.5 percentage points from monetary compensatory amounts on exports of milk products from the United Kingdom to other Member States of the European Communities undertaken between 1 April 1980 and 25 April 1980, irrespective of the date prescribed in Article 5 of Council Regulation (EEC) No 652/79 as amended by Article 1 of Council Regulation (EEC) No 1264/79 and irrespective of

the validity or invalidity of Commission Regulation (EEC) No 846/80, save in any case in which an operator has acquired an individual right to receive monetary compensatory amounts without the deduction of those 1.5 percentage points.

(b) The individual rights acquired by operators, mentioned in Article 1 of Council Regulation (EEC) No 1011/80 are those arising from an agreement or decision made specifically by a national authority or by a Community institution whereby an operator is to receive monetary compensatory amounts without the 1.5 percentage points reduction in any event. Where such agreement has been made, or such a decision has been communicated to the operator and acted upon, an operator who has made exports from the United Kingdom to another Member State, between 1 April 1980 and 25 April 1980, is entitled to receive monetary compensatory amounts in respect of exports without the deduction of 1.5 percentage points.