OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 12 APRIL 1984

My Lords,

This is an action for damages brought against the Commission and the European Economic Community by an agricultural cooperative ("SICA") and a "Société d'Intérêt collectif agricole" ("Sipefel") formed under French law. The claims were initially made under Article 175 and under Article 215 of the EEC Treaty, but in the reply the applicants abandoned reliance on Article 175. The outstanding claim is that, in 1983, the Commission wrongfully failed to take action to prevent the dumping of new potatoes from Greece in other Member States of the Community in particular in the Federal Republic of Germany and in the United Kingdom. It is said that, as a result, the applicants lost money because they were able to export less, and they obtained a lower price for what they did export.

In the course of the proceedings it became evident that the applicants do not themselves produce potatoes. It appears that they sell potatoes grown by their members. They do not sell as agents but, it is said, as owners. In consequence, it seems to me that the application is admissible, but only in so far as the claim raised is based on the damage suffered by the applicants as sellers of new potatoes.

The Community produces 14 million tonnes of "ware" or old potatoes, 2.2 million tonnes of "new" potatoes a year, although potatoes are not covered by a common organization of the market. New potatoes are essentially a spring crop, ware potatoes an autumn crop which can be kept until about July of the following year.

Accordingly for a time the two compete and old potatoes cost a quarter or a third of the price of new potatoes. The Federal Republic of Germany and the United Kingdom are the principal importers of both Greek and French new potatoes, although both receive from other Mediterranean countries, the Federal Republic substantially from Italy, the United Kingdom from Cyprus.

The Court has been given much evidence about trade in potatoes in the years 1980 to 1983, much of it conflicting, which it is impossible or unnecessary to resolve. The most that can be said is that in 1983 the harvest, if not as prolific as in 1982, was still substantial. So far as the United Kingdom is concerned it seems clear that there was a significant percentage increase in the imports from Greece and the Canaries, a decline in imports from France and Egypt. French imports to the Federal Republic were also significantly reduced; Italian imports were lower in 1983 than in 1980 and 1981 though the position relative to 1982 is not clearly established. There certainly were very substantial stocks of old potatoes in the United Kingdom in May and June, but the effect of such stocks on prices on and after 6/7 June (which is the date the applicants say is crucial since that is

when the London price of new potatoes began to fall) is not clear, even if it must be anticipated to have had some effect on the price of new potatoes.

So far as the United Kingdom market was concerned the position in summary seems to have been this. A total of 37 457 tonnes of Greek new potatoes were imported in 1983, of which, ignoring minimal quantities received earlier, about two-thirds arrived in the last three weeks of June, the rest in the first three weeks of July. That figure constitutes about 12% of total United Kingdom imports of new potatoes. French new potatoes are normally received in the United Kingdom in June and July, principally from Brittany. In 1983 what is accepted as a normal level of imports was taken until 17 June, pursuant to orders made earlier, since prices are closed five days before delivery. Thereafter exports dropped to a trickle until the end of July, it is said because of the arrival of substantial quantities of Greek potatoes, at very low prices.

On the evidence available it seems that the prices of Cyprus potatoes were already lower than in 1982 and fell sharply between 17 and 25 May, and when Greek potatoes first arrived at the end of May and in the first week of June, they sold at prices higher than those of Spanish and Italian potatoes. Initially Greek potatoes seem to have had little effect on prices. On or after 7 June, however, it is clear that prices did fall though it has to be borne in mind that even if the importation of Italian and Spanish new potatoes was coming to an end, those from Turkey, and in particular in large quantities from Cyprus, were beginning to arrive. Those from Greece and France were expected and the level of prices might be anticipated to fall in any event because of the larger quantities available, as had apparently happened about the same time in 1982.

In 1983 Greek potatoes came on to the German market in the second half of May and continued to be imported into July, on both counts later than in the two previous years; French potatoes came in very small quantities at the end of May and the beginning of June, the greater part being imported between 11 and 30 June. In that month, which alone accounts for about 47% of total imports for the whole of 1983, Italian potatoes took up 85% of imports. The information on prices which is available to the Court is incomplete. So far as can be seen, prices generally though not universally were lower than in 1982, though some Greek potatoes were more expensive than some of those coming from Italy. No explanation has been given of the reduction in French exports to the German market. It is to be inferred that, as in the case of the United Kingdom market, either orders ceased to be made or French sellers ceased to export as prices fell.

The reason for the fall in prices in Germany is not clearly shown. The fact that it appears to have commenced with the first considerable increase in Italian imports, which took place at a time when only a small quantity of Greek potatoes was being imported, would tend to suggest that it was the increase in supply of Italian potatoes which caused prices to fall. They represented 73% of total imports in April and over 80% in May, June and July.

It seems to be accepted that the level of Greek exports to France was not particularly high. However, as a result of the reduction in French exports to the United Kingdom and Germany, there

was a surplus of French potatoes on the French market which depressed prices. The decline was no doubt aggravated by the existence on the market (until 10 June) of quantities of ware potatoes. It seems that, in France, potatoes which cannot be sold at the minimum prices may be withdrawn from the market and destroyed, the producer receiving the withdrawal price fixed from time to time. According to the applicants, 1 000 tonnes of potatoes were withdrawn from the market and destroyed in Brittany between 6 and 9 June and 3 400 tonnes between 13 and 15 June. Thereafter about 1 000 tonnes were withdrawn and destroyed each day. This, it is said, was sparked off by a marked drop in average prices for new potatoes which took place on 7 June. The applicants say that French new potatoes are not suitable to be left in the ground, and have to be harvested before 10 July for other crops to be planted, so that they could not, as the Commission contends, have left them in the ground and sold them later, thereby mitigating their loss.

It follows that these potatoes had to be destroyed and the applicants say that they are entitled to be compensated for the loss they suffered.

The claims advanced can be considered under four headings. But they must be seen in the light of the Court's judgment in Case 4/69 *Lütticke* v *Commission* [1971] ECR 325 para. 10, that the Commission's conduct must be "illegal" and that that conduct causes damage which has proved to have been suffered. As Mr Advocate General Gand pointed out in Case 5/66 *Kampffmeyer* v *Commission* [1967] ECR 245, there must be, to constitute illegality, a culpable failure to act.

In the first place there seems to be an allegation pervading the claim that the Commission is under a general duty to protect sellers of products from the kind of events alleged here. In the case of agricultural products, where there is no common organization of the market, it does not seem to me that there is any such general duty actionable in damages. A more specific legal obligation to traders must be found.

In the second place a number of specific provisions of Community law are relied on by the applicants to support this duty which can be dealt with briefly:

(i) Article 85 of the EEC Treaty.

There is no evidence that the problem arose from an agreement between undertakings, a decision of an association of undertakings or a concerted practice. At the most, the low price of the Greek exports can be attributed to the relatively high level of Greek production of new potatoes in 1983 and, it is alleged, to a decision of the Greek Government to give financial aid to Greek producers. That does not seem to me to be enough.

(ii) Article 91 of the Treaty.

That, however, applied only during the original transitional period and, so far as Greece is concerned the problem of dumping was covered by Article 131 of the Greek Act of Accession (Official Journal 1979, L 291, p. 17).

(iii) Article 93 of the Treaty.

Articles 93 (1) and 93 (3) are made applicable to agricultural products by Article 4 of Regulation No

26/62 (Official Journal 1962, L 30 p. 993, English special edition 1959-1962, p. 129). These however do not assist, and as the Court pointed out in Case 337/82 *St. Nikolaus Brennerei* v *HZA Krefeld*, 21 February 1984, at paragraph 12 ([1984] ECR 1051), the Commission does not have power to commence proceedings under Article 93 (2) in regard to aids for products not covered by a common organization of the market.

(iv) Article 155 of the Treaty.

The applicants have not explained what specific measures could have been taken under this provision which could not have been taken under the other provisions relied on.

(v) Article 169 of the Treaty.

The commencement of proceedings under this Article against the measures apparently intended by the Greek Government in 1983 would not have prevented those measures being put into effect unless the Commission had applied for and obtained the grant of interim measures under Article 186 of the Treaty. I am not satisfied that the Commission had sufficient material in April to justify commencing such proceedings. In any event, it seems to me that there was no "illegality" or culpable fault on the part of the Commission in its failing to do so. Moreover, there was not sufficient time for effective steps to have been taken to deal with the 1983 season by this route. Accordingly, it seems that there is no direct causal connection between the failure to act under Article 169 and the occurrence of the alleged loss. The fact that proceedings were subsequently started under Article 169 does not seem to me to affect this conclusion.

(vi) Council Regulation No 17/62 (Official Journal 1962, L 13, p. 204 English Special Edition 1959-1962, p. 87).

Since the problem did not arise from an infringement of Articles 85 or 86. I cannot see that this assists.

(vii) Council Regulation No 26.

This does not seem to me to contain any provision which assists the applicants.

(viii) Article 131 of the Greek Act of Accession.

Nor can I see that this is of any assistance to the applicants. No transitional period was laid down so far as new potatoes are concerned. In consequence, as in the case of Article 91 of the EEC Treaty, dumping problems are to be dealt with under the normal Treaty rules.

Thirdly, Article 46 of the Treaty is relied on. That Article empowers the Commission to fix a countervailing charge to be applied by Member States. Even if the Commission erred in thinking, on the basis of the Court's decision in Cases 80 and 81/77 *Société Les Commissionnaires Réunis* v *Receveur des Douanes* [1978] ECR 927, that Article 46 only applied during the transitional period (see Case 337/82 *St. Nikolaus Brennerei* v *HZA Krefeld*), it does not seem to me that such an erroneous interpretation of a legal provision constitutes a wrongful act grounding a claim for damages against the Commission.

In any event, Article 46 would only be applicable if Greek potatoes were subject to "a national market organization or to internal rules having equivalent effect which affect the competitive position of

similar production in another Member State".

Taking the definition of a national market organization given by the Court in Case 48/74 *Charmasson* v *Minister for Economic Affairs* [1974] ECR 1383, there is very little evidence before the Court of the existence in Greece of such a market organization which covers potatoes.

According to the applicants, a Greek undertaking called "Agrex", which is said to be an emanation of the Greek Agricultural Bank, organizes and coordinates Greek exports. Whether this is so or not, it does not by itself establish the existence of a national market organization or internal rules having equivalent effect which affect the competitive position of production in other Member States. It is also said that in this case potatoes are sold at various unconnected centres in Greece, rather than through a national market organization.

It is, however, argued that, in 1983, Greek producers received financial aid, either directly from the Greek Government or through Agrex, which enabled Greek potatoes to be sold at a loss. The existence of sales at a loss is inferred in part from a comparison between prices in Athens and on the United Kingdom and German markets, which is said to show that the latter were about the same or even slightly below the former, and in part from the estimated price paid to the grower in Greece. This estimate is made by deducting from the market prices in the United Kingdom and Germany an estimate of the costs of transporting the potatoes from Greece and the importers' margin. The Commission disputes the accuracy of both the deductions made and the market prices referred to. Even, however, if the figures relied on by the applicants are accepted, it does not necessarily follow that Greek potatoes were sold at the kind of loss alleged. This question can only be decided on the basis of a comparison of the basic price with the costs incurred by the producers as to which no sufficient evidence is available.

Moreover, to sell at a loss is not, by itself, sufficient to justify the application of Article 46. Nor is it sufficient proof of the existence of a State aid. Where prices are depressed because, for example, of an abundant supply, and there is no guaranteed minimum price or, as appears to be the case in France, a fixed price at which goods can be withdrawn from the market, producers may well sell at a loss rather than not sell at all. At least by selling their products they will be able to reduce their overall losses. The applicants have maintained that Greek producers did indeed benefit from a guaranteed minimum price, stated at various points in the pleadings to amount to 1.15 and 0.85 francs per kilo. This is denied by the Commission. Whatever is the true position, there is, in my view, insufficient evidence before the Court to establish that aid was given by a market organization in the way alleged.

There is, however, some evidence that the Greek Government intended to give financial support to producers. There is an undertaking to indemnify in respect of losses for the 1981 season contained in the government circular of 19 May 1981 and a letter from the British Government of 20 June 1983 asking for

protective measures which refers to information given by the Greek Minister for Agriculture that producers' incomes would be kept at the same level as in 1982. The Commission apparently accepted a subsequent denial that there had been any aids or any promise to guarantee prices, though both a letter of 7 July 1983 from the Greek Permanent Representative and a telex of 2 November 1983 from the Greek Minister for Agriculture seem to indicate the possibility of incomes being supported by the government, and these do not really deal with the British Government's letter.

The latter seems to me to be evidence that the arrangements contemplated to maintain the income of Greek producers were "internal rules having equivalent effect which affect the competitive position of similar production in another Member State" within the meaning of Article 46. They would encourage producers to export rather than leave in the ground, despite the fall in prices due to the increased supply, since their income would in any event be maintained.

Article 46, unlike similar provisions (such as Article 130 of the Greek Act of Accession), does not expressly make the exercise of the Commission's powers dependent upon an application being made. It seems to me that this is however implied in Article 46 because it states that the countervailing charge "shall be applied by Member States" and that the Commission "shall fix" the amount of the charge. In consequence, the Member States must apply to the Commission for it to fix the charge they wish to apply. In the absence of such application, no countervailing charge could be applied because the Member States cannot fix its amount unilaterally. If this interpretation is correct, the Commission was not at fault because no application seems to have been made to it under Article 46 and none is alleged.

Counsel for the Commission said, however, that the reasons why the Commission would not have acted under Article 46 (had it thought Article 46 applicable) would have been the same as those on which its refusal to act under Article 130 of the Greek Act of Accession are based. There is, it seems to me, a significant difference between these two provisions. Article 46 is designed to enable distortions of competition, arising primarily from State support, to be corrected and, unlike Article 130, does not require proof of serious economic difficulties or a serious disturbance of the market before a countervailing charge can be applied. In consequence, the question arises whether, if the Commission can act of its own motion under Article 46, there is any causal connection between its failure to do so and the loss suffered by the applicants in this case.

There is no evidence before the Court which establishes that the Commission had reasonable grounds for acting under Article 46 before 20 June. To this extent, any loss caused before that date is not attributable to it.

So far as the position after that date is concerned, a countervailing charge can be imposed under Article 46 "at the level required to redress the balance". Here that seems to be the difference between the producer price and what is said to be the guaranteed price of 85 francs per 100 kilogrammes. Taking into account the transport and other costs, the Greek producers could not have sold, without

making a loss, at less than 181.7 francs per 100 kilogrammes in London. The applicants say that they could not have sold below 154 francs per 100 kilogrammes without making a loss. From the evidence, however, it seems that on or about 6 June the French potatoes were selling in London at 195 francs per 100 kilogrammes or over and that Greek potatoes were quoted at 183 to 207 francs per 100 kilogrammes. Even on 20 June the latter were still quoted at 176 to 187 francs per 100 kilogrammes.

Since the price was at these levels until 20 June it cannot be said that the French producers would have had to sell at less than 181.7 francs per 100 kilogrammes. Yet the applicants say that they were excluded from contracting to sell on the United Kingdom market as from about 6 June (with deliveries later) when the overall level of prices was higher than that which would have resulted from the application of a countervailing charge in respect of Greek potatoes, a countervailing charge equal to the difference between the producers' price and the guaranteed price. It does not seem to me therefore that the imposition of a countervailing charge would have made any difference. After 20 June such a charge would not, it seems, in any event have restored the market to what it was before 7 June. There is, as I see it, no causal connection between any loss and the failure to impose a countervailing charge.

Finally, the applicants rely on Article 130 of the Greek Act of Accession. The Commission is empowered to authorize the adoption of protective measures on application by a Member State and it seems that two requests were made in 1983 under Article 130 (2).

The first request was made by the French Government in the form of a note dated 9 June and a telex dated 10 June. By a Decision dated 17 June the Commission rejected the request on the grounds that Greek exports were of minor importance and Greek prices were no lower than those of Italian potatoes. The French request sought measures to protect the French market. That market was not troubled by a significant increase in the level of imports from Greece. The quantities imported were low. The difficulties on the French market arose partly from an increase in imports from Italy and mainly from the cessation of or reduction in French exports to the United Kingdom and Germany. Trade in potatoes between France and Greece was not, therefore, the cause of any serious disturbance on the French market. In the circumstances, protective measures applicable to Greek exports to France would not have been appropriate. A ban on Greek exports to Germany and the United Kingdom might have eased the position in France by enabling French producers to export. In view of the possible effects of such a measure on the German and United Kingdom markets, this would not, in my view, have been an appropriate measure to take under Article 130 (2) at the request of the French Government in the absence of a request from the German or United Kingdom Governments.

So far as is known, no request for protective measures was made by the German Government. The second request made under Article 130 (2) was contained in the letter of 20 June, already referred to, and emanated from the British Government. In this letter the

Commission was requested to act within 24 hours, pursuant to the last paragraph of Article 130 (2). By a Decision dated 1 July the Commission rejected the request, finding that Greek potatoes had not seriously disturbed the market in the United Kingdom. The Decision recites that Greek exports to the United Kingdom would represent only about 10% of total imports; the price of Greek potatoes was lower than that of competing products due to differences in variety and quality and had barely influenced movements in British prices and those of the principal supplying countries; British prices are said to have been higher than at the same time in 1981.

In order to establish liability in damages, it would have to be shown that the Commission's conduct in assessing whether or not to authorize protective measures evinced a sufficient degree of fault. The fault, if any, lies in the Commission's assessment that Greek exports had not caused a serious disturbance of the market. The wording of Article 130 (2) seems to me to require that, in making this assessment, the Commission looks at the impact of the Greek exports on the United Kingdom market, not, as counsel for the Commission appeared to suggest, on the importance of Greek exports in the overall context of Community trade. As has been said, the evidence available does not suggest that imports from Greece caused the difficulties on the United Kingdom market. Instead, it seems to have been the concentration of supply from several exporting countries which caused prices to fall from a level which seems already to have been low. At the time the Commission considered the British Government's request, French potatoes were no longer sold on the London market, other than in small amounts. Had protective measures been adopted and Greek exports halted, the further influx of large quantities of French potatoes would probably not have relieved the situation on the market. It is in any event uncertain whether the applicants would have exported at the prices prevailing after 6/7 June.

In consequence, even if it could be accepted that the Commission's assessment was so mistaken as to ground a claim in damages, which I do not think has been established, a causal connection between the fault and the loss alleged has not been shown.

If I had been of the opinion that the applicants had established the existence of fault on the part of the Commission and a causal connection between it and the loss suffered, it would still have been my view that the claim for damages could not be upheld as it stands. The claim has been pleaded as if the applicants were suing as producers and there is no clear evidence of the loss suffered by them as intermediate sellers.

Nevertheless, for the other reasons given, it is my opinion that the action should be dismissed and the applicants ordered to pay the costs of these proceedings and the proceedings for interim relief.