OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 5 July 1988

My Lords,

This reference under Article 177 from the Athens court of first instance raises once again the dispute concerning the coefficients fixed for production aid for tomato concentrates in Greece. The previous cases in the series are Case 250/81 (*Greek Canners* v *Commission* [1982] ECR 3535), Case 192/83 (*Greece* v *Commission* [1985] ECR 2791, the '1983 annulment action'), Joined Cases 194 to 206/83 (*Asteris and Others* v *Commission* [1985] ECR 2815, the 'damages action') and the judgment of 26 April 1988 in Joined Cases 97, 99, 193 and 215/86 (*Asteris and Others and Hellenic Republic* v *Commission* [1988] ECR 2181, the '1986 annulment actions').

I refer to those cases and particularly to my Opinion in the 1986 annulment actions, as well as to the report for the hearing in the present case, for an account of the relevant Community legislation. The result of the 1983 annulment action and the damages action was that, despite the technical error committed by the Commission in fixing the coefficients for Greece in respect of each marketing year from Greece's accession to the Community to marketing year 1986/87, only the regulation dealing with marketing year 1983/84 was annulled and the Commission was held not liable to the producers in damages. The Commission, in purported compliance with the 1983 annulment action, adopted Regulation No 381/86 (Official Journal 1986, L 44, p. 10) which provided supplementary aid for marketing year 1983/84 only. That regulation was challenged by the producers and the Hellenic Republic in the 1986 annulment actions; it appears that the present proceedings before the national courts were brought in parallel.

Judgment in the 1986 annulment actions was given after the national court made its reference. However, the parties were able to comment on its relevance to the present proceedings at the oral hearing.

In that judgment, the Court dismissed the applications in so far as they were brought under Article 173 to annul Regulation No 381/86 as inadmissible, the producers' application because the regulation could not be characterized as a decision of direct and individual concern to them and the Hellenic Republic's because it was not alleged that the regulation was itself in any way unlawful but rather that the Commission was required to take other steps to comply with the judgment in the 1983 annulment action. The Hellenic Republic had in fact

sent the Commission a letter of 17 April 1986 which expressly invited the Commission to act, within the meaning of Article 175 of the Treaty, by providing for supplementary aid in respect of marketing years 1981/82, 1982/83, 1984/85, 1985/86 and 1986/87. The Commission's refusal so to act was the subject of the Hellenic Republic's application in Case 215/86 (and also of the producers' application in Case 193/86, which was declared inadmissible).

To assess that application, the Court considered the obligations imposed on the Commission by the judgment in the 1983 annulment action. It did not address the issue whether the judgment in the damages action might also impose obligations on the Commission, as the Hellenic Republic had contended. The Court held that 'by virtue of the retroactive effect of judgments by which measures are annulled, the finding of illegality takes effect from the date on which the annulled measure entered into force' (paragraph 30). Therefore, in order to comply with the judgment as required by Article 176, the Commission was under a duty to eliminate from the regulations governing marketing years after 1983/84 provisions fixing the coefficient in the manner held illegal in the 1983 annulment action. However, that obligation did not extend to the regulations adopted before that governing the 1983/84 marketing year.

In practical terms, the Court's ruling in the 1986 annulment actions means that the producers will in due course receive supplementary aid in respect of marketing years 1984/85 to 1986/87 but that there is presently no obligation on the Commission to make good the discrimination they suffered in marketing years 1981/82 and 1982/83.

In the national proceedings, the producers seek the payment of the difference between the aid they actually received in respect of marketing years 1981/82 to 1983/84 and the amount they would have received if the coefficients had been properly fixed.

The national court asks the following questions:

'(1) Do the national courts of a Member State of the European Communities have jurisdiction to hear proceedings concerning claims by individuals against the competent national authorities for the payment of differences of aid due to them by the latter resulting from the incorrect application of Community law and capable of being claimed back by the national authorities from the competent Community organs pursuant, in particular, to Regulation No 729/70 of the Council on the financing of the common agricultural policy?

If so:

(2) Does the dismissal by the Court of Justice of the European Communities of an action brought by the plaintiff in these proceedings against the Commission on the grounds set out in the judgment of the Court of Justice of 19 September 1985 in Joined Cases 194

to 206/83 prevent the same plaintiff from bringing an action against the Greek State for compensation in respect of the loss of benefits which it would have received from the competent Greek authority had the latter claimed from the EAGGF pursuant to Regulation No 729/70 of the Council?

(c) Is the plaintiffs' claim for compensation in so far as it relates to the 1983/84 marketing year, contrary to Commission Regulation No 381/86?'

At the hearing before this Court, counsel for the producers stated that the claim in respect of marketing year 1983/84 would not be pursued, Regulation No 381/86 having been adopted since they started their action in the national court.

If not:

(3) In respect of the payment by national authorities of compensation to individual owners of processing undertakings in receipt of aid pursuant to Council Regulation Nos 729/70 and 516/77, inasmuch as it is intended to compensate for or redress a technical error of the competent Community organs,

It was also explained that the Commission is not formally a third party to the national proceedings. It has merely been officially informed of them and has standing to submit observations to the national court, a facility which the Commission has not so far used. It therefore appears that there is no possibility as yet of the Commission being ordered by the national court to pay any amount to which it finds the producers entitled.

(a) is it sufficient for the national authority simply to inform the competent Community organs in order for the operation to be valid from the point of view of Community law (Article 92 of the EEC Treaty), or

(b) must the prior approval of the Community organs be obtained in accordance with the requirements of Article 93 of the EEC Treaty, as given detailed effect by Council Regulation Nos 729/70 and 516/77?

The national court's first two questions appear to assume that any supplementary payment 'resulting from the incorrect application of Community law' may be reclaimed by the national authorities from the European Agricultural Guidance and Guarantee Fund (the 'Fund') pursuant to Council Regulation No 729/70 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 I, p. 218, as amended). The Court heard no argument on that point. In my view, any dispute whether such payments are to be borne by the Fund will have to be the subject of further proceedings unless agreement is reached between the respective parties.

I therefore examine the national court's questions on the understanding that the action is between the producers and the Greek State only, and solely concerns marketing years 1981/82 and 1982/83.

The basis of the action is not entirely clear. Reference is made to a provision of the Greek Constitution which was said to be to all intents and purposes identical with the Community law principle of non-discrimination as particularly embodied in Article 40 (3) of the Treaty. The national court appears to understand the action as being one for damages representing the difference between the aid received and that allegedly payable. The producers say that their claim is for a declaration that the sums are due as a debt and not by way of damages. Nor is it clear whether it is an essential part of the producers' case that the Hellenic Republic failed to bring timely actions before this Court for annulment of the Commission regulations governing the two marketing years in question. Had such actions been brought, they would have succeeded as the 1983 annulment action shows. However, if that fact is part of the producers' claim, the claim would appear to be for breach of duty or non-contractual liability, which the producers expressly disavow.

The action does not appear to be founded upon a breach of a directly effective provision of Community law 'creating individual rights which national courts must protect' (Case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1, at p. 13) in a manner which must be effective although the procedural rules and remedies are left to the national systems (see for example the line of cases on recovery of charges levied contrary to Community law, most recently the judgments of 25 February 1988 in Joined Cases 331, 376 and 378/85 (*Les Fils de Jules Bianco and Others* v *Directeur général des douanes et droits indirects* [1988] ECR 1099) and of 24 March 1988 in Case 104/86 (*Commission* v *Italy* [1988] ECR 1799).

The parties before the Court are both agreed that the first question is posed in relation to Greek national law alone. No question is raised as to whether there exists any principle of Community law which enables a trader, whose government has failed to challenge in due time a regulation which is invalid (which the trader cannot challenge before this Court because of lack of a sufficient interest) and which in the result deprives the trader of monies which he should have received under a valid regulation, to recover them from his government, either by way of damages or as monies due under the applicable regulations or otherwise. If such a question had been posed, different considerations would arise. Since it is agreed that it has not been put and there has been no argument about it, it is clearly inappropriate to go into it.

The question whether the State is responsible under Greek law for financial loss caused by 'incorrect application of Community law' or, more correctly, faithful application of Commission regulations

containing a technical error, is one for the Greek courts. It therefore seems to me that, on that basis, the national court's first question discloses no issue of interpretation or validity of Community law for the Court to decide.

It seems to me to follow that the answer to the second question must be in the negative. The national action is brought against a different defendant and on different grounds from the damages action in which the Court held that, although the coefficients for 1983/84 were fixed unlawfully (paragraph 20), which finding should be extended to the regulations fixing coefficients for the 1981/82 and 1982/83 marketing years (paragraph 19), the illegal fixing 'was due to a technical error which, although leading in objective terms to unfair treatment for Greek producers, cannot be regarded as constituting a serious breach of a superior rule of law or as manifest and grave disregard by the Commission of the limits on its powers' (paragraph 23) and was therefore not sufficient to found the Community's liability in damages under Article 215 (2) of the Treaty.

It seems to me that the national court is not prevented by the damages action, or by any other of the actions against the Commission which the Court has decided in this connection, from entertaining the producers' claim against the State to the extent allowed by national law. However, in so doing, it must adopt as its own the Court's findings on matters of Community law. Thus, for example, it would not be open to it to dismiss the producers' claim on the basis that they could claim damages from the Commission, nor could it hold that the regulations governing marketing years 1981/82 and 1982/83 were not tainted by a technical error leading to discrimination against Greek producers *vis-à-vis* producers in the other Member States.

I do not consider that this position is affected by paragraph 31 of the judgment in the 1986 annulment actions, contrary to a suggestion made by the Commission at the hearing in this case. Having held that the finding in the 1983 annulment action that the coefficients for marketing year 1983/84 were illegally fixed obliged the Commission to remedy the position as regards that year and also subsequent years, the Court stated in paragraph 31 that 'that finding cannot apply to the marketing years covered by the regulations adopted before the 1983/84 marketing year'. That seems to me to refer to the Commission's obligation to remedy the position and does not affect or purport to reverse the Court's statement in the damages action, quoted above, that the finding of a technical error in respect of the 1983/84 marketing year should be extended also to the earlier two years.

As I understand the third question, it presupposes that the producers will be successful in their action before the national court. It also seems to assume that, in that event, the amounts which the State would have to pay to the producers would constitute State aid within the meaning of Article 92 of the Treaty. The question then asks whether (a) it would be enough for the national authorities to inform the Commission that

they had paid those amounts or (b) the national authorities must seek prior authorization by virtue of Article 93. It then refers to Regulation No 729/70 and to Regulation No 516/77 (Official Journal 1977, L 73, p. 1), the latter being at the relevant time the basic regulation on the common organization of the market in products processed from fruit and vegetables (the 'basic regulation').

The producers argue that aid paid pursuant to the basic regulation and financed by the Fund pursuant to Regulation No 729/70 is, by definition, Community aid, not national aid. Therefore Articles 92 and 93 of the Treaty do not apply. In the terms of the last recital to the basic regulation, 'expenditure incurred by Member States as a result of obligations arising out of the application of this regulation is financed by the Community in accordance with . . . Council Regulation (EEC) No 729/70'.

However, it may be doubtful whether money paid by the State in the event of the producers succeeding in their claim would result from application of the basic regulation and therefore be an allowable charge on the Fund. These proceedings have arisen precisely because the regulations governing the two marketing years in question, which were made pursuant to the basic regulation, did not provide for the payment of the sums now claimed by the producers. The producers appear to be claiming in the national court that the fact that the failure so to provide was caused by a technical error would bring steps taken by the State to remedy the position within the basic regulation. Again, that seems to me a matter on which the Court cannot rule in this case.

Article 17 of the basic regulation expressly provides that, save as otherwise provided therein, Articles 92 to 94 of the Treaty 'shall apply to the production of and trade in' the products covered by the common organization of the market. It therefore seems that aid paid otherwise than pursuant to the express terms of the basic regulation or regulations made thereunder must be notified in accordance with Article 93 (3) to the Commission before it is granted. Contrary to the implication of paragraph (a) of the national court's third question, there is no provision in Articles 92 to 94 for national authorities merely to inform the Community institutions of aids granted.

Does production aid, if it is not paid pursuant to the regulation, cease to be aid subject to Articles 92 to 94 solely because paid by court order as the Commission contends? It remains 'aid granted by a Member State or through State resources' and the questions whether it distorts or threatens to distort competition by favouring certain undertakings or the production of certains goods and affects trade between Member States are for the Commission upon notification, though it is hard to see on what grounds the Commission could declare incompatible with the common market aid which, but for a technical error on the Commission's part, would have been paid under Commission regulations.

If the Commission is submitting more generally that Court awards can never constitute State aid within Article 92, I do not accept its submission. It happens that a Member State promises aid to an undertaking which, on examination by the Commission, is held incompatible with the common market. If the undertaking were to receive an equivalent sum by suing on the promise, the application of Articles 92 to 94 would be subverted. A similar situation would arise if a recipient undertaking sues the State for damages following a Commission decision ordering the State to recover illegal aid. It is therefore of prime importance for the proper operation of the Treaty rules on State aids that court awards fall within their reach in appropriate cases.

If the producers succeed in their action, there will clearly be complicated issues between the Greek State and the Commission as to the status and legality of the money to be paid to the producers. The Commission acknowledged at the hearing in the 1986 annulment actions that it had the power to supplement the aid but had decided not to as a matter of policy. It is to be hoped that this long-drawn-out dispute will now be resolved.

Since the producers have declared that they will not pursue their claim in respect of marketing year 1983/84, paragraph (c) of the national court's third question does not require an answer.

In my view, therefore, the national court's questions fall to be answered along the following lines. Its jurisdiction to entertain the producers' claim is a matter of national law, not Community law. Its jurisdiction is not precluded by anything in the Court's judgments in Case 192/83, Joined Cases 194 to 206/83 and Joined Cases 97, 99, 193 and 215/86, although it must abide by the findings of Community law made in those judgments. Production aid paid by a Member State to producers, in so far as it is not expenditure properly chargeable to the European Agricultural Guidance and Guarantee Fund, must be notified to the Commission in accordance with Article 93 of the Treaty.

The producers' costs are a matter for the national court. The Commission's costs are not recoverable.