OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 22 November 1989 *

Mr President,
Members of the Court,

1. The applicant company, a French importer of fresh fruit, seeks the annulment of Commission Regulations (EEC) Nos 962/88, 984/88 and 1040/88 of 12, 14 and 20 April 1988 respectively.[1] Those regulations were adopted as part of the system of surveillance of imports of dessert apples from third countries introduced by the Commission by Regulation (EEC) No 346/88 of 3 February 1988.[2] Under that system, imports are subject to the presentation of a licence, which is to be applied for from the national authorities and issued, pursuant to Article 3(3) of Regulation No 346/88, on the fifth working day following the day on which the application is lodged 'unless measures are taken within that time'.

By way of protective measure, the Commission adopted Regulation No 962/88 which suspended the issue of import licences for dessert apples from Chile from 15 to 22 April and also provided that applications pending on 18 April for import licences were to be rejected (see Article 1(1) and (2)).

By Regulation No 984/88, the Commission amended Article 1 of Regulation No 962/88. The suspension was prolonged so as to apply from 18 to 29 April; moreover, no further provision was made — Article 1(2) being repealed — regarding the rejection of applications affected by the suspension.

Finally, on 20 April 1988 the Commission issued Regulation No 1040/88, the purpose of which is twofold. First (see Article 2), it amends Article 1 of Regulation No 962/88, deferring the end of the suspension of the issue of import licences for Chilean apples from 29 April 1988 to 31 August 1988 and, secondly (Article 1), lays down maximum quantities — to apply until the end of the 1988 marketing year — for imports of dessert apples originating in a number of non-member countries (in particular, South Africa, New Zealand, Australia, Argentina and Chile).

A — Admissibility

2. The applicant challenges those regulations on the ground that, despite the form attributed to them, they are to be regarded rather as a series of decisions which are of direct and individual concern to the undertakings affected by the suspension. The Commission has not expressed a view on this aspect, but in the event of the Court considering that in this case the conditions laid down in the second paragraph of Article 173 of the Treaty are not satisfied, it

* Original language: Italian.

1 — Commission Regulation (EEC) No 962/88 of 12 April 1988; Commission Regulation (EEC) No 984/88 of 14 April 1988; Commission Regulation (EEC) No 1040/88 of 20 April 1988.

2 — Commission Regulation (EEC) No 346/88 of 3 February 1988.

could, of its own motion, declare the application inadmissible pursuant to Article 92(2) of the Rules of Procedure.[3]

3. I should point out straight away that the Court has already had occasion to consider the admissibility of an action brought by private persons against a suspending regulation, and declared it inadmissible — judgment of 25 March 1982 in Case 45/81 *Moksel* [1982] ECR 1129. It is true that in that case the Commission suspended the issue not of import licences but of advance-fixing certificates for export refunds; however, I consider that fact to be of no significance. On the other hand, the essential features of the case appear to me to be entirely comparable, and must be considered for the purpose of deciding whether or not the measure in question constitutes a regulation. In *Moksel* too the measures at issue prevented the issue of a document and, under the basic legislation, were adopted within the period — the so-called reflection period — between lodgment of the application and the day on which it should have been issued, that period being specifically provided for in order to allow the Commission to check whether, *in the meantime* any imbalance had emerged on the market which might, in the light of the basic provisions, justify recourse to its power of suspension.

The problem again came to the fore recently in Case C-244/88 *UCDV*, in which I delivered my Opinion on 26 September of this year (judgment of 21 November 1989, [1989] ECR 3811, at page 3819), proposing that the application should be declared inadmissible. I should point out that it was as recently as yesterday that the Court gave judgment in that case, declaring the action to be inadmissible and making (paragraph 12) the following observation: 'It must be pointed out that a regulation which suspends advance fixing concerns both applications pending at the time of suspension and those which are lodged during the period of suspension'.

Since I do not consider that there are any substantial differences as far as admissibility is concerned, between those previous cases and the present case, I refer in general terms to my Opinion in *UCDV* and to the cases which I cited on that occasion (in particular the judgments in *International Fruit* and *CAM*[4]).

At this stage, I shall confine myself to a number of observations on matters of detail which should be read against the background of the reasoning already expounded in my Opinion in *UCDV*.

4. In the first place, it should be noted that Regulation No 962/88 is not addressed to a specific and identified group, a requirement that appears essential in the light of the *International Fruit*, *CAM* and *UCDV* cases. The suspension decided upon by the Commission on 12 April 1988 and effected by Regulation No 962/88 related in fact both to the applications already submitted by that date and to any applications which had not yet been lodged but might well have been lodged subsequently. Under the regulation, the suspension was to remain in force until 22 April; if account is taken of the period of five days between lodgment of the application and the issue of the certificate, the suspension therefore also affected any

3 — See however judgment of 8 March 1988 in Joined Cases 62/87 and 72/87 *Exécutif régional wallon and Glaverbel* v *Commission* [1988] ECR 1573, in particular paragraph 8.

4 — Judgments of 13 May 1971 in Joined Cases 41/70 to 44/70 *International Fruit* [1971] ECR 411 and of 18 November 1975 in Case 100/74 *CAM* [1975] ECR 1393.

applications which might have been submitted in the days immediately following 12 April.

Moreover, it must be remembered that the suspending regulation, which, as I have said, was adopted on 12 April, was published on the following day. Therefore, it was only on 13 April that the traders concerned became aware of the suspension. It is therefore probable that the suspension covered applications (like that of the applicant, for example) lodged with the national authority on 12 April, of which the Commission, when adopting the regulation, *could not actually have been aware.*

It seems to me therefore that the measure in question related not to a specific and identifiable group, a *numerus clausus*, but to a category of traders who were not and could not be identified individually when the measure was adopted.

5. It should also be borne in mind that the status of the measure as a regulation is also confirmed by another factor. The suspension was not decided upon exclusively in relation to the applications submitted by traders. Those applications constitute *one* of the matters to be taken into account in assessing the need for a measure of that kind. The purpose of suspension, as is apparent from the basic legislation, is essentially to remedy or prevent serious disturbance of the market in question as a result of imports. The Commission therefore acts in such cases on the basis of a comprehensive appraisal of the relevant economic factors and not by reference to the applications lodged by individual traders, who, moreover, are not individually known to the Commission but merely account for part of the total volumes notified to it by the national authorities.

I therefore consider that the suspension at issue here derives from the exercise of a legislative power intended to regulate and maintain the equilibrium of the market. Whilst it is true that the measure in question applies to a number of persons it is also true that, to use an expression from a previous decision, that comes about 'by virtue of an objective legal or factual situation defined by the measure in relation to its purpose'. [5]

6. Nor can it be considered that the measure is of individual concern only to the importers whose goods were in transit at the time of the suspension. They too are affected by the regulation because they are importers and lodged applications for a licence — before or after the suspension — as required in general terms by Regulation No 346/88; furthermore, as will become clearer shortly, no specific provision was adopted in relation to those traders, which confirms that they are viewed in the same way and in relation to the same objective circumstances as all the other persons affected.

7. My observations so far also apply to Regulation No 984/88 and Article 2 of Regulation No 1040/88 which merely amend Article 1 of Regulation No 962/88, extending the period of the suspension. It does not seem to me that those straightforward amendments can be regarded as having the effect of changing the nature of the measure to which they are made, converting it from a regulation into a set of individual decisions.

5 — See most recently the judgment of 29 June 1989 in Joined Cases 250/86 and 11/87 *RAR* [1989] ECR 2045.

8. It is thus clear, without the need for any comment, that Regulation No 1040/88 is a genuine regulation as regards that part of it which determines the maximum permitted quantities for imports of dessert apples from a number of non-member countries until the end of August 1988.

9. I therefore consider that the present application must be declared inadmissible in its entirety.

However, *inter alia* because of the importance of the present proceedings and in the event of the Court's considering that the contested suspending regulation (and the subsequent amending measures) is not of general scope, I think that it is appropriate to consider the substantive aspects of the case as well.

B — Substance

10. The applicant claims that, in adopting the suspension measure in question, the Commission exceeded its powers under the basic regulations.

In particular, Regulations Nos 962/88, 984/88 and Article 2 of Regulation No 1040/88 are alleged to be unlawful since the suspension of the issue of import licences for apples from Chile was decided upon by the Commission:

(a) In the absence of any serious disturbance within the meaning of the first subparagraph of Article 29(1) of Regulation (EEC) No 1035/72;[6]

(b) for purposes (review of the overall situation prevailing on the apple market) other than those provided for in the basic regulations;

(c) without account being taken of the position of products in transit as required by Article 3(3) of Regulation (EEC) No 2707/72.[7]

Moreover, Regulation No 1040/88 is also, it is maintained, entirely unlawful in so far as it introduces a *de facto* quota regime for imports, and by virtue of Article 113 of the Treaty only the Council is empowered to adopt such measures.

11. Let me say immediately that it does not seem absolutely necessary to consider the merits of the latter criticism. I think in fact that the general scope and, therefore, the status of Regulation No 1040/88 as a genuine regulation are entirely clear and incontestable, in so far as it provides for the introduction of general quotas for imports of dessert apples from a number of non-member countries until the end of the 1988 marketing year.

As regards the remaining criticisms I have no hesitation in saying that submissions *(a)* and *(c)* appear to me to be well founded. My analysis will therefore focus primarily on the points raised by them.

Submission (a)

12. As regards submission (a), it must first be pointed out that by virtue of the first

6 — Regulation (EEC) No 1035/72 of the Council of 18 May 1972 (OJ, English Special Edition 1972 (II), p. 437).

7 — Regulation (EEC) No 2707/72 of the Council of 19 December 1972 (OJ, English Special Edition 1972 (28 to 30 December) p. 3).

subparagraph of Article 29(1) of Regulation No 1035/72, protective measures of the type at issue may be adopted where two conditions are satisfied:

(i) the Community market is experiencing or is threatened with 'serious disturbances' which may endanger the objectives of the common agricultural policy;

(ii) those disturbances are caused by imports.

Secondly, it must be emphasized that, whilst the existence of those conditions is a matter to be assessed on a discretionary basis, Article 29 must nevertheless be interpreted and applied restrictively, since it is clearly a provision derogating from the general prohibition of charges and measures having equivalent effect in relation to imports from non-member countries contained in Article 22 of the same regulation.

13. Having regard to those preliminary considerations, I shall now consider the criticism levelled by the applicant. In the first place it must be noted that, in adopting Regulation No 962/88, the Commission committed a serious and manifest error regarding price levels. As is apparent from the fourth recital in the preamble to that regulation, the Commission considered that 'prices considerably lower than those in the previous marketing year' prevailed on the market in question; on the contrary, however, it has been established — and was expressly conceded by the Commission at the hearing — that that statement is wholly incorrect, since prices during the 1987/88 marketing year remained stable and in fact there was a slight increase in the price of certain qualities by comparison with the previous period.

14. That error does not merely affect a point of detail in the statement of the reasons on which the measure was based. Price levels constitute an essential indicator for determining, as required by the regulation, whether or not the market is experiencing serious disturbances. That situation, as envisaged in the regulation, takes only one form, namely a serious imbalance due to the market's inability to continue absorbing excess products from non-member countries. However, an imbalance — what is more, a serious imbalance — caused by *surplus* supply could not conceivably be regarded as existing in a situation like that with which the present case is concerned (when Community production was stable) without giving rise to a clearly discernible downward pressure on prices. The particular importance of price levels for the purpose of assessing the market situation is also accounted for, of course, by the fact that they constitute an indicator which reflects the combined effect of the various conditions and forces which influence the market and therefore provides the most reliable barometer for detecting the emergence of an unfavourable economic situation.

15. Moreover, the fact that price levels are an essential indicator for the purpose of adopting a measure like the one at issue here is expressly confirmed by the basic legislation, specificially Article 1 of Council Regulation No 2707/72. That provision in fact requires that, in order to determine whether the situation referred to in the first subparagraph of Article 29(1) of Regulation No 1035/72 has arisen, specific account must be taken in particular of 'the prices of domestic products recorded on the Community market, or the probable trend of those prices, and in particular their

tendency to fall or rise excessively in relation to basic prices or, with regard to products which do not have basic prices, in relation to the prices of preceding years'.

Clearly therefore, it seems to me, the Commission made an error of appraisal which, in so far as it affects a matter which is decisive in justifying the adoption of protective measures, is of itself likely to detract from the logical cohesion of the statement of the reasons on which the measure is based and, therefore, to undermine its validity.

16. It is true that the Commission contended that it also considered other factors, in particular the need to defend the Community market from a foreseeable increase in imports from non-member countries at a time when recourse to intervention was increasing considerably. It is also true that the findings of fact relating to the pattern of imports and of sales into intervention, mentioned in the third and fourth recitals to the preamble to Regulation No 962/88, are correct.

17. It seems to me, however, in the first place that where there is price stability (a fact which is in itself indicative of a balanced market) an increase in intervention, although relevant, is not sufficient to show, as required by Article 29, the existence of a serious disturbance. Increased intervention, although a negative development, is not necessarily incompatible with an economic situation which is generally stable. Moreover, in the marketing years prior to 1987/88, intervention was erratic and in some years (1982/83 and 1984/85) reached levels, both in absolute terms and by reference to Community production (which, moreover, tended to be stable) that indeed greatly exceeded those of the 1987/88 marketing year, and the Commission did not consider it necessary to adopt protective measures in that case.

18. But even if it were admitted that, in the absence of any pressure on prices, the levels of intervention were such that the Commission had reason to consider that the market was experiencing a serious disturbance, it could always be pointed out that in Regulation No 962/88 no proof is given of the fulfilment of the second condition laid down in Article 29: in other words, there are no grounds for concluding that the alleged disturbance of the market, characterized by an increase in intervention, was caused by imports.

On that specific point, it seems to me that the applicant has sufficiently proved that the increase in intervention recorded in the 1987/88 marketing year, which, moreover, was not exceptional having regard to the previous pattern, was more properly attributable to internal causes and is a structural phenomenon occurring within the organization of the market in question. In fact, the intervention was concerned primarily with apples of inferior quality, grown in well-defined regions of the Community, whose prices were considerably lower (up to five or six times) than those of apples of superior quality, which is doubtless the category to which the imported apples belong. Even though it might be going too far to say that those lower-quality apples have practically no commercial outlets and are therefore to a considerable extent produced exclusively in order to benefit

from the Community intervention system, the incontrovertible fact nevertheless remains that the price difference between those apples and the imported products of superior quality (the first varying between ECU 11.91 and 15.12 per 100 kg and the second between ECU 49.74 and 65.20) and the stability of the average price level confirm that the market was substantially divided into two barely interdependent tiers.

19. Admittedly, the possibility cannot be ruled out that the restriction on imports decided upon by the Commission in some measure alleviated the difficulties relating to intervention. It cannot be excluded that there is a limited possibility of substitution between the apples in each of the two tiers of the market to which I just referred. But the possibility of such *competition by substitution*, on which the Commission placed particular emphasis, does not seem to me to be sufficient to justify the disputed measures.

The Community legislation at issue does not in fact allow the Community, and in particular the Commission, to have recourse to restrictions on trade with non-member countries for the purpose of obviating, or rather alleviating, difficulties whose origin is internal. The basic legislation allows recourse to exceptional remedies of that kind only when it is shown that the imbalance of the market was brought about by extra-Community trade.

20. From what I have said so far it seems to me that in the present case the Commission has absolutely failed to provide the required proof. On the contrary, it committed a factual error of essential importance regarding the appraisal of the conditions to which the basic regulations made the adoption of exceptional protective measures subject. If that error had not been made, the Commission would probably have arrived at a conclusion different from that which it in fact drew.

Finally, it must be remembered that, precisely because of the exceptional nature of such measures, if in fact the Commission was unable to form a definite view on the basis of its assessment of the information obtained, it should have refrained from adopting the disputed suspension measure.

It seems to me therefore that in adopting Regulation No 962/88 the Commission went beyond the limits imposed by the basic legislation. The regulation should therefore be annulled, together with Regulation No 984/88 and Article 2 of Regulation No 1040/88 which are based on the same premisses as Regulation No 962/88, merely extending the duration of the suspension.

Submission (c)

21. In the applicant's opinion, Regulation No 962/88 and the later amending provisions are unlawful since the Commission failed to take account of the situation of goods in transit, as required by Article 3(3) of Regulation No 2707/72.

22. It that connection, it should be remembered that Regulation No 346/88 introduced a system of surveillance on the basis of which intending importers of dessert apples from non-member countries

were required to apply for an import licence from the national authorities. In accordance with a procedure well known in Community spheres, the licence is issued only after a 'reflection period' (in this case, five working days as from the lodgment of the application) 'unless measures are taken within that time' (see Article 3(3) of Regulation No 346/88). Moreover, during that period the applicant trader has no entitlement whatsoever to the issue of a licence — the Commission may decide to suspend the issue of licences, provided of course that it complies with the conditions for the exercise of its power to do so. Conversely, once a licence has been obtained, the trader has an indefeasible right to carry out the operation to which the licence relates.

That is the background to Article 3(3) of Regulation No 2707/72. That provision affords specific protection for a specific category of traders, namely those whose products are in transit when the suspension measure is adopted. There is no doubt that the Commission is required to comply with Article 3 when it adopts suspension measures of the kind at issue here.

In the sixth recital in the preamble to Regulation No 962/88, the Commission stated:

'since the period of validity of import licences has been fixed so as to cover amply the dispatch of dessert apples to the Community and to permit the operators to obtain import licences before the ships depart, no account should be taken of goods being transported to the Community other than those for which import licences have been issued'.

23. In order to determine whether the Commission thereby infringed Article 3 of Regulation No 2707/72, it is necessary to define the real scope of the obligation imposed by that provision.

Three different interpretations have been put forward.

24. The first, advocated by the applicant, is that goods in transit must in any event be allowed into the Community. The provision thus allows a legal exception which imposes an absolute limit on the material extent to which suspension measures can be applied, as in the case of any other measure restricting trade with non-member countries: such measures can never be applied to goods in transit.

That reading perhaps has the merit of conforming with Article XIII, (3), (b) of the General Agreement on Tariffs and Trade, which, it will be remembered, does not have direct effect but is nevertheless binding on the Community. However, the clear and absolutely unequivocal wording of the Community provision militates against it. The latter merely requires account to be taken of the special situation of products in transit to the Community, and that expression certainly does not amount to an obligation to guarantee access for the products in question to the Community in all cases and at all times.

That conclusion also appears to be consistent with the need mentioned by the Court in its judgment of 5 May 1981 in Case 112/80 *Dürbeck* [1981] ECR 1095 not to interpret that provision widely since the

efficacy of the protective measures adopted must not be put at risk. That finding was repeated in the order given on 10 June 1988 in the present case in response to an application for interim relief, where it is also stated that, in principle, at least in certain particularly critical circumstances, it cannot be excluded that the Commission may be able to comply with Article 3 even if it does not exempt goods in transit to the Community from the application of the protective measures (paragraph 22).

25. The second interpretation, put forward by the Commission, in conformity with the recital in the preamble to Regulation No 962/88 referred to earlier, is that traders whose goods are in transit are adequately protected by the simple fact that they were in a position to obtain an import licence before the goods were loaded aboard the vessel. In the present case, that possibility derives from the fact that the duration of the licence, whose validity was extended from 30 to 40 days, was sufficient (this question of fact has, however, been vigorously disputed) to cover the journey from Chile to Europe.

I must say immediately that that view seems unacceptable in so far as it leads to a nihilistic interpretation of Article 3. It is clear that as soon as a trader has obtained an import licence he acquires a right to import the product into the Community. But his right in those circumstances derives not from Article 3 but from mere possession of the licence. In other words, when he has obtained a licence he is no longer caught by the suspension measures. Such measures suspend the issue of licences but once a licence has been issued suspension would be inconceivable; at most there might be the possibility of cancellation of the licence — but that is a wholly different and absolutely exceptional case.

On the other hand, the specific guarantee provided for in Article 3 is intended to take effect earlier, at a different stage: during the 'reflection period' which I mentioned earlier, between the lodgment of the application and the issue of the licence. It is at that stage that a trader whose goods are in transit benefits from the guarantee contained in Article 3, a provision which, moreover, is intended to lay down a condition for the exercise of the power to adopt suspension measures. The Commission's argument that a trader is protected by the possibility of obtaining a licence before shipping the goods is tantamount to stating that Article 3 is inoperative in the phase during which the restrictive measure is issued, that is to say specifically in the phase in which that guarantee — as is moreover apparent from the wording of the provision in question — is intended to come into play.

In other words, the Commission's argument leads (as indeed clearly emerges from the wording of the recital mentioned earlier) no more and no less than to a failure to take due account of the position of goods in transit when the suspension is decided upon.

26. I think in fact that it is more appropriate to adopt a third interpretation on which, if I am not mistaken, the Court's order made on the application for interim relief was based. According to that approach, the provision in question is intended essentially to protect the legitimate

expectations of traders. Consequently, once they are in transit, goods should in principle enter the Community without the possibility of running foul of any suspension measure. However, that guarantee — and here lies the difference from the first interpretation — protects traders only if, before shipping the goods, they have not been given a sufficiently clear indication that any suspension measures might affect goods in transit *as well*. Where such a warning has been given to traders, they are aware of the fact that goods which have been shipped, without the prior issue of a licence, are not immune from restrictive measures; there is no reason therefore to protect their legitimate expectations.

That interpretation also has the merit of being consistent if not with the letter then at least with the spirit of the GATT provision mentioned earlier. It is also confirmed, as pointed out by the Court in its order, by the practically invariable and consistent practice of the Commission which, unless clear warnings were given, has always (with the exception of one case only) not made the suspension measure applicable to goods in transit.

27. If this third interpretation is held to be correct, it must follow that in the present case the Commission clearly neglected its obligations under Article 3. It gave no clear signal to the traders concerned of the possibility of the suspension measure being applied also to goods in transit. No indication to that effect is to be gleaned from Regulation No 346/88. That regulation merely shows that importers could obtain an import licence before shipping the goods. But that does not mean that they were aware of the fact that they had to obtain such a licence before loading the goods if they wished to ensure that they would not be affected by restrictive measures.

The Commission also stated at the hearing, departing from what it had said in its written submissions, that it did not give any indication to that effect through informal contacts with the trade associations.

28. I therefore consider that, in adopting Regulation No 962/88 and the subsequent amendments thereto, the Commission did not comply with the first subparagraph of Article 3(3) of Regulation No 2707/72. The applicant's submission in that regard should thus also be upheld.

My analysis so far is conducive to the application being upheld as far as its merits are concerned, but of course that is subject to what I stated earlier regarding its admissibility.

I shall therefore consider in less detail the remaining submission.

Submission (b)

29. In the applicant's opinion, Article 29 of Regulation No 1035/72 does not give authority for protective measures intended to allow an overall review of the market in apples, the reason put forward in the preamble to Regulations Nos 962/88 and 984/88.

30. It is true that protective measures are justified where there is a serious disturbance brought about by imports. But if it is admitted that such a situation has come about, it is entirely consistent with the purposes of the measure in question to review the market situation. The measure is intended to remedy or prevent serious disturbances on the market. It is therefore based on an assessment of such difficulties or risks. Consequently, it must be of a sufficient duration to enable the Commission to verify whether the market is becoming more stable or whether, on the other hand, the disturbance is persisting or becoming worse to such an extent as to justify an extension of the measures. The time needed for reviewing the situation must therefore be taken into account in determining the period for which the protective measures are to apply: and it was precisely in that context that 'the period necessary for a review of the overall situation on the market' was taken into account by the Commission in adopting the contested regulations.

I consider therefore that this submission must in any case be rejected.

C — Compensation for damage

31. If the Court should consider that the contested regulations do not constitute measures of general scope and consequently declare the action admissible and then uphold it on the merits, it will have to give a decision on the claim for compensation for damage.

In that regard, whatever doubts may arise as to the 'legislative' nature of a measure of individual concern [8] and the applicability in such circumstances of the limitation of liability for damage caused by legislative measures, it must be noted that, in the present case, the restrictive conditions upon which, according to well-established decisions of this Court, [9] the existence of such liability is conditional, appear to be satisfied.

32. In the first place, by adopting exceptional or protective measures in a factual situation clearly different from that required by the basic regulations, and by wholly failing to take account of the special position of goods in transit, as required by the same regulations, the Commission 'manifestly and gravely disregarded the limits on the exercise of its powers'. [10]

Similarly, it must be concluded that there is a 'serious breach of a superior rule of law for the protection of the individual' [11] in so far as the finding of unlawfulness relates to the infringement of provisions which, pursuant to commitments entered into by the Community at international level, are intended to ensure freedom of trade with non-member countries, specifically

8 — The point was raised by Mr Advocate General VerLoren van Themaat in his Opinion in Case 59/84 *Tezi* [1986] ECR 887, particularly at p. 914, but was not considered in the judgment (of 5 March 1986).

9 — See judgments of 2 December 1971 in Case 5/71 *Zuckerfabrik* [1971] ECR 975, of 25 May 1978 in Joined Cases 83/76 and 94/76, 5/77, 15/77 and 40/77 *HLN* [1978] ECR 1209, of 4 October 1979 in Case 238/78 *Ireks-Arkady* [1979] ECR 2955, in Joined Cases 241/78, 242/78, and 245/78 to 250/78 *DGV* [1979] ECR 3017, in Joined Cases 261/78 and 262/78 *Interquell Stärke-Chemie* [1979] ECR 3045, of 5 December 1979 in Joined Cases 116/77 and 124/77 *Amylum* [1979] ECR 3497, of 17 December 1981 in Joined Cases 197/80 to 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle* [1981] ECR 3211, of 6 December 1984 in Case 59/83 *Biovilac* [1984] ECR 4057, of 19 September 1985 in Joined Cases 194/83 to 206/83 *Asteris* [1985] ECR 2815 and of 30 May 1989 in Case 20/88 *Roquette Frères* [1989] ECR 1553.

10 — See in particular *HLN*, paragraph 6.

11 — Ibid., paragraph 4.

protecting the legitimate expectations of traders and, more generally, guaranteeing them the necessary certainty regarding the conditions on which the effective exercise of their rights may depend in certain circumstances.

Finally, it seems to me that the damage complained of by the applicants in this case, deriving from their being prevented from placing their products on the market of destination within the scheduled period, falls substantially outside, and indeed exceeds, 'the bounds of the economic risks inherent in the activities of the . . . sectors concerned'. [12]

33. That answers the question *whether* there is liability. As regards the *quantum* of damages, I think it would be appropriate for the Court to call on the parties to agree on the calculation thereof within a specified period, on the expiry of which, without any agreement being reached, it would be incumbent upon the Court to make an order.

34. In view of all the foregoing considerations, I suggest that the Court:

(i) declare the application inadmissible;

If, however, the application is declared admissible, the Court should:

(i) uphold the application for the annulment of Regulations Nos 962/88 and 984/88 and Article 2 of Regulation No 1040/88;

(ii) declare that the Community is liable for the damage arising from those unlawful measures, leaving determination of the amount of compensation to be agreed by the parties or, if no agreement is reached, to be determined in a subsequent decision of the Court.

12 — Ibid. paragraph 7.