OPINION OF MR ADVOCATE GENERAL LENZ DELIVERED ON 5 APRIL 1984 [1]

Mr President,
Members of the Court,

A — The action for damages pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty on which I am to give my views today is based on the following facts: On 12 May 1982 Eximo Molkereierzeugnisse Handelsgesellschaft mbH, whose registered office is in Hamburg, applied to the Bundesanstalt für landwirtschaftliche Marktordnung in Frankfurt am Main for an export licence and advance fixing certificate for the export to Switzerland of 500 tonnes of butter under tariff heading No 04.03 A of the Common Customs Tariff. The licence was issued on 18 May 1982, at the rate of export refund applicable on the date of application (12 May 1982), that is, 105 European currency units (ECU) per 100 kg, against the provision of security in the amount of DM 53 150.

By communication of 13 November 1981, published in Bundesanzeiger No 21 of 2 February 1982, the Commission had informed interested parties in the Community of its intention, pursuant to Article 5 (3) of Regulation No 876/68 of the Council (Official Journal, English Special Edition 1968 (I), p. 234), to adjust export refunds fixed in advance, in the transition period to the 1982/83 milk year, according to changes in the intervention prices, so that persons concerned could enter into contracts on that basis for delivery after the beginning of the new marketing year. In the communication it was expressly stated, *inter alia*, that the adjustment would be applied to refunds fixed in advance not less than 14 days before the decision of the Council setting the intervention prices for the 1982/83 year.

Since the Council was not able to arrive at a decision on prices for the new year before the normal end of the 1981/82 year on 31 March 1982, the milk year was extended five times by regulations of the Council. The new milk year began only on 20 May 1982 with the coming into force of Council Regulation No 1184/82 of 18 May 1982 (Official Journal, L 140, 20. 5. 1982, p. 2), which set target and intervention prices for milk and milk products.

Pursuant thereto, by Regulation No 1324/82 (Official Journal, L 150, 29. 5. 1982, p. 46), the Commission set the export refund for the butter in question at 133 ECU per 100 kg net weight.

On 29 May 1982, the day on which that regulation came into force, Eximo applied for a new export licence and advance fixing certificate, which it duly received. It carried out the delivery on the basis of that licence, and did not use the export licence of 18 May 1982.

By Regulation No 1669/82 of 14 June 1982 (Official Journal, L 187, 1. 7. 1982, p. 1) the Commission finally set the adjustment rate for butter of the kind in question at 31.86 ECU per 100 kg net weight. It appears from the preamble that in order to avoid certain speculative dealings, the Commission considered it necessary, as had been stated in the

1 — Translated from the German.

communication of 13 November 1981, to limit operation of the adjustment to cases in which the export licence had been applied for more than 14 days before the date on which the Council had set intervention prices for the 1982/83 milk year. The regulation therefore provided that only refunds fixed in advance on or before 3 May 1982 should benefit from the adjustment.

In its action brought on 18 April 1983 against the European Economic Community, represented by the Commission, Eximo claims compensation for damage in the amount of DM 100 300, plus interest. In its view the damage is the direct result of the Commission's communication of 13 November 1981 and Regulation No 1669/82 of 14 June 1982, adopted on the basis of that communication. The applicant submits that the damage consists first of the difference between the refund adjusted pursuant to Regulations Nos 876/68 and 1169/82, in the amount of 136.86 ECU per 100 kg, and the refund paid to it pursuant to Regulation No 1324/82, in the amount of 133 ECU per 100 kg. Converted into German currency, that amount, according to the applicant's calculation, comes to DM 47 150.

Secondly it advances a claim for the loss of the security in the amount of DM 53 150 which it was obliged to lodge on application for the unused export licence of 18 May 1982.

B — My opinion on the matter is as follows:

I — Admissibility

1. The defendant considers the action inadmissible in its entirety. It refers in the first place to the fact that according to the case-law of the Court the liability of the Community under the second paragraph of Article 215 is *subsidiary* to national compensation remedies. In its view the applicant has not exhausted all national remedies with regard either to the alleged damage resulting from the forfeiture of the security or to the damage alleged to have occurred in connection with the adjustment of the refunds.

(a) With regard to the *forfeiture of the security* the defendant submits that that was a measure of the German intervention agency against which an action could have been brought in the national courts. That was in any event the case with regard to the decision of forfeiture of 17 January 1983, which could have been challenged in a separate action. The court seised of that action could then if necessary have made a preliminary reference to the Court.

I cannot agree with that view of the law.

(aa) It is true that there is consistent case-law of the Court [1] to the effect that,

1 — Judgment of 25. 10. 1972 in Case 96/71, *Haegeman* v *Commission*, [1972] ECR 1005.

Judgment of 27. 1. 1976 in Case 46/75, *IBC Importazione* v *Commission*, [1976] ECR 65.

Judgment of 21. 5. 1976 in Case 26/74, *Roquette Frères* v *Commission*, [1976] ECR 677.

Judgment of 2. 3. 1978 in Joined Cases 12, 18 and 21/77, *Debayser* v *Commission*, [1978] ECR 553.

Judgment of 12. 12. 1979 in Case 12/79, *Wagner Agrarhandel* v *Commission*, [1979] ECR 3657.

Judgment of 5. 12. 1979 in Joined Cases 116 and 124/77, *Amylum* v *Council and Commission*, [1979] ECR 3497.

Judgment of 10. 6. 1982 in Case 217/81, *Interagra* v *Commission*, [1982] ECR 2233.

in actions for damages in respect of allegedly illegal imposition of levies or other implementation measures by national authorities, the persons affected must in principle first exhaust all national legal remedies. The remedy of the action for damages should accordingly take second place, in principle, to those actions in which the annulment of the actual measure causing the damage is sought. That case-law is moreover in conformity with the division of powers between the Member States and the Community. That is, it emphasizes that it cannot be the purpose of the action for damages under Articles 178 and 215 of the Treaty to review the validity of decisions of State authorities which are charged by Community law with the implementation of specific measures, or to adjudicate on the financial consequences which may result from any invalidity of such decisions. That is on the contrary the duty of the national courts.

Such a reference to the national courts is however appropriate only where the remedy available before those courts is likely *effectively* to guarantee protection of the individual. [1] In other words, as Mr Advocate General Mancini submits in his opinion in the *Unifrex* case, [2] an action for damages pursuant to Article 178 and the second paragraph of Article 215 should be dismissed as inadmissible only where the injured party may specifically obtain the same economic result in an action before the national courts.

An action challenging the grant of the export licence or the decision ordering forfeiture of the security would perhaps be successful if the plaintiff could conclusively state that the decision of the Bundesanstalt as such or its legal basis was defective. [3]

As the decision of the Verwaltungsgericht [Administrative Court] Frankfurt am Main of 27 September 1983 shows, it cannot be asserted that the export licence issued on the demand of the applicant was so defective. The applicant is moreover correct to say that pursuant to Council Regulation No 3183/80 (Official Journal, L 338, 13. 12. 1980, p. 1), if the licence was not used the Bundesanstalt was obliged to order the forfeiture of the security lodged and had no discretion in that regard. According to that regulation the forfeiture of the security may be avoided only in a case of *force majeure;* such circumstances are undoubtedly absent in this case. Furthermore, the applicant is not challenging the legality of the forfeiture of the security but the validity of the time-limit laid down by Commission Regulation No 1669/82. However, even if a national court, in the context of an action challenging the forfeiture, made a preliminary reference to the Court of Justice on the validity of Regulation No

1 — Joined Cases 116 and 124/77, *Amylum* v *Council and Commission,* see Note 1, p. 2315.

Judgment of 17. 12. 1981 in Joined Cases 197 to 200, 243, 245 and 247/80, *Ludwigshafener Walzmühle* v *Council and Commission,* [1981] ECR 3211.

2 — Case 281/82, *Unifrex* v *Commission and Council,* [1984] ECR 1969.

3 — Case 217/81 *Interagra* v *Commission* and Case 12/79 *Wagner Agrarhandel* v *Commission,* see Note 1, p. 2315.

1669/82, and the Court declared the regulation invalid, I am unable to see how such a decision could result in the annulment of the forfeiture of the security.

For that reason an action challenging the forfeiture of the security before the national courts would not have the same economic result as an action for damages pursuant to the second paragraph of Article 215; the latter should therefore be considered admissible to the extent to which it concerns the damage asserted in regard to the forfeiture of the security.

(bb) The Commission also objects that the action is inadmissible because there is a danger of contradictory decisions of the courts at national and Community level. Those misgivings must be taken seriously, but I think they are unfounded. The licence had not been used, and it expired on 18 November 1982. The decision on the forfeiture of the security was issued on 17 January 1983. It was futile to challenge it before the courts, and the applicant could therefore not be expected to do so. The danger evoked by the Commission of contradictory decisions of national and Community courts does not therefore exist.

(cc) The Commission objects further that a national remedy was open to the applicant with regard to its claim for damages for *failure to adjust the refunds.* According to the Commission, it must indeed be conceded to the applicant that it would have been contradictory to apply for adjustment of the refunds when the export was not carried out on the basis of the licence of 18 May 1982. But if the applicant was of the opinion that the refunds calculated for the export in question should have been adjusted, it should have carried out the export and then applied to the German intervention agency for payment of the adjusted refunds. Finally, in the event of a negative decision it should have brought action in the national courts.

In my view however, the close relation of this damage to the damage resulting from the forfeiture of the security makes it fundamentally impossible to split this claim, admitting the Court to have jurisdiction with regard to part of it but remitting the other part to the national courts. It would not be consistent with the efficient use of legal procedure to deny the admissibility of the claim for damages with regard to the alleged failure to adjust the refunds, and refer the applicant to that extent to the national courts. The danger of differing judgments in the same proceedings would moreover present itself.

2. The Commission further argues that the action is also inadmissible because it is directed against the Commission alone and not also against the Council. According to the Commission, the alleged damage resulting from the failure to adjust the export refunds should also be attributed to the action of the Council in extending the milk year 1981/82 on several occasions.

That view is correct to the extent to which the Court has held that the correct defendant is that institution to which the action of the Community giving rise to liability is to be attributed. An action against the Community must accordingly in principle be directed against those

institutions which in the applicant's view have caused the damage. [1] In this regard the Commission is also correct to say that the application made by the applicant in its reply to supplement the designation of the defendant, in the alternative, so that the defendant is also represented by the Council, having its seat in Brussels, is inadmissible. Since such a claim cannot, according to Article 38 (1) of the Rules of Procedure, be raised as an alternative claim, and since the Council's right to defend itself would be curtailed, the Court correctly refused to include the Council in the proceedings at a later stage.

The fact that the Council is not a party to the proceedings does not however, in my view, make the action inadmissible. The applicant's claim is directed expressly against the action of the Commission which in July 1982, in Regulation No 1669/82, maintained the announced provision with regard to the time-limit, after the Council had extended the 1981/82 milk year several times. Since the applicant is challenging a measure of the Commission imposing charges, the Commission must in any event be regarded as a party liable to be sued.

II — Substance

1. The applicant argues that it suffered damage for which the Community is liable as a result of *legislative action* on the part of the Commission. The Commission communication of 13 November 1981, published in the Federal Republic of Germany on 2 February 1982, which was of a legislative nature, was itself illegal. Contrary to the purpose of Article 5 (3) of Regulation No 876/68 of the Council, which is to give Community exporters a degree of certainty with regard to the stability of refunds, the Commission arbitrarily announced a provision fixing a time-limit. In the applicant's view, in order to avoid damage to persons affected in the Community, the Commission should at the latest in adopting Regulation No 1669/82 of 14 June 1982, by which the provision fixing the time-limit was introduced as previously announced, have taken into account the fact that the beginning of the milk year had been postponed several times for a short period. In maintaining the provision with regard to the time-limit the Commission improperly or at least incorrectly exercised the discretion conferred upon it, which related at most to the question whether or not to make an adjustment. By its illegal conduct the Commission has committed a breach of the principles, guaranteed by Community law, of economic freedom of action, protection of legitimate expectation and equality of treatment.

In reply the Commission denies having acted incorrectly, in particular with reference to the wide discretion which it enjoys in making decisions of economic policy. There can moreover be no question of breach of the principles referred to by the applicant.

2. In dealing with this dispute it must first be recalled that the Court has consistently held in regard to liability for legislative wrongs that a finding that a legislative act is illegal is not in itself sufficient to give rise to liability. As

1 — Judgment of 13. 11. 1973 in Joined Cases 63 to 69/72, *Wehrhahn Hansamühle* v *Council*, [1973] ECR 1229.

the Court has consistently held [1] the Community does not incur liability on account of a legislative measure involving choices of economic policy unless a "sufficiently serious breach of a superior rule of law for the protection of the individual" has occurred. "Only exceptionally and in special circumstances" can liability for legislative measures which are the result of choices of economic policy be admitted. In the *HNL* case, [2] the Court thus held that the legislative authority "cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals". In that case and in later cases (cf. the *Ireks-Arkady*, *DGV*, *Interquell* and *Dumortier Frères* cases [3]), the Court has accordingly held that liability can only and exceptionally be incurred when "the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers". At the same time the Court has stressed *inter alia* in the *HNL* case [2] "that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void".

3. The question whether a refund fixed in advance should be adjusted depends however on a decision of economic policy. That decision is characterized by a wide discretion essential for the implementation of the common agricultural policy. That such a discretion exists is made clear by Regulation (EEC) No 2732/71 of the Council of 20 December 1971 (Official Journal, English Special Edition 1971 (III), p. 1020), by which Article 5 (3) of Regulation No 876/68 was amended. The previous wording of that provision stated that the refund fixed in advance *"shall"* be adjusted according to changes in the threshold price and certain aids; the version in force since 1 January 1972, in contrast, reads as follows:

"It *may* be decided that the refund fixed in advance

shall be adjusted if there is an alteration:

(a) to intervention prices

(b) . . ."

The imperative provision was thus replaced by a permissive provision, so that the wording of the regulation itself indicates the Commission's discretion. It is moreover clear from the preamble to

1 — Judgment of 2. 12. 1971 in Case 5/71, *Zuckerfabrik Schöppenstedt* v *Council*, [1971] ECR 975.

Judgment of 5. 12. 1979 in Case 143/77, *Koninklijke Scholten-Honig* v *Council and Commission*, [1979] ECR 3583.

2 — Judgment of 25. 5. 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL* v *Council and Commission*, [1978] ECR 1209.

3 — Judgment of 4. 10. 1979 in Case 238/78, *Ireks-Arkady* v *Council and Commission*, [1979] ECR 2955.

Judgment of 4. 10. 1979 in Joined Cases 241, 242 and 245 to 250/78, *DGV* v *Council and Commission*, [1979] ECR 3017.

Judgment of 4. 10. 1979 in Joined Cases 261 and 262/78, *Interquell Stärke* v *Council and Commission*, [1979] ECR 3045.

Judgment of 4. 10. 1979 in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *Dumortier Frères* v *Council*, [1979] ECR 3091.

the regulation that the Council considered the automatic adjustment of export refunds fixed in advance to be too rigid, and therefore replaced the imperative provision of the previous Article 5 (3) by a less strict provision which would "enable account to be taken of the situation on the Community market when adjustments are made". The same recital further states that "adjustments decided on *where possible* before the entry into force of alterations to intervention prices may in particular ensure the continuity of export conditions from one milk year to the next".

It cannot, then, be disputed that the Commission has a wide discretion to decide whether refunds fixed in advance should be adjusted after the fixing of new intervention prices, taking into account all relevant aspects of economic policy. It must also lie within that discretion, therefore, to decide what requirements and conditions shall be attached to such an adjustment.

In this regard the Court has no jurisdiction to judge the appropriateness of the provision with regard to the time-limit introduced by the Commission, but must restrict itself to the review of its *legality.* The provision is lawful if it is consistent with the purpose of the provision regarding adjustment.

As is clear from the preamble to Regulation No 2732/71, the purpose of Article 5 (3) of Regulation No 876/68 of the Council is so far as possible to ensure the continuity of export conditions from one milk year to the next. In order to relieve traders of their uncertainty whether or not use would be made of the possibility of adjustment at the beginning of the 1982/83 milk year, in November 1981 the Commission announced its intention to make use of the possibility of adjustment in order to enable traders to conclude contracts on that basis for delivery after the beginning of the new marketing year. When such an adjustment is announced, however, the danger cannot be excluded that contracts will be concluded on the basis of the published price proposals of the Commission and of relevant press reports regarding the expected new intervention prices, with the main purpose of exploiting such changes. Accordingly it was not inconsistent for the Commission, in order to prevent such speculative dealings, to state expressly in the announcement itself that the adjustment of refunds was to be restricted to those applications for advance fixing which were introduced more than 14 days before the change of the intervention prices.

Nor, from this point of view, can objection be made to the fact that the Commission did not refer the beginning of the 14-day period to a specific date, since from previous experience it could not be excluded that the beginning of the milk year might be delayed and that the risk of speculation would continue during this period.

Finally, contrary to the submission of the applicant, the Commission cannot be accused of having incorrectly used its discretion in adopting the legislative measures announced in the communication of November 1981 without regard

to the altered requirements of economic policy in June 1982. If the Commission had departed from its announced intention in regard to the time-limit, it would in any event have laid itself open to the reproach of having failed to protect the legitimate expectation of all those traders who, relying on that communication, did not apply for advance fixing during the period in question.

4. For those reasons the submission that the regulation in question, No 1669/82, is illegal must in my view be dismissed. According to the case-law set out above, even if the regulation were to be held illegal the Community could only and exceptionally incur liability if the Commission had manifestly and gravely disregarded the limits on the exercise of its powers. In that regard the Court has held that not only the extent of the incorrect exercise of discretion but also the *effects* of the defective legislative acts on the economic interests of individuals must be taken into account.

(a) In that connection I cannot agree with the assertion of the applicant that its *economic freedom of action* was restricted by the provision in question. It must first be borne in mind, as the Commission has correctly submitted, that export refunds amount to a subsidy whose payment is a matter for the discretion of the Community institutions. They are intended to make it possible for Community products to be disposed of on the markets of non-member countries. The fact that the refunds were not adjusted cannot therefore in principle amount to an injury giving rise to a right to damages. It was moreover for the applicant to decide upon its own conduct, on the basis of its commercial appraisal of the foreseeable course of business. It could either refrain from concluding the contract if the unadjusted export refunds were not in its view sufficient to enable it to make the delivery without loss, or it could delay the advance fixing until the new intervention prices came into force. If, instead of so doing, the applicant proceeded with the advance fixing according to the rates of refund applicable at the time, with full knowledge of the Commission's communication, it should have taken into account the possibility that the refunds would not be adjusted. Any loss which may have occurred must be attributed to its own actions and not to those of the Commission.

(b) The applicant's submission that in not adjusting the export refunds the Commission infringed the principle of *protection of legitimate expectation* is also unsound. The adjustment of the refunds after the fixing of new intervention prices was a matter for the discretion of Community institutions. It could not therefore be expected that this possibility would automatically be used. The Commission had moreover expressly stated in its communication that only those refunds would be adjusted which had been set in advance at least 14 days before the alteration of the intervention prices. The applicant could not therefore expect that refunds fixed in advance within the 14-day period would be adjusted. The applicant made its application for advance fixing after the fourth prolongation of the 1981/82 milk year, that is, at a moment when the fixing of the new farm prices could be expected any day. It could not therefore expect not to come within that period.

(c) Finally, the applicant's submission that the Commission offended against the *principle of equal treatment*, inasmuch as it did not maintain the provision regarding the time-limit for the transition to the 1982/83 year, in spite of allegedly identical circumstances, is also unfounded. According to that principle similar circumstances may not be treated differently unless a differentiation is objectively justified. The transition in question differed from the following one however inasmuch as the expected price increase in 1982, of which traders were also aware, was unquestionably much higher than that of a year later. No objection can therefore be made on legal grounds to the fact that in the transition to the 1983/84 marketing year the Commission considered the danger of speculation to be less important and therefore dispensed with the provision as to a time-limit. Moreover, the Commission must in general remain at liberty to alter its decisions of economic policy on the basis of improved knowledge of the operation of the market and adapt them to conditions, without the legality of earlier decisions being challenged for that reason alone.

III — The damage and causation

Since it must be concluded that the conduct of the Commission was not such as to involve the Community in liability, it may be remarked in conclusion, from a purely subsidiary point of view, that the applicant has suffered no damage for which compensation should be paid. In the oral procedure the applicant stated that it applied for advance fixing with regard to a contract that was already concluded. The application for advance fixing was made however in the expectation that the refund fixed in advance would be adjusted. It considers itself injured by reason of the fact that contrary to its expectation no adjustment was made to the refund fixed in advance. As has already been shown, however, it could not reasonably expect that the Commission would, contrary to its communication, also adjust those refunds in respect of which advance fixing was applied for within the 14-day period before the fixing of the new intervention prices. The alleged damage thus results from a purely speculative calculation of the applicant, which must be regarded as part of its business risks. If it did not export the goods on the basis of the export licence of 18 May 1982 in order to mitigate the expected loss, the resulting forfeiture of the security must also be attributed to its commercial risk.

IV — Interest

Since the action has been show to be unfounded in all respects the claim for interest need not be discussed.

C — In conclusion I therefore propose that the Court dismiss the action as unfounded and order the applicant to pay the costs of the proceedings pursuant to Article 69 (2) of the Rules of Procedure.