OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 29 March 1990 *

My Lords,

The common organization of the market in fruit and vegetables

1. In these proceedings, the applicants claim damages from the Community under Article 215(2) of the EEC Treaty by reason of losses allegedly suffered as a result of the adoption of Commission Regulation No 3587/86 (Official Journal 1986, L 334, p. 1). That regulation altered the conversion factors applicable in calculating the price at which fruit and vegetables with certain commercial characteristics are bought in.

2. The applicants are eight in number. Four of them, namely Aerpo, ALPO, the groupement de producteurs 'Hermitage-Basse Isère', and the groupement 'Dauphiné-Vivarais', are producers' organizations within the meaning of Article 13 of Regulation (EEC) No 1035/72 (Official Journal English Special Edition 1972 (II), p. 437), as amended. Of this group, the first two are based in Italy, the second two in France. Each of the remaining four applicants, namely CAPO, COT, Mr Jean-Claude Guillermain and Mr Jean Julien, is a producer of fruit and vegetables and a member of one of the applicant producers' organizations.

3. Fruit and vegetables are subject to a common organization of the market, the rules relating to which are contained in Regulation No 1035/72. The price support mechanism laid down in that regulation, which is fairly weak compared with that applicable in other sectors, has two elements. First, producers' organizations may fix a withdrawal price below which they will not offer for sale products supplied by their members (Article 15(1)). When a withdrawal price is fixed, producers' organizations are required to grant an indemnity to their members for quantities that remain unsold. Member States may fix a maximum level for the withdrawal price. Producers' organizations may also decide not to put on sale products which do not comply with marketing rules. Where this occurs, producers' organizations are required to grant their members compensation, calculated on the basis of the withdrawal price, for the quantities that remain unsold (Article 15(1), as supplemented by Article 4 of Regulation (EEC) No 1154/78, Official Journal 1978, L 144, p. 5).

4. To finance these withdrawal measures, producers' organizations are required to

* Original language: English.

establish an intervention fund maintained by contributions assessed on quantities offered for sale. Products offered for sale by their members will normally be sold through the organization. This emerges from the French text of Article 13 of Regulation No 1035/72, although the English text of that provision is somewhat obscure, as I pointed out in my Opinion in Case 77/88 *Stute* v *Federal Republic of Germany*, paragraph 10 (judgment of 15 June 1989, [1989] ECR 1755, 1765).

5. In addition, for certain products the Council is required by Article 16(1) of Regulation No 1035/72 to fix each year a 'basic price' and a 'buying-in price'. The basic price, according to Article 16(2) (as amended by Article 1 of Regulation (EEC) No 2454/72, Official Journal, English Special Edition 1972 (November), p. 60),

'shall be fixed taking particular account of the need to:

(i) contribute to the support of the incomes of farmers,

(ii) stabilize market prices without leading to the formation of structural surpluses in the Community,

(iii) consider the interests of consumers,

on the basis of the development of the average of the prices recorded during the preceding three years on the most representative Community production markets, for a product with defined commercial characteristics such as variety or type, quality class, sizing and packaging'.

The buying-in price is fixed at between 40 and 70% of the basic price depending on the product.

6. Under Article 18 (as amended by Article 2 of Regulation No 2454/72, *supra*), Member States are required to grant financial compensation to producers' organizations which intervene under Article 15, provided that the withdrawal price does not exceed a certain level. That level is calculated by reference to the basic price and the buying-in price, multiplied where appropriate by the relevant conversion factor.

7. The main function of the buying-in price is to determine when Member States become obliged to buy in products which are offered to them (Article 19, as amended by Article 3 of Regulation No 2454/72, *supra*). When the actual price on particular markets remains below the buying-in price for three consecutive days, the Commission is required to record, if the Member State in question so requests, that the market in the relevant product is in a state of serious crisis. At that point, Member States become subject to an obligation to buy in products of Community origin which are offered to them, provided the products meet certain requirements as to quality and size and that they have not been withdrawn from the market under Article 15. Buying-in operations cease when prices remain higher than the buying-in price for three consecutive days.

8. When products offered to the Member States in accordance with Article 19 possess characteristics different from those by reference to which the relevant basic price was fixed (so-called pilot products), the price at which the product is bought in is calculated by multiplying the buying-in price for the pilot product by a conversion factor (Article 16(4), as amended by Regulations (EEC) Nos. 793/76, Official Journal 1976, L 93, p. 1, and 1154/78, *supra*). Conversion factors are fixed in accordance with the management committee procedure, the main features of which are examined below.

The contested regulation

9. By Regulation No 3587/86, the Commission introduced new conversion factors to be applied to the buying-in prices for fruit and vegetables. According to the applicants, the result was a reduction in (i) the prices at which certain products covered by Regulation No 1035/72 were bought in, (ii) the amount of financial compensation Member States were required to grant producers' organizations intervening pursuant to Article 15, and (iii) the level of the indemnities paid by producers' organizations to their members in respect of unsold products. The applicants claim that Regulation No 3587/86 is unlawful and that they should be awarded damages representing, in the case of the producers' organizations, the difference between the financial compensation to which they would have been entitled from Member States in application of the old conversion factors, and the amounts calculated by applying the new conversion factors. In the case of the applicant producers, the claim is for damages representing the difference between the indemnities to which they would have been entitled from the producers' organizations in application of the old conversion factors, and the amounts resulting from the application of the new conversion factors. The applicants also claim a nominal sum to compensate for an alleged fall in market prices resulting from the reduction in buying-in prices following the introduction of the new conversion factors.

Admissibility

10. In its defence the Commission suggests, somewhat obliquely, that the action is, at least in part, inadmissible. It claims that those of the applicants which are producers' organizations could have brought proceedings in the national courts challenging the amount of financial compensation paid to them by the competent national authorities. The validity of Regulation No 3587/86 could then have been the subject of a reference for a preliminary ruling. Had that regulation been declared invalid pursuant to such a reference, this could have resulted in the payment of compensation by reference to the old conversion factors.

11. The Commission seems to be referring to the case-law of the Court laying down that the admissibility of an action for damages is subject in certain cases to the exhaustion of any domestic remedies which would enable the applicant to recover compensation from the national authorities. An action for damages will only be inadmissible on this basis, however, where the national remedies provide an effective means of protection for individuals who consider themselves harmed by acts of the Community institutions: see the judgments

of 30 May 1989 in Case 20/88 *Roquette Frères* v *Commission* ECR 1553, paragraph 15, of 12 April 1984 in Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, paragraph 11 and of 26 February 1986 in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 27.

12. As the applicants point out, however, their claim is not limited to the difference between the compensation and indemnities payable on the basis of the new conversion factors and the amounts payable under the old conversion factors, but also encompasses the loss they claim to have suffered by reason of the alleged fall in market prices consequent upon the adoption of the contested regulation. Compensation for this loss can only be awarded by the Court. Although the applicants only claim a symbolic sum in respect of this alleged loss, this tactic seems designed to circumvent the difficult issue of assessing that loss rather than simply to avoid having to bring proceedings in the national courts.

13. The Court's case-law on the exhaustion of national remedies should in my view be applied with caution, since it requires one to speculate on the course of hypothetical proceedings before the courts of a Member State. In this case, the Commission does not claim that the applicants' claim for compensation in respect of the alleged fall in market prices is manifestly unfounded. Nor is it suggested that the claims of the applicants who are producers, as opposed to producers' organizations, in respect of the indemnities to which they are entitled are inadmissible. In these circumstances, I do not consider that any of the applicants' claims should be dismissed as inadmissible.

Substance

14. In Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975, the Court stated that:

'where legislative action involving measures of economic policy is concerned, the Community does not incur non-contractual liability for damage suffered by individuals as a consequence of that action, by virtue of the provisions contained in Article 215, second paragraph, of the Treaty, unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred' (paragraph 11).

In order to establish whether that statement is applicable in this case, it is necessary to consider whether Regulation No 3587/86 constitutes a legislative act involving, on the part of the institution which adopted it, choices of economic policy.

15. According to Article 189 of the Treaty, 'A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States'. Regulation No 3587/86 is therefore prima facie legislative in nature. Moreover, the applicants in this case are affected by it, not because of some special characteristic peculiar to themselves, but solely by virtue of their commercial activities. In this respect, their position is no different from that of anyone else carrying on the same activity. I am therefore unable to accept the applicants'

contention that Regulation No 3587/86 is not a legislative act but is analogous to an administrative act of general scope. It is clear that this regulation, being of general application, is truly legislative in character.

16. As to whether it involves measures of economic policy, it will be recalled that the purpose of conversion factors is to allow the buying-in price of products with commercial characteristics different from those of the relevant pilot product to be calculated. In fixing the buying-in price, the Council is required by Article 16(3) of Regulation No 1035/72, as amended by Regulation No 2454/72, to take special account, 'for each of the relevant products, of the characteristics of the market and, more particularly, the extent to which market prices fluctuate'. It follows that, in fixing the conversion factors applicable in particular cases, the Commission must apply similar considerations to products with commercial characteristics different from those of the pilot products, as indicated by the second recital of the preamble to Regulation No 3587/86.

17. In my view, the Commission clearly enjoys a discretion in performing this exercise. That discretion is not, of course, an unlimited one but it extends to deciding when a product's characteristics are such that a conversion factor should be applied to it and to determining the level at which that conversion factor should be fixed in the light of the function performed by the buying-in price in the mechanism established by Regulation No 1035/72. That this involves subjective choices of economic policy rather than merely the rigid application of a formula is reflected by the applicants' failure to establish that the Commission actually made mistakes in fixing the amounts of the conversion factors or to specify the level at which they should, in the applicants' view, have been set. It is confirmed by the requirement laid down in Article 16(4) of Regulation No 1035/72 that conversion factors are to be fixed in accordance with the procedure laid down in Article 33 (the so-called management committee procedure). Under that procedure, the Commission is required to submit a draft of any measures to be taken to a committee of representatives of the Member States. The committee must then deliver an Opinion on the draft. If the measures subsequently adopted by the Commission do not comply with the committee's Opinion, the Council may, within a period of one month, substitute its own decision for that of the Commission. This procedure implies the possible exercise of discretion at three stages: first, by the Commission; then by the committee of national representatives; and finally by the Council. It clearly envisages that views may differ as to what the proper functioning of the common organization of the market in fruit and vegetables requires and establishes a mechanism for determining which view is to prevail.

18. It follows from what has been said above that, in accordance with the Court's decision in the *Schöppenstedt* case, the applicants must establish that 'a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred'.

19. The applicants have put forward three grounds on which they consider Regulation No 3587/86 to be unlawful. First, they say that the Commission has exceeded its powers because the effect of the new conversion factors is to reduce the buying-in prices fixed by the Council. This, it is said, amounts to a usurpation of the Council's prerogatives by a Commission intent on pursuing policy objectives of its own, namely a reduction in the level of intervention. Secondly, the applicants say that the contested regulation undermines the basic principles of the common organization of the market in fruit and vegetables by altering the effect of the prices fixed by the Council on the evolution of market prices. Thirdly, the applicants claim that the reasoning of the contested regulation is defective.

20. I can deal with the third allegation briefly. The Court held in Case 106/81 *Kind* v *EEC* [1982] ECR 2885 that 'any inadequacy in the statement of reasons upon which a measure contained in a regulation is based is not sufficient to make the Community liable' under Article 215(2) (paragraph 14 of the judgment). I see no reason for departing from that statement of principle here.

21. With regard to the other arguments advanced by the applicants, I am prepared to assume for the purposes of this case that the provisions of Regulation No 1035/72 under which the contested regulation was adopted constitute superior rules of law, breach of which may expose the Community to liability for damages under Article 215(2) (see Case 74/74 *CNTA* v *Commission* [1975] ECR 533). Moreover, the mechanism established by Regulation No 1035/72 may in my view be regarded as intended, at least in part, to protect the interests of the class to which the applicants belong, namely traders dealing in the products to which that regulation applies. As Article 39(1)(b) of the Treaty indicates, it is one of the objectives of the common agricultural policy to protect the interests of the agricultural community. The *Kampffmeyer* case suggests that the rules relating to that mechanism may therefore be seen as designed for the protection of individuals for the purposes of the Court's decision in the *Schöppenstedt* case (see Joined Cases 5/66, 7/66 and 13/66 to 24/66 *Kampffmeyer* v *Commission* [1967] ECR 245). This is so notwithstanding the fact that the mechanism in question doubtless also has the broader objective of promoting the proper functioning of the relevant market organization.

22. I do not consider it necessary to dwell on these issues since, in order to succeed, the applicants must establish not only a breach of a superior rule of law for the protection of individuals, but also that the breach is sufficiently serious to entail the imposition on the Community of liability in damages. In Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209 ('skimmed-milk powder'), the Court stated 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 . . . '.

It went on to emphasize that, in a legislative field involving the exercise of a wide discretion such as the common agricultural policy, the Community does not incur liability 'unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers' (paragraph 6).

23. In such cases, it is therefore necessary to enquire, as the Court pointed out in the 'isoglucose' cases (Joined Cases 116/77 and 124/77 *Amylum* v *Council and Commission* [1979] ECR 3497, paragraph 16, and Case 143/77 *KSH* v *Council and Commission* [1979] ECR 3583, paragraph 13), whether there has been a grave and manifest disregard of the limits the Commission is required to observe in exercising its discretion within the framework of the common agricultural policy.

24. This is a very strict test which the Court may one day wish to reconsider. I do not believe it to be necessary for the Court to do so in this case, however, for the applicants have not in my view succeeded in showing any misuse whatsoever by the Commission of the discretion conferred upon it. In exercising its power to fix new conversion factors, the Commission was simply giving effect to the duty cast upon it by Article 16(4) of Regulation No 1035/72. It is true that conversion factors alter the buying-in prices applicable to products with certain characteristics, but this is the function they are intended by that regulation to perform. The level at which conversion factors are set will obviously need to be reviewed as the requirements of the market evolve. Altering the conversion factors previously applied cannot therefore be said to amount to interfering with the prerogatives of the Council. It is rather an integral part of the mechanism for regulating the common organization of the market in fruit and vegetables established by Regulation No 1035/72. The fact that the Commission subsequently decided, in the further exercise of its discretion, to mitigate the effects of the new conversion factors by adopting Regulation No 1998/87 laying down certain derogations from the contested regulation for the 1987/88 marketing year (Official Journal 1987, L 188, p. 30) does not in my view have any bearing on the legality of the latter regulation.

25. That the fixing of new conversion factors by the Commission falls squarely within the framework of the division of tasks envisaged by Regulation No 1035/72 is confirmed by the procedure which was required by that regulation to be followed prior to the adoption of Regulation No 3587/86 and which I described briefly above. That procedure allows the Council to substitute its own decision for that of the Commission when the committee of national representatives delivers an adverse Opinion on the Commission's draft measures. It appears from the last recital of the preamble to the contested regulation that no Opinion was delivered by the committee on the measures contained in that regulation within the time-limit set by its chairman. It may therefore be assumed that the committee did not feel sufficiently strongly about those measures to give the Council the opportunity to substitute its own views. In these circumstances, the Commission was required to implement the

measures it considered necessary. In doing so, it cannot therefore be said to have interfered with the powers of the Council.

26. I would add that, in assessing the seriousness of the rule alleged to have been violated, the Court also has regard to the extent of the category affected. Thus, in the *HNL* case, *supra*, the Court observed, in the course of rejecting the applicants' claim, that the measure in question 'affected very wide categories of traders' (paragraph 7). Conversely, in the 'Maize Gritz' and 'Quellmehl' cases (Cases 64/76 and 113/76, 167/78 and 239/78, 27/79, 28/79 and 45/79 [1979] ECR 3091; Case 238/78 [1979] ECR 2955; Cases 241/78, 242/78 and 245/78 to 250/78 [1979] ECR 3017; Cases 261/78 and 262/78 [1979] ECR 3045), where actions against the Community under Article 215(2) were successful, the Court pointed out that the Community's disregard of the rule of law which had been violated affected a limited and clearly defined group of commercial operators. In the instant case, the effects of the contested regulation will have been felt by a broad group, namely anyone dealing in the numerous products to which that regulation applies. This in my view constitutes a further ground for concluding that the applicants have failed to establish a sufficiently serious breach of a superior rule of law.

27. Finally, I will consider briefly two further issues which have been addressed by the parties although, in the light of what has been said above, I do not believe the Court will be called upon to deal with them. They are, first, whether or not there is a causal link between the contested regulation and the loss said to have been suffered by the applicants; and, secondly, the assessment of damages. As to the question of causation, it has not in my view been established that those of the applicants which constitute producers' organizations in fact suffered any direct loss at all by reason of the adoption of Regulation No 3587/86. Even if the amount of financial compensation to which they were entitled from Member States fell after the introduction of the new conversion factors, that fall would have been cancelled out by an equivalent reduction in the indemnities they had to pay to their members. I also have reservations about the effect of the contested regulation on market prices generally, for the market may be affected by many factors. Even if it could be established that market prices for the relevant products fell after the new conversion factors entered into force, it would not automatically follow that the former was due to the latter. The applicants have not in my view discharged the burden on them of showing that this was the case.

28. With regard to the assessment of damages, the applicants have made some attempt to establish the extent of the loss they claim to have suffered as a direct result of the introduction of the new conversion factors. However, the parties remain at odds over whether the products singled out by the applicants to illustrate the effect of the contested regulation are representative of fruit and vegetables generally. This is an issue which would have to be pursued were the applicants' claim to be upheld in

principle. As far as the effect of the contested regulation on market prices generally is concerned, the applicants have sought to avoid the need to quantify this by simply claiming a nominal sum in damages in respect of it. In my view, the burden on the applicants of making some attempt to quantify their loss cannot be avoided in this way, for the purpose of Article 215(2) is to compensate for damage which has actually been caused, not simply to enable the Court to give a ruling on the legality of actions taken by the Community. Moreover, it will be observed that to award damages both to a producers' organization and to its members in respect of a fall in market prices would be to compensate the same loss twice over. Any such loss is suffered by producers' organizations only through the effect felt by their members.

Conclusion

29. To conclude, although I consider the present action to be admissible, the applicants have not in my view established any unlawful act on the part of the Commission. I therefore propose that the Court:

(1) dismiss the application;

(2) order the applicants to pay the costs.