OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 5 December 1986 *

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* Translated from the German.

Mr President,
Members of the Court,

A — Chapter 1

Facts and conclusions of the parties

1. (a) The applicants in the case on which I am delivering my opinion today are claiming compensation from the Commission of the European Communities for damage suffered as a result of the implementation of Commission Regulation No 2956/84 of 18 October 1984.[1] The applicants, a Belgian, two Netherlands and four German manufacturers of margarine, regard as unlawful the implementation of the regulation by way of the so-called 'Christmas butter' sales in 1984/85. In the alternative, the Netherlands applicants also claim compensation even if the Commission's conduct was lawful.

2. The purpose of the 1984/85 Christmas butter scheme, which ran from 5 November 1984 to January/February 1985, was to sell at reduced prices in all the Member States of the Community with the exception of Greece 169 800 tonnes of butter which had been in public or private storage for at least 120 days. According to Article 2 of Regulation No 2956/84, the butter from public storage was to be sold at the buying-in price applied by the intervention agency concerned on the day when the contract of sale was concluded, less 160 ECU per 100 kg. However, that reduction in price was limited to 147.25 ECU per 100 kg for Member States which applied special measures for reducing the price of butter for direct consumption under Council Regulation No 1269/79 of 25 June 1979.[2]

3. In addition to those sales of butter at a reduced price in the Community, Title II of Regulation No 2956/84 provided that butter from public stocks which was intended for export to certain destinations could be offered for sale at a price reduced by 141.50 ECU per 100 kg.

4. In total, it was intended to dispose of approximately 200 000 tonnes of butter at a reduced price. The overall cost of the Christmas butter scheme for 1984/85 amounted to approximately 320 million ECU. The costs of the scheme are to be met out of the Community budget.[3]

5. The Commission was led to adopt Regulation No 2956/84 by the development of the Community butter market. In the recitals in the preamble to the regulation it stated that there were large quantities of butter on the market, that all appropriate means should therefore be used to increase butter consumption, and that a reduction in prices to the final customer was an appropriate means of attaining that objective.

6. Moreover, there were in the Community stocks which were built up following intervention, and it was not possible to dispose of those stocks on normal terms during the current milk year. Prolonged storage was to be avoided in view of the high costs involved; steps should therefore be taken to facilitate the disposal of that butter.

7. The reduction in the selling price of butter or the amount of the aid should be

1 — Commission Regulation (EEC) No 2956/84 of 18 October 1984 on the disposal of butter at a reduced price and amending Regulation (EEC) No 1687/76 (Official Journal 1984, L 279, p. 4).

2 — Council Regulation No 1269/79 of 25 June 1979 on the marketing of reduced-price butter for direct consumption (Official Journal 1979, L 161, p. 8).

3 — Article 1 (2) of Regulation No 729/70 (Official Journal, English Special Edition 1970 (I), p. 218).

sufficient to ensure that additional quantities were disposed of without disturbing normal trade in butter. To ensure even distribution throughout the Community of the butter made available to consumers under the measure and to avoid disturbances of the market in certain Member States, the maximum quantities qualifying for the aid should be fixed for each Member State.

8. (b) It can be seen from the statistics concerning the development of agricultural production that the implementation of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products [4] has led in the last few years to considerable overproduction of milk. The surplus production, which may clearly be regarded as structural, amounted for example to 22 million tonnes in 1983, with production at 104 million tonnes and consumption at 82 million tonnes. [5]

9. The two principal characteristics of the organization of the market in milk are a target price for milk and a guarantee that milk products will be bought, which until 1984 was practically unlimited and which operates through an intervention system. Since milk itself can be stored only to a limited degree, intervention operates, according to Article 6 *et seq.* of Title II of Regulation No 804/68, through the buying-in of processed products — namely butter, milk powder and certain kinds of cheese.

10. The price of milk, on which the intervention price for butter, skimmed-milk powder and certain kinds of cheese is dependent, is fixed annually by the Council of Ministers in accordance with Article 43 (2) of the Treaty. As the Commission pointed out during the oral procedure concerning the so-called 'Berlin butter scheme', [6] the price of milk is regularly fixed by the Council, for political and other reasons, at a level higher than the Commission's proposal. If a balance between supply and demand is to be reached through the price of milk, then the Commission estimates that the current price would have to be reduced by about 15%.

11. Council Regulation No 856/84 of 31 March 1984 [7] added to Article 5 of Regulation No 804/68 a new paragraph, paragraph (c), providing for an additional levy to be paid in respect of quantities of milk exceeding a given reference quantity. The guaranteed total quantity was fixed at the same time. However, the fixing of that guaranteed total quantity at approximately 98 million tonnes per year makes it possible merely to prevent a further increase in milk production; since Community requirements are about 82 million tonnes per year, it does not eliminate the structural overproduction of milk. That is shown by the quantities of butter in storage, which amounted to over 1 million tonnes at the end of 1984 and which, *after* termination of the contested Christmas butter scheme, again reached approximately the same level. [8]

12. As regards the world market, the price levels applied under the common organization of the market in milk were secured in the case of butter imported from non-member countries by charging a levy which was fixed at 218 ECU per 100 kg at the beginning of 1985. [9]

4 — Official Journal, English Special Edition 1968 (I), p. 176.

5 — *The Agricultural Situation in the Community*, 1984 report, paragraph 67.

6 — Case 97/85, Joined Cases 133 to 136/85 and Case 249/85.

7 — Official Journal 1984, L 90, p. 10.

8 — Eurostat, *Animal production*, quarterly report No 3/85, p. 81.

9 — See Regulation No 243/85 of 30 January 1985, Official Journal 1985, L 26, p. 36.

13. On the other hand, the common organization of the market in oils and fats is organized in a totally different manner. [10] Its market management mechanism is based primarily on a system of aid to Community producers. Basically, the price charged to the consumer under that system is the world market price. Consequently, products coming within the common organization of the market in oils and fats may be imported from non-member countries without a levy being charged and the Community has undertaken in the framework of GATT to permit such importation. [11]

14. The margarine manufacturers which are the applicants in these proceedings are of the opinion that the sudden placing on the market of a substantial quantity of a competing substitute product at a price greatly reduced because of the Community subsidy has caused them considerable damage.

15. They have therefore applied in their respective actions for an order directing the defendant to pay them compensation for the damage suffered by them as a result of the implementation of Regulation No 2956/84 of 18 October 1984 on the disposal of butter at a reduced price.

16. The applicants have reserved the right to assess precisely the amount of the damage suffered by them, with the exception of the applicants in Case 265/85, which have provisionally estimated their loss.

17. The applicants quantified their losses in their respective replies. Since they requested that those figures be treated as confidential and since the Court has called upon the parties to present argument solely on the question of liability, I will not give those figures here.

18. The Commission contends that the Court should:

(1) Dismiss the applications in Cases 279, 280, 285 and 286/84 as inadmissible or, in the alternative, as unfounded;

(2) Dismiss the applications in Cases 27 and 265/85 as unfounded.

19. In the notice of the oral procedure, the Court called upon the parties to limit their oral arguments to the admissibility of the applications and the basis of the Commission's liability.

A — Chapter 2

Submissions of the parties

I. *Admissibility*

20. The *Commission* regards the applications of the Belgian margarine producer and the German margarine producers as inadmissible on two grounds without, however, raising expressly a procedural issue under Article 91 of the Rules of Procedure of the Court.

21. In the Commission's view, the applications are only apparently claims for compensation. That can be seen from the time at which the German applicants [12] brought their actions, that is, when the contested measures were still being implemented and no damage had yet been caused. In truth, the applicants wish to prevent a future repetition of such measures and also to obtain a declaration that measures adopted in the form of a generally applicable regulation are void. However,

10 — Regulation No 136/66 of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats, Official Journal, English Special Edition 1965-66, p. 221.

11 — *The Agricultural Situation in the Community*, 1984 report, paragraph 314.

12 — Joined Cases 279, 280, 285 and 286/84.

private individuals cannot challenge such measures before the Court of Justice.

22. The Commission also contends that the fact that the applicants first stated the amount of damages they were claiming in their reply constitutes an infringement of the right to a fair hearing and an infringement of Article 42 of the Rules of Procedure of the Court, and deprives it of an opportunity of expressing its views comprehensively on the measure of the damages.

23. The *applicants* object that they have not brought actions for annulment but rather actions seeking to establish liability for damage which was about to occur and was both certain and foreseeable. Such proceedings in no way limit the Commission's opportunities to defend itself. Since the Court has decided that such a procedure is admissible, in particular in its judgment of 6 December 1984 in Case 59/83,[13] the Commission's objections as to admissibility are without foundation.

II. *Substance of the case*

24. The seven applicants put forward a series of grounds for their applications designed to show that Regulation No 2956/84 is unlawful. In addition, they argue that this unlawful conduct on the part of the Commission makes it liable to pay compensation for the damage suffered.

Some of those grounds are put forward by *all* applicants.

25. All complain of a breach of the principle of market stabilization, of the prohibition of discrimination and of the principle of proportionality.

26. In addition, the Belgian applicant[14] and the Netherlands applicants[15] allege misuse of powers ('détournement de pouvoir') on the part of the Commission and the Netherlands applicants lay particular emphasis on the alleged breach of the principle of the protection of legitimate expectation and the principle of free movement of goods.

27. The German applicants also allege in their reply that there has been a breach of the principle of the right to the free exercise of a profession.

Principle of market stabilization and market equilibrium

28. The *applicants* are of the opinion that the Commission's adoption of Regulation No 2956/84 infringed the principle of market stabilization laid down in Article 39 (1) (c) of the EEC Treaty and the principle of market equilibrium laid down in Article 6 (3) of Regulation No 804/68.

29. They argue that it is undoubtedly true that the objectives of the common agricultural policy set out in Article 39 of the EEC Treaty, which are partly contradictory, cannot always be achieved at the same time. However, it is not permissible to pursue one of those objectives in isolation in such a way as to make the achievement of the other objectives impossible. The Commission has overlooked the principle of market stabilization in the interests of increasing agricultural earnings. The Christmas butter scheme has led to distortions of the market which, having regard to the fact that margarine competes with and is a substitute product for butter, upsets the balance both of the butter and of the margarine market. A massive sale of butter at greatly reduced

13 — Judgment of 6 December 1984 in Case 59/83 *SA Biovilac NV* v *European Economic Community* [1984] ECR 4057.

14 — Case 27/85.

15 — Case 265/85.

prices during a short period disturbs the balance of the entire common market in edible fats since fresh butter and margarine are displaced from the market by virtue of the fact that consumption of edible fats in the Community is constant. The applicants refer in that connection to a report of the Court of Auditors [16] which shows that the Christmas butter schemes did not meet the objectives of the common organization of agricultural markets. Although originally conceived as a measure to be used only in exceptional cases, the Commission now wishes to use this method to alter the normal working of the price mechanisms in the common organizations of the market in milk and in oils and fats. If market stabilization remains the objective, intervention measures must not result in ever larger intervention stocks. However, those stocks increased almost fourfold between October 1980 and October 1984.

30. Furthermore, the Christmas butter scheme lay outside the powers granted to the Commission under the organization of the market in milk and milk products.

31. The *Commission* replies that the objective of stabilizing markets laid down in Article 39 of the EEC Treaty is only one of a number of mutually contradictory objectives which, according to the case-law of the Court, the Community institutions must reconcile. However, the Commission attributed particular importance to ensuring a fair income for milk producers. The Christmas butter scheme is directly connected with that objective because it makes it possible to support the price paid to producers. Furthermore, the disposal of butter at reduced prices also makes it possible to reduce the stocks, which cannot be stored indefinitely, accumulated because of the intervention measures. Such disposal is in conformity with Article 6 (3) of Regulation No 804/68 which permits the adoption of special measures where the balance of the market is disturbed, that is to say, it permits a derogation from the principle of market stabilization. It is also in conformity with Article 7a of Regulation No 985/68. [17] Measures such as the Christmas butter scheme must be regarded as extensions of the intervention system. The sole purpose of intervention measures is to relieve pressure on the market and not to dispose definitively of the products withdrawn from the market. Because of limited storage capacity, it is inevitable that they must later be once again placed on the market. Those who produce or sell milk, milk products or products competing with them must allow for the possibility that recourse will be had to the special provisions providing for disposal of intervention stocks. Since the second subparagraph of Article 6 (3) of Regulation No 804/68 expressly provides for the adoption of special measures if butter held in intervention stocks cannot be fully disposed of on normal terms during a milk year, there is a legal basis for the Christmas butter scheme.

Breach of the prohibition of discrimination

32. The *applicants* are of the opinion that the Christmas butter scheme gives rise to a discriminatory difference in treatment both between milk producers and the producers

16 — Special report of the Court of Auditors on sales of reduced-price butter within the Community of 13 April 1982, Official Journal 1982, C 143, p. 1.

17 — Regulation No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream, Official Journal, English Special Edition 1968 (I), p. 256; Article 7a was added by Regulation No 750/69 of the Council of 22 April 1969, Official Journal, English Special Edition 1969 (I), p. 204.

of oil seeds and oleaginous fruit used in the production of margarine, and between milk processors and margarine manufacturers. Although there is no subsidy for margarine, not only is butter which cannot be disposed of on the market bought by the intervention agencies but the intervention stocks are also sold at considerably reduced, publicly subsidized prices, contrary to the principle of market stabilization. Butter producers are therefore indirectly permitted to sell their products at a price lower than its production price and, moreover, the Commission subsidizes such sales at less than cost price with the effect that the financial consequences thereof do not have to be borne by the butter manufacturers. The fact that the intervention agencies are required to buy butter but not margarine undoubtedly justifies the different treatment represented by the disposal and price guarantee of the intervention system. However, it does not justify continued sales of large quantities of goods bought in by the intervention agencies at considerably reduced prices.

33. The fact that butter and margarine manufacturers find themselves in different positions is a consequence of the common agricultural policy and of the decisions adopted in the framework of that policy. The consequence is that from the very beginning, milk products were sold in the Community at a price significantly above the world market price. It is against that background that a balance in the competition between margarine and butter came into existence which has permitted the two competing industries to maintain their market position.

34. The Christmas butter scheme destroys that balance. Although the mechanisms of the common organization of the milk market protects producers and sellers of fresh butter from any damage arising from the Christmas butter scheme, there are no similar measures in favour of margarine producers. There is no objective justification for such a difference in treatment. In particular, the existence of two different organizations of the market employing different regulatory machinery may not be regarded as such a justification.

35. Furthermore, it is incorrect to say that consumption of margarine has increased to the detriment of butter over the last few years and that the common organizations of the Community markets in question give margarine advantages over butter which must be compensated for.

36. The *Commission* accepts that, to a certain extent, margarine competes with butter as a substitute product and that the sale of butter at reduced prices could affect sales of margarine. However, butter producers and margarine manufacturers are necessarily in different positions. The way in which the common organization of the markets in question functions at present gives margarine manufacturers very clear advantages. Under the common organization of the market in oils and fats, they are able to obtain raw materials at world market prices. On the other hand, the price of butter in the Community is considerably greater than the world market price with the result that for many years, in particular because margarine has been offered to the consumer at a price only half that of butter, there has been an increase in the consumption of margarine to the detriment of butter. The subsidies provided for schemes such as the Christmas butter scheme are ultimately nothing more than a limited and temporary compensation for a disadvantage which arises from the mechanisms of the organization of the markets in

question. The effect of that compensation is merely that the butter thus subsidized can be sold to the Community consumer at a price near the world market price.

37. The advantageous market position of margarine *vis-à-vis* butter is also one of the reasons why it was necessary to adopt measures to reduce production of milk products although no similar measures have been adopted in the oils and fats sector since the levy on oils and fats proposed by the Commission has not yet been introduced by the Council. Thus there is no prohibited difference of treatment of margarine manufacturers — on the contrary, they can claim no duly acquired right to the continuance of the competitive advantages which they enjoy.

Breach of the principle of proportionality

38. In the *applicants'* view, the sales of butter at reduced prices are neither a necessary nor an appropriate means of achieving the objective of reducing intervention stocks, and that is a further reason why the unequal treatment of the traders concerned is unjustified. If the goal to be achieved is a long-term stabilization of the markets, then short-term sales cannot have any effect on the structural causes of the imbalance between supply and demand which arise from the Community's price policy. They merely represent a means of managing intervention stocks, by disposing of stored butter, and they increase the imbalance still further. If, however, the objective is to reduce intervention stocks, such a scheme is doomed to failure because the sale of butter at reduced prices generally reduces sales of fresh butter, which must in its turn be stored. Furthermore, the quantities held in stock at the end of May 1985 were as great as those in November 1984. Although it is true that overall consumption of butter is increasing to the detriment of margarine, that growth is none the less very small, and in any event does not justify the disproportionately high outlay (320 million ECU) for a temporary reduction of intervention stocks by some 60 000 tonnes while at the same time causing serious damage to margarine manufacturers.

39. There are other ways of disposing of intervention stocks, in particular by processing and export to countries outside the Community, in the context of food aid, for example. It would be cheaper to distribute the butter free of charge or to pay financial compensation to milk producers who have suffered loss through the introduction of the milk quota rules. Furthermore, the measures adopted by the Commission for the purpose of reducing milk production are insufficient to reduce the ever-increasing stocks of butter.

40. The *Commission,* on the other hand, denies that it has infringed the principle of proportionality. It is true that the effectiveness of the Christmas butter schemes is limited but it has no other means of disposing of butter. Additional exports are not possible. The world market is flooded. Furthermore, the Community is subject to the rules of GATT, which permit export of subsidized butter only to a limited degree. It has done everything possible to reduce butter production and, at an earlier stage, milk production. It introduced a co-responsibility levy, premiums for not marketing products and for converting to other kinds of production and rules concerning guaranteed quantities. There was nothing left for it to do but to seek to increase consumption of butter in the Common Market and therefore to implement schemes such as the Christmas butter schemes.

41. It cannot be disputed that such measures are in principle appropriate ways of achieving the desired result, namely increasing the consumption of butter, reducing intervention stocks and disposing of those stocks more quickly. Ultimately, the disposal of 200 000 tonnes of butter at reduced prices made it possible to place an additional 60 000 tonnes of butter on the market and to avoid further storage of 140 000 tonnes.

42. Furthermore, the applicants' arguments are contradictory. Either an increase in butter consumption is to the detriment of margarine and in that case the effectiveness of the Christmas butter schemes is uncontestable, or the increase in the sale of intervention butter is exclusively to the detriment of fresh butter and in that case the margarine manufacturers suffer no damage whatsoever from such a scheme.

43. Moreover, the applicants are not entitled to complain about the cost of the Christmas butter scheme. They have no right to participate in decisions as to how the Community's budget is spent. Private undertakings cannot set themselves up as judges of the appropriateness of Community decisions.

Ultra vires *and misuse of powers*

44. In the view of the Belgian and Netherlands *applicants,* the Commission used the power to adopt measures to ensure disposal of butter stocks granted to it under Regulations Nos 804 and 985/68 of the Council to achieve an increase in consumption of butter. That is not authorized by the powers granted in the said regulations since the intervention rules must be so applied that the competitive position of butter on the market is preserved but not improved. Any measures which may be adopted to ensure disposal of butter stocks must not affect competition. That is not so in regard to massive subsidization of butter which gives it an artificial competitive advantage over margarine. The Commission has destroyed the long-standing competitive balance between butter and margarine, not, as it is entitled to do, in order to protect the competitive position of butter, but instead to improve that position.

45. The *Commission* replies that it acted within its powers under Articles 6 and 12 of Regulation No 804/68 and Article 7a of Regulation No 985/68. The expression 'the competitive position of butter on the market' means that all appropriate means may be used to guarantee the competitive position of that product *vis-à-vis* substitute products, not that the measures in question must have no influence on competition with that product.

46. It is obvious that improving the weak market position of butter is equivalent to maintaining its position on the market. Furthermore, the protection and improvement of the market position of an agricultural product must be judged on its own merits and not primarily in regard to the position of competing products. The objective laid down in Article 6 (4) (b) of Regulation No 804/68, of ensuring that the initial quality of butter is so far as possible preserved, clearly implies avoiding the storage of old butter for so long that it can no longer be used. The increase in butter consumption brought about by the Christmas butter scheme led to a reduction

in and more rapid use of existing intervention stocks. At least one of the objectives of the basic rules governing the sector concerned, the orderly management of the butter stocks by their reduction and renewal, has been pursued and achieved.

Breach of the principle of free movement of goods

47. The Netherlands *applicants* point out that according to Article 5 (1) of Regulation No 2956/84, intra-Community trade in Christmas butter is fully excluded. That constitutes a quantitative restriction on imports or a measure having equivalent effect thereto within the meaning of Articles 30 and 34 of the EEC Treaty and Article 22 (1) of Regulation No 804/68. The Commission is not to adopt that approach because Community institutions are also required to respect the principle of the free movement of goods.

48. The *Commission* denies that it has infringed the principle of free movement of goods since trade in butter is possible in respect of small quantities of a non-commercial nature and because a certain partitioning of the markets of the various Member States was necessary in order to ensure a balanced distribution across the Community. Furthermore, the Court has decided that the principle of free movement of goods may be restricted on grounds other than those set out in Article 36 of the EEC Treaty.

Breach of the principle of the protection of legitimate expectation

49. The Netherlands *applicants* also argue that the Commission has itself made repeated public statements to the effect that schemes such as the Christmas butter schemes are not an appropriate means of achieving the objectives in question here, namely a durable reduction of intervention stocks. For that reason, the applicants could not be expected to allow for the possibility that the Commission would organize a further scheme of that nature, contrary to its own statements.

50. The *Commission* denies that it announced that it would never again organize a Christmas butter scheme. It had, however, decided that such programmes should only be used in the future after careful consideration. For that reason, the applicants, like all other traders in the sector of milk products, could have foreseen, having regard to the increase in intervention stocks of butter (which doubled between June 1983 and June 1984), that measures such as Christmas butter schemes would be adopted in order to reduce those stocks.

Breach of the principle of the right to the free exercise of a profession

51. In their reply, the German *applicants* state that the Commission's Christmas butter scheme is also a breach of the general legal principle of the right to the free exercise of a profession. They have been driven from the market by measures granting subsidies without that situation being justified or required by the objectives which the Community legal order seeks to achieve.

52. In the *Commission's* view, this complaint is out of time and therefore inadmissible. In the alternative, it refers to its observations in Case 97/85 R, in which it made clear that there was no breach of the right to pursue an activity. The applicants remain free to carry on business as margarine manufacturers. If in fact the scheme produced an increase in the market share of butter and a corresponding decline in that of margarine,

that was merely a side-effect of the Commission's scheme. Such side-effects can occur in practically every exercise of public powers but may not be regarded as a breach of a fundamental right.

Community liability

53. The *applicants* claim that the infringements of the law set out above constitute a sufficiently serious breach of several superior rules of law for the protection of the individual within the meaning of the Court's case-law on the liability of the Community for such infringements. Although it is true that the damage which they have suffered does not yet threaten their existence, it is sufficiently serious to go beyond the limits of the economic risks inherent in the pursuit of activities in the branch of the economy in question.

54. The Netherlands applicants in particular claim that by employing a wholly inappropriate means of achieving the said objectives the Commission has caused the applicants damage. That itself constitutes a serious breach of a rule of law as defined in the Court's previous decisions.

55. Furthermore, the Netherlands applicants claim that even if the Commission's Christmas butter scheme was lawful, they are entitled to compensation on the basis of the principle of the protection of legitimate expectation. In view of the Commission's earlier statements concerning the unsuitability of Christmas butter schemes, the applicants should have been able to rely on the fact that in the future such schemes would no longer be introduced.

56. The *Commission* denies that there has been a breach of a superior rule of law for the protection of the individual.

B — Opinion

My opinion on the seven claims for compensation is as follows:

I. *Admissibility*

57. With regard to the Commission's argument that the applications brought by the German margarine manufacturers and the Belgian margarine manufacturer are inadmissible, the following should be stated.

58. The Commission's view that these proceedings are not genuine applications for compensation but are in reality applications for annulment or for an order to restrain unlawful conduct contradicts the applicants' express statements that they are seeking compensation for damage they have allegedly suffered, the amount of which they have stated precisely in their reply. From the point of view of form, therefore, the applications are for compensation.

59. I cannot share the Commission's objection that these are not in substance applications for compensation. If compensation is claimed for damage suffered as a result of the allegedly unlawful conduct of a Community institution in the exercise of its legislative powers, the lawfulness of the measures so adopted must necessarily be considered. It is not a question of regarding such actions as disguised actions for annulment which might be inadmissible because the applicants are not directly and individually concerned. To draw from such an eventuality the conclusion that applications for compensation of that kind are inadmissible would automatically exclude all such actions against legislative measures adopted by the Community institutions. Having regard to the settled case-law of the Court on actions for damages arising out of unlawful legislative measures, it is not necessary to explain in greater detail why that clearly cannot be the case.

60. Even the fact that the German applicants brought their actions between 26 and 29 November 1984, that is to say, at a time when the contested Christmas butter scheme was still being implemented, does not militate against the admissibility of those applications. The contested regulation of 18 October 1984 came into effect on 5 November 1984 and the basis of the Community's liability was thereby established.

61. Although it is true that the damage which the applicants feared had not fully occurred, it had already begun to occur, and further damage was imminent and could be foreseen with certainty by the applicants. In such a situation, the Court has held that compensation may be sought. [18]

62. According to the judgment of the Court of 2 June 1976 in Joined Cases 56 to 60/74, [19] it may be necessary in order to prevent even greater damage to bring the matter before the Court as soon as the cause of damage is certain.

63. It was thus not merely permissible to bring the claims for compensation at an early date: it was also sensible since by so doing, the applicants fulfilled their obligation to limit the amount of the damage. By virtue of the actions being brought early, the Commission was made aware that compensation was going to be claimed from it. It was therefore in a position to reconsider the lawfulness of its action, and if necessary suspend it, so as to prevent further damage being caused to the applicants.

64. The applications for compensation are also not inadmissible by virtue of the fact that at the time that they were brought, the damage actually suffered could not be expressed in monetary terms. According to the Court's case-law, Article 215 of the EEC Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed. [20]

65. It is not possible to agree with the Commission that the applications constitute a 'flagrant violation of Article 42 (2) of the Rules of Procedure and of the rights of the defence'. Expressing in monetary terms at a later stage a claim for compensation the grounds for which have already been set out cannot be regarded as a new claim or defence. It is merely the expression in concrete terms of a claim the grounds for which have already been set out in the application.

66. There is also no question of an inadmissible amendment of the application. Although the German applicants speak in their reply of such an amendment, none in fact exists. For there to be an amendment of the application, the subject of the action must be modified. However, that is not the case since both the application and the reply deal with compensation for damage suffered by the applicants because of the Christmas butter scheme.

67. It must also be accepted that the Court will draw the necessary consequences from the fact that it allows claims for compensation in which the damage suffered is

18 — See the judgment of the Court of 2 March 1977 in Case 44/76 *Milch-, Fett- und Eier-Kontor* v *Council and Commission* [1977] ECR 393, and the judgment of the Court of 6 September 1984 in Case 59/83, cited above.

19 — Judgment of 2 June 1976 in Joined Cases 56 to 60/74 *Kurt Kampffmeyer Mühlenvereinigung KG and Others* v *Commission and Council* [1976] ECR 711.

20 — See, *inter alia*, the judgments in Cases 44/76 and 59/83, cited above.

expressed in concrete figures only at a later date. If it decides that the Commission's liability is established, it will give the parties an appropriate opportunity to express their views on the amount of compensation to be paid.

68. The claims for compensation are therefore admissible.

69. However, that does not mean that all the issues raised are admissible. The Commission is therefore right in so far as it regards the submission concerning the breach of the right to the free exercise of a profession as out of time. That argument was first advanced in the German applicants' reply and those applicants themselves admit that it is an additional submission which had not previously been advanced. Since such a claim was not even hinted at in the application and is also not implicit in any of the submissions put forward in the application, it must in fact be regarded as out of time having regard to Article 42 (2) of the Rules of Procedure and therefore no account should be taken of it.

II. *Substance of the case*

The Commission's powers

70. Before I go into the grounds put forward by the applicants in support of their action I would like to deal first with a question raised by the applicants in various ways in their various submissions but which was first discussed in detail during the oral procedure: *the power of the Commission to adopt Regulation No 2956/84.* My consideration of the question will be limited to the central problem of the Christmas butter scheme, namely the granting of a subsidy for the sale of butter at reduced prices.

71. When adopting Regulation No 2956/84, the Commission based itself on three Council Regulations:

(i) Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products and in particular Articles 6 (7) (general intervention rules for butter), 12 (3) (measures for the disposal of surpluses of butterfat) and 28 (rules concerning information) thereof;

(ii) Regulation No 985/68 of the Council of 15 July 1968 laying down general rules for intervention on the market in butter and cream and in particular Article 7a thereof (measures for the disposal of butter in storage which cannot be marketed on normal terms during a milk year);

(iii) Council Regulation No 1223/83 of 20 May 1983 on the exchange rates to be applied in agriculture. [21]

72. Since the latter measure, dealing with monetary matters in regard to agriculture, is irrelevant to the problem under consideration now, there remain only two sets of rules to be discussed:

(i) The special measures for the disposal of surpluses of butterfat: Article 12 of Regulation No 804/68;

(ii) The general rules on intervention including those governing the disposal of butter held in storage which cannot be marketed on normal terms during a milk year: Article 6 of Regulation No 804/68 and Article 7a of Regulation No 985/68.

21 — Official Journal 1983, L 132, p. 33.

(i) *Special measures for the disposal of surpluses of butterfat*

73. According to Article 12 (1) of Regulation No 804/68, measures other than those laid down in Article 6, that is to say measures other than those provided for under the general intervention rules, may be taken in order to facilitate the disposal of surpluses of butterfat when they build up or are likely to occur. Article 12 (2) provides that the Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the EEC Treaty, which now means by a qualified majority, on a proposal from the Commission, is to decide on those measures and adopt general rules governing their application. According to Article 12 (3), detailed rules for the application of that article are to be adopted in accordance with the procedure laid down in Article 30, that is to say, in accordance with the so-called management committee procedure.

74. Article 12 of Regulation No 804/68 thus permits the adoption of special measures different from those provided for under the general intervention rules in order to deal with surpluses of butterfat. However, it requires the cooperation of the various Community institutions.

75. The Council, on a proposal from the Commission and after consulting the Assembly, is to decide on the measures to be taken and adopt the general rules governing their application. The Commission, the defendant in these proceedings, is therefore required to adopt the relevant implementing measures by way of the management committee procedure.

76. However, the necessary decision of the Council authorizing the 1984/85 Christmas butter scheme, adopted after consulting the Assembly, is lacking in this case. The Council does not appear to have adopted a regulation on the subject, and even during the oral procedure the Commission was unable to point to such a measure when questioned by the Court. Since a decision of the Council under Article 12 (2) and the corresponding general rules is lacking, the Commission was not entitled to make use of the machinery provided for in Article 12 (3) of Regulation No 804/68.

77. The Commission therefore does not itself have the power to adopt the contested measures under Article 12 (3) of Regulation No 804/68 since the EEC Treaty does not confer on it the power to adopt concrete measures of that kind, as is required by the third indent of Article 155 of that same Treaty. The Commission could therefore only exercise the powers conferred on it by the Council for implementing the rules laid down by the latter, as provided for in the fourth indent of Article 155. However, the adoption of detailed rules for the application of special measures designed to dispose of surpluses of butterfat is dependent on a corresponding decision of principle on the part of the Council, which in this case is lacking.

78. In order to provide a further concrete illustration of the procedure required by Article 12 of Regulation No 804/68, reference should be made to the rules on the granting of aid for the consumption of butter in Greece and Italy, which were put into effect at the same time as the 1984/85 Christmas butter scheme. Reference had already been made in the preamble to Regulation No 2956/84, the measure at issue in these proceedings, to the fact that it should be provided that aid might be granted for butter intended for direct consumption in Greece and Italy so that consumers there could benefit, on comparable terms, from the reduction in the price of butter although there were neither public nor private stocks in Greece and the stocks in Italy were very small. In order to do so, it was necessary for the Council to adopt a regulation.

79. That was Regulation No 2957/84 of 22 October 1984 on the granting of aid for the consumption of butter in Greece and Italy.[22] On the basis of that Council regulation, the Commission, for its part, adopted Regulation No 3029/84 of 29 October 1984 on the disposal of reduced-price butter for direct consumption in Greece and Italy.[23]

80. There thus exists in respect of the disposal of reduced-price butter for direct consumption in Greece and Italy the necessary decision of principle on the part of the Council required by Article 12 (2) of Regulation No 804/68, but not, however, for the general scheme concerning 'butter for direct consumption in the Community', as it was described in Title I of Regulation No 2956/84, that is to say, for the Christmas butter scheme.

81. Article 12 of Regulation No 804/68 cannot therefore be the legal basis for the implementation of the 1984/85 Christmas butter scheme.

(ii) *General rules on intervention*

82. It therefore remains to be considered whether the general rules concerning intervention measures permit the Commission to dispose of butter held in intervention stocks by granting aid of the amount granted in the 1984/85 Christmas butter scheme. It should be noted in that regard that the aid granted in this case was not small: it amounted to 160 ECU per 100 kg, that is to say, approximately half the 1984/85 intervention price for butter of 319.70 ECU per 100 kg.[24]

83. According to the second paragraph of Article 6 (3) of Regulation No 804/68, special measures may be taken for butter held in public storage which cannot be marketed on normal terms during a milk year. Article 7a of Regulation No 985/68 provides further that the Commission is to examine the situation as regards products falling within heading No 04.03 of the Common Customs Tariff, that is to say, butter, in public storage which cannot be marketed on normal terms during a milk year. The appropriate measures are to be adopted according to the procedure laid down in Article 30 of Regulation No 804/68, that is to say, according to the management committee procedure.

84. The measures at issue[25] are based on the proposition that the reduction in the price to the final consumer constitutes a grant in aid from public funds.

85. The question must now be considered whether 'special measures' or 'appropriate measures' also include aid granted within the Community in the form at issue here.

86. It must first be noted that Article 92 *et seq.* of the EEC Treaty concerning State aid in the agricultural sector are not directly applicable. According to the terms of those provisions, the prohibition on aid therein contained and the procedure for the approval of aid are applicable only to State aid. None the less, the Court has accepted that in principle Community institutions must have due regard for the provisions of the EEC Treaty even if, according to the terms of those provisions, they apply primarily to the Member States.[26] In

22 — Official Journal 1984, L 280, p. 1.

23 — Official Journal 1984, L 287, p. 16.

24 — See Council Regulation No 858/84 of 31 March 1984 fixing for the 1984/85 milk year the target price for milk and the intervention prices for butter, skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheeses, Official Journal 1984, L 90, p. 17.

25 — Regulations Nos 2956 and 2957/84, cited above, and the report of the Court of Auditors of 13 April 1982.

26 — See the judgment of 13 December 1983 in Case 218/82 *Commission* v *Council* [1983] ECR 4063 and the judgment of 29 February 1984 in Case 37/83 *REWE-Zentrale AG* v *Director of the Landwirtschaftkammer Rheinland* [1984] ECR 1229.

particular, the Court stated in regard to the principle of free movement of goods in its judgment of 29 February 1984 in Case 37/83 as follows:

'Although it is true . . . that Articles 30 to 36 of the Treaty apply primarily to unilateral measures adopted by the Member States, the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market'. [27]

87. The fact that the Community institutions are bound by the principles of the common market is also generally applicable to the agricultural sector since even the exceptions from the general provisions of the Treaty are, according to the judgment of the Court of 15 October 1969 in Case 16/69, [28] exceptions which must be construed strictly.

88. Thus, in the agricultural sector also, the Community institutions must have regard for the principle that subsidies paid out of public funds are prohibited except in so far as the contrary is provided for or permitted in the EEC Treaty.

89. In the event, the EEC Treaty has laid down a number of special rules for agriculture. Thus, Article 42 provides that the chapter relating to rules on competition is to apply to production of and trade in agricultural products only to the extent determined by the Council, account being taken of the objectives set out in Article 39. The Council may in particular authorize aid for the protection of undertakings handicapped by structural or natural conditions or within the framework of economic development programmes.

90. Furthermore, the first subparagraph of Article 40 (3) of the EEC Treaty provides that the common organizations of agricultural markets may include all measures required to attain the objectives of the agricultural policy, in particular aid for the production and marketing of the various products.

91. Since, according to the basic division of powers which may be deduced from Article 43 (2) of the EEC Treaty, it is for the Council to authorize the establishment of common organizations of the market which, *inter alia*, may provide for the granting of aid, and since furthermore, according to Article 42 of the EEC Treaty, it is the Council which has the power to authorize the granting of aid, it follows that only the Council is entitled to authorize the granting of aid in the agricultural sector. The Commission may only adopt a decision on that subject when it has been duly authorized so to do by the Council.

92. The question therefore arises whether the general rules on intervention, which provide for special measures for the disposal of butter held in storage which cannot be marketed on normal terms during the milk year, grant such a power to the Commission when they permit 'special measures' or 'appropriate measures' to be taken.

93. Article 6 (7) of Regulation No 804/68, on which the Commission relied to justify the introduction of the Christmas butter scheme, and which permits it, by way of the management committee procedure, to determine, in particular, the amount of the aid for private storage, militates against the proposition that the Commission was entitled to grant aid on its own authority as a 'special measure' under Article 6 (3). Article 6 (7) merely permits it to determine,

27 — Cited above.

28 — Judgment of 15 October 1969 in Case 16/69 *Commission* v *Government of the Italian Republic* [1969] ECR 377.

in the context of detailed rules for the application of Article 6, the amount of the aid, which Article 6 (2) and (6) of the regulation expressly provides must be granted by the Council itself.

94. Furthermore, the structure of Regulation No 804/68, the practice of the Community institutions in the implementation thereof and the provisions of the EEC Treaty dealing with the question of aid also militate against the proposition that 'special measures' may also include aid, except where the Council has expressly authorized it.

95. The comparable rules in Article 12 of the regulation, to which reference has already been made, also provide for an initial decision by the Council on the measures provided for therein for the purpose of disposing of surpluses of butterfat and authorize the Commission merely to adopt general rules governing their application.

96. Thus the Council itself, in Regulation No 2957/84 dealing with the disposal at reduced prices of butter for direct consumption in Greece and Italy, which accompanied the Christmas butter scheme, decided to grant aid in those countries for direct consumption of butter and at the same time fixed the amount of that aid: 160 ECU per 100 kg. Only later did the Commission, in Regulation No 3029/84, adopt the corresponding implementing measures.

97. Similarly, in Regulation No 1269/79, the Council authorized the Member States to grant aid for butter for direct consumption and there too determined the amount of that aid itself, leaving to the Commission only the task of adopting implementing measures.

98. The Council itself also adopted the rules relating to the granting of aid designed to maintain the level of use of butter by certain categories of consumer and industry.[29] It decided itself, in the version of Article 1 in force at the material time,[30] to whom the aid was to be granted: non-profit-making institutions and organizations, military forces, manufacturers of pastry products and ice-cream and manufacturers of other foodstuffs to be determined. In Article 3, however, it left to the Commission the task of laying down detailed rules for the implementation of the regulation.

99. In general, it can therefore be said that in specific cases which were not concerned with one-off schemes but dealt with long-term price reductions for butter, the Council itself has always adopted the decision to grant the aid and sometimes has also itself fixed the amount thereof.

100. The case-law of the Court on Article 155 of the Treaty, that is to say, on the Commission's powers to adopt implementing measures, also does not militate against the conclusion that aid is *not* covered by the expression 'special measures' in the second paragraph of Article 6 (3) of Regulation No 804/68 or 'appropriate measures' in Article 7a of Regulation No 985/68.

101. It is, of course, true that the Court decided, in its judgment of 30 October 1975 in Case 23/75[31] that it follows from the context of the Treaty in which Article 155

29 — Council Regulation No 1723/81 of 24 June 1981 establishing general rules relating to measures designed to maintain the level of use of butter by certain categories of consumer and industry, Official Journal 1981, L 172, p. 14.

30 — In the version introduced by Council Regulation No 863/84 of 31 March 1984 amending Regulation No 1723/81 as regards the possibility of granting aids for the use of butter in the manufacture of certain foodstuffs, Official Journal 1984, L 90, p. 23.

31 — Judgment of 30 October 1975 in Case 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279.

must be placed and also from practical requirements that the concept of implementation must be given a wide interpretation. Since the Commission alone is able continually to follow with attention trends on the agricultural markets and to act with urgency as the situation requires, the Council may be led, in the sphere of the common agricultural policy, to confer on the Commission wide powers of discretion and action. However, the Court was merely disposing of the argument of a party in that case that powers to adopt implementing measures conferred by the Council on the Commission were to be interpreted strictly.

102. Although the Commission's powers to adopt implementing measures must also not be narrowly interpreted, it cannot authorize the granting of aid which is not provided for either in the Treaty or in a legal measure adopted by the Council. That follows from the general structure of Regulation No 804/68 and the special provision in Article 23 thereof which lays down that save as otherwise provided, Articles 92 to 94 of the EEC Treaty are to apply; above all, it follows from the general reserve with which aid is treated in the EEC Treaty.

103. That reserve is evident in the provisions concerning State aid contained in Article 92 *et seq.* of the EEC Treaty which are, as has already been stated, not directly binding on Community institutions in deciding whether to grant Community aid but the underlying principles of which are none the less applicable to such aid.

104. According to those provisions, aid is prohibited save as otherwise provided in the EEC Treaty. Provisions of that nature are to be found in Article 92 (2) and (3), which set out the kinds of aid which are generally compatible with the common market and those which may be considered compatible therewith. Furthermore, according to Article 92 (3) (d), the Council may declare other categories of aid to be compatible with the common market and, according to the third subparagraph of Article 93 (2), may authorize in an individual case the payment of aid which would otherwise be unlawful.

105. It is undoubtedly true that the Commission has been granted a certain discretion in the supervision of aid, in particular in regard to assessing whether it may be regarded as lawful under Article 92 (3) of the EEC Treaty. However, it cannot go beyond the framework laid down in the EEC Treaty or in a corresponding legal measure adopted by the Council. It is thus solely for the Council to decide on the lawfulness of aid going beyond those limits.

106. The fact that the reserve with which the EEC Treaty approaches aid also applies in agricultural matters is confirmed by the resolution adopted by the conference of the Member States held in Stresa in order to evolve the broad lines of a common agricultural policy, pursuant to Article 43 (1), in which general agreement was clear, *inter alia*, on the following basic proposition:

'The abolition of subsidies which are contrary to the spirit of the Treaty must be regarded as essential.' [32]

107. It must be considered that the principle that only the Council may adopt a decision concerning the granting of aid not expressly provided for also applies to agriculture. The

32 — *Journal Officiel* 1958, p. 218.

basis for that proposition is to be found, as has already been stated above, in the first subparagraph of Article 40 (3) and in Article 42 of the EEC Treaty.

108. The principle that aid is lawful only when it is provided for either in the Treaty or in a legal measure adopted by the Council cannot be set aside by a broad interpretation of the expression 'powers to adopt implementing measures'.

109. The conclusion which must be drawn from what has been discussed so far is that the Commission was not itself entitled to adopt the measures on aid contained in Title I of Regulation No 2956/84.

110. It also cannot be argued that the Council's silence constitutes an approval of the Commission's measure. It can be seen from the preamble that the Management Committee had not delivered an opinion within the prescribed period. [33]

111. Furthermore, account may not be taken in that connection of the second recital in the preamble to Council Regulation No 2957/84 of 22 October 1984. It is stated therein that the Commission envisaged 'the adoption of an *ad hoc* measure based on Article 6 (7) of Regulation (EEC) No 804/68 involving an additional reduction in the price of butter bought for direct consumption in view of the Christmas and New Year holidays'. In my view, that statement does not constitute a subsequent approval of the measure adopted by the Commission. The Council's decision was adopted a few days after that of the Commission. At that time, the Council had to act on the basis that the Commission had set up the Christmas butter scheme in accordance with the applicable law and drew the necessary consequences for Italy and Greece from that situation.

33 — See Official Journal L 279 of 18 October 1984, p. 5, last recital in the preamble.

Breach of the principle of market stabilization

112. According to Article 39 (1) (c), one of the objectives of the common agricultural policy is to stabilize markets. The objective thus set is binding on all Community institutions responsible for establishing or administering the common agricultural policy, that is to say, it is binding on the Council in regard to establishing common organizations of markets and on the Commission in regard to its legislative activity and the implementation of measures adopted by the Council.

113. Stabilizing markets means adapting production in particular to demand within the Community. It refers to a balance between supply and demand in regard to the individual agricultural products. To that extent, the principle of market stabilization must coincide with the principle of market equilibrium to be found in Article 6 of Regulation No 804/68.

114. However, the expression 'market stabilization' must also be understood in a wider sense. Where different agricultural products are in competition because they are substitutes for each other, market stabilization also covers the balance between the individual markets for both products.

115. The objectives of the common agricultural policy laid down in Article 39 of the EEC Treaty may not, however, be regarded in isolation but must be viewed as a whole. Since the individual objectives are potentially divergent and may not all be simultaneously and fully attained, the competent Community organs, as the Court has repeatedly held, must strike a balance between the various objectives laid down in Article 39. That provision does not,

however, permit the pursuit of one of those objectives in an isolated manner which makes it impossible to attain other objectives. [34]

116. Butter and margarine are agricultural products within the meaning of Chapters 4 and 15.13 of Annex II to the EEC Treaty, the prices of which mutually influence each other. [35]

117. The Council reinforced the general relationship between the market in butter and the market in margarine by adopting Regulation No 804/68 on the common organization of the market in milk and milk products, already referred to several times in these proceedings, and Regulation No 136/66 on the establishment of a common organization of the market in oils and fats, as well as through decisions concerning prices and tariff protection against imports by means of the Common Customs Tariff.

118. By means of those measures, the Council has established the balance between the markets in butter and margarine which it considers appropriate. It thereby laid down the framework within which the butter and margarine producers are to pursue their activities.

119. That framework, and hence the basic relationship between the butter market and the margarine market, is criticized by the Commission. It sees in the high butter price, which is based on decisions of the Council, as well as in the fact that the prices for the raw materials used in the production of margarine are near the lower world market prices, an unjustifiable advantage for the margarine producers and a disadvantage for the butter producers. In order to redress what it regards as this imbalance, the Commission has on several occasions made proposals to the Council to introduce a tax on fats, which, however, has never been accepted by the Council.

120. In order to establish what it describes as the normal competitive relationship between butter and margarine, at least for a short period and in regard to limited quantities of butter, the Commission set up, *inter alia*, the 1984/85 Christmas butter scheme, which provided considerable subsidies for the sale of butter. In so doing, it ignored the underlying relationship between the butter and margarine markets established by the Council and itself adjusted that relationship.

121. The issue here is not whether the relationship between the butter and margarine markets established by the Council was the right one or whether the competitive conditions which the Commission sought to achieve were appropriate. The question to be considered is whether the Commission was justified in using its powers to adopt implementing measures to amend decisions adopted by the Council.

122. As has already been stated, the powers which the Council may confer on the Commission under Article 155 of the EEC Treaty are not to be so narrowly interpreted as to be restricted to powers other than that of drawing up regulations. [36] In its judgment of 30 October 1975 in Case 23/75, [37] the Court went so far as to emphasize that the Council is entitled to confer on the Commission extensive powers the limits of which must be judged in the light of the basic general objectives of the organization

34 — Judgment of 13 March 1968 in Case 5/67 *W. Beus GmbH & Co.* v *Hauptzollamt München-Landsbergerstrasse* [1968] ECR 83; judgment of 6 December 1984 in Case 59/83, cited above.

35 — Judgment of 23 February 1983 in Case 66/83 *Fromançais SA* v *Forma* [1983] ECR 395.

36 — See the judgment of 15 July 1970 in Case 41/69 *ACF Chemiefarma NV* v *Commission* [1970] ECR 661.

37 — Cited above.

of the market and less in terms of the literal meaning of the enabling words. However, the limits of the Commission's power to adopt implementing measures are to be found in the general rules of the organization of the market concerned, which it may not alter.

123. In this case, the Commission overstepped those limits when, by setting up the 1984/85 Christmas butter scheme, it substituted its own conception of the appropriate conditions of competition between butter and margarine, at least for a short period, for the basic market relationship between margarine and butter which had been established by the Council. The Commission thereby interfered with the stabilization of the butter and margarine markets, which the Council was seeking to achieve in accordance with Article 39 of the EEC Treaty.

124. The Commission has therefore infringed the principle of market stabilization laid down in Article 39 of the EEC Treaty. However, that infringement lies not in the alteration of the conditions of competition between butter and margarine but in the interference with the existing conditions of competition set up by the Council.

Breach of the prohibition of discrimination

125. According to the second subparagraph of Article 40 (3) of the Treaty, the common organization of agricultural markets is to exclude any discrimination between producers or consumers within the Community. The prohibition of discrimination contained in that provision is a particular expression of the general principle of equality which is one of the fundamental principles of Community law. According to that principle, comparable situations should not be treated differently unless that difference is objectively justified. It thus limits the freedom of action of the Community institutions when seeking to achieve the objectives of the agricultural policy laid down in Article 39 of the EEC Treaty. [38]

126. It should first be noted in this connection that the basic treatment of the products in question here, butter and margarine, as provided for by the Council in the aforementioned organizations of the market in oils and fats and in milk and milk products respectively, has not been interfered with. The basic relationship established by the Council between both parts of the market in the fats sector must be taken as the point of departure for stabilizing the market.

127. It must also be considered whether the Commission, through the 1984/85 Christmas butter scheme, interfered in a discriminatory manner with the balance thus established by the Council.

128. We must therefore consider whether butter on the one hand and margarine on the other are in comparable positions, and in particular whether margarine may be a substitute for butter in its usual specific use. It is clear from the parties' arguments and from what is generally known on the subject that margarine is a substitute for butter at least in so far as both products may be used to spread on bread and for cooking. [39]

129. If, therefore, having regard to the use to which both products are put, a certain similarity can be found to exist, it must further be considered whether the different structure of the organizations of the market

38 — See the judgment of 5 July 1977 in Case 116/76 *Granaria BV* v *Hoofdproduktschap voor Akkerbouwprodukten* [1977] ECR 1247.

39 — With regard to price interdependence between butter and margarine, see the judgment of 23 February 1983 in Case 66/82, cited above.

in milk and milk products on the one hand and in oils and fats on the other justifies a subsidy scheme for butter such as the 1984/85 Christmas butter scheme.

130. It should be noted in this connection that the two organizations of the market provide for very different price systems. Whereas the raw materials used in the production of margarine can generally be obtained in the Community at a price corresponding to the world market price, butter producers are required to pay a significantly higher price for their basic product, namely milk, of approximately 200 ECU per 100 kg above the world market price. It should also be noted, however, that there was at the material time a guarantee that butter would be purchased in unlimited quantities at prices which took account of the fact that the price of milk was significantly higher than the world market price.

131. The Commission interfered with that price structure inasmuch as it subsidized the sale of butter from intervention stocks to the extent of approximately half the intervention price for fresh butter while at the same time the intervention rules concerning fresh butter remained in effect and the intervention price remained unaltered. The butter from intervention stocks sold at approximately half price thus reduced to a certain extent the market for fresh butter sold at the usual price, so that the fresh butter could no longer be directly sold to consumers. There was, however, always the possibility of selling the butter to the intervention bodies at the intervention price, with the effect that butter producers would not be deprived of their outlets.

132. The position of the margarine manufacturers was different. Since they had no guaranteed outlet for their products through intervention measures, they were obliged, when a competing product was dumped on the market at a price which was massively subsidized, that is to say subsidized to the extent of approximately half its value, to suffer a loss of outlets for which no compensation was provided.

133. It must therefore be concluded that because of the subsidization of butter in intervention stock in the context of the 1984/85 Christmas butter scheme, the burden to be borne by producers of butter and margarine was different. The producers of fresh butter driven from the market could offer their goods to the intervention agencies without any restriction and those agencies were required to buy, whereas such a solution was not available to margarine producers. The Commission's intervention in the two markets for products made from fats thus produces different effects. Butter producers were affected at most if the market price was above the intervention price, something which nobody has claimed, whereas the margarine producers suffered a loss of revenue without receiving any compensation.

134. Such different treatment of the producers of the two products cannot be justified on objective grounds, and in particular it cannot be justified on the basis of the different way in which the two markets are organized. By means of the two market organizations, the competent Community institution, the Council, acting in accordance with the relevant provisions of the Treaty, set up particular conditions of competition. The fact that the markets are differently organized cannot be regarded as a legitimate ground for the Commission to bring about, with the help of implementing measures, a deterioration in the competitive position of margarine producers.

135. If it is necessary in order for there to be discrimination for a disadvantage imposed on one group of producers to give

rise to an advantage for another group, then the following must also be accepted.

136. Although subsidizing butter in intervention stock forces down demand for margarine, and because of the rotation of those stocks also forces from the market fresh butter, which is then purchased by the intervention agencies, the Christmas butter scheme may not be regarded as having any immediate advantage for butter producers. However, they obtain a considerable indirect advantage from the scheme. Having regard to the organization of the market in milk and milk products, which is managed in such a way that because an unlimited guarantee of sales and prices considerably above those of the world market necessarily leads to permanent structural overproduction of milk, schemes to reduce intervention stocks such as the 1984/85 Christmas butter scheme are simply a necessity if the existing system of high milk prices and an unlimited sales guarantee is to be maintained in existence at least for a further limited period. Although intervention, of its very nature, cannot mean that agricultural products can in the long term be withdrawn from the market in any quantity, since such products must be returned to the market at an appropriate time, intervention practice on the market in milk has developed into a system designed to find exceptional means of disposing of stocks. Thus, the 1984/85 Christmas butter scheme served, if only to a limited degree, to maintain in existence, at least for a short period, the high price for milk and the guarantee of disposal. That scheme therefore was indirectly of advantage to milk producers.

137. The 1984/85 Christmas butter scheme therefore imposed a considerable burden on the margarine producers but only a small burden on the butter producers, and that unequal treatment within the meaning of the Court's case-law [40] amounted to discrimination against the margarine producers, who cannot benefit from the advantages of the organization of the market in milk and milk products. The discrimination lies not in the fact that the applicants were placed at a greater disadvantage, but in the unjustified interference in the existing distribution of advantages laid down by the Council, which operates to the detriment of the applicants.

138. I conclude that the Commission, through its Christmas butter scheme, interfered on its own authority, that is to say, without sufficient legal basis, in the conditions of competition between butter and margarine laid down by the Council, and therefore acted unlawfully.

139. The conclusion cannot be drawn from the foregoing that similar conduct on the part of the Council would also be automatically unlawful since the Council has more extensive powers under the Treaty in the agricultural sector than has the Commission.

140. The view put forward here leads to the conclusion that the Council, whose price policy is responsible for the existence of the butter surpluses, must itself adopt the measures necessary to dispose of that surplus. Such measures may well be an express grant of powers to the Commission to sell butter at reduced prices. In this case, there was no such grant of powers.

40 — See the judgment of 25 October 1978 in Joined Cases 103 and 145/77 *Royal Scholten-Honig Ltd and Another* v *Intervention Board for Agricultural Produce* [1978] ECR 2037 and the judgment of 5 July 1977 in Case 116/76, cited above.

Disturbance of the balance of the market

141. Article 6 (3) of Regulation No 804/68 provides that disposal of the butter bought in by the intervention agencies is to take place in such a way as to avoid disturbing the balance of the market.

142. Since the purpose of Regulation No 804/68 is to organize the market in milk and milk products, I agree with the Commission when it argues that the 'balance of the market' referred to in Article 6 (3) can only be understood to mean the balance of the market in milk and milk products. Unlike the situation under Article 39 (1) (c) (see paragraphs 112 to 124), there is no obligation under this provision to take account of competing products prepared from vegetable fats.

143. If it is still possible to speak of a market situation, having regard to the intervention prices fixed by the Community and the guarantee of disposal which is also offered in respect of butter, then another factor in that market situation is the opportunity to sell unlimited quantities of butter to the intervention agencies at the intervention price. Even if subsidized butter from intervention stocks temporarily interferes with sales of fresh butter, which is then in its turn bought into intervention stock, there is no lasting interference with the 'market situation'. The only disadvantage which there could be for the fresh butter forced from the market is that the opportunity is lost to dispose of it on the market at a price higher than the intervention price. Having regard to the butter surplus, nobody has claimed, and it may not be assumed, that a price significantly higher than the intervention price could be obtained on the free market.

144. It follows that notwithstanding the fact that the 1984/85 Christmas butter scheme may have caused fresh butter to be driven from the market by butter from intervention stocks, there is no evidence of interference with the 'market situation' which may be regarded as more serious than the kind of interference which is already common.

145. There was therefore no disturbance of the balance of the market within the meaning of Article 6 (3) of Regulation No 804/68.

Breach of the principle of proportionality

146. In considering the alleged infringement of the principle of proportionality, two problems must be distinguished. It must first be considered whether the method employed, namely the subsidized sale of butter from intervention stocks, is proportionate to the objective to be achieved, namely the relief of the butter market.

147. From that must be distinguished the question of whether the relief which was obtained is in harmony with the costs incurred by the Community. This point may not be taken into consideration in regard to the claims for compensation before us now since it is for the competent political bodies and the Court of Auditors, and not traders, to pass judgment on whether the financial aspects of a Community action are appropriate.

148. It thus remains to discuss whether the results of the Christmas butter scheme justify the fact that margarine was temporarily forced from the market and whether there was any possibility of achieving comparable results by adopting measures which imposed less of a burden on margarine producers.

149. Having regard to the fact that the Community market for products prepared from fats is saturated, and that a significant extension of the market is not possible both because of consumer habits and on health grounds, it would have been possible if need be to adopt measures designed to reduce butter stocks the effects of which would take place outside the Common Market. In regard to such measures, the Commission has conclusively shown that the market in fats outside the Community is every bit as saturated as that within the Community. Additional exports are not possible both because the capacity, for example, of developing countries to absorb even gifts in the context of food aid is lacking and because it is not possible on account of the trade obligations which the Community has undertaken in the context of GATT to dispose of any significant additional quantities of butter to non-member countries.

150. Thus, the only possibility open to the Commission was to dispose of additional quantities of butter within the Community. That cannot constitute a breach of the principle of proportionality unless the measures concerned are unlawful for some other reason.

151. In any event, there is no evidence of an independent infringement of the law.

Ultra vires *and misuse of powers*

152. In regard to the claim of the Belgian and Netherlands applicants that the Commission misused its powers under Articles 6 and 12 of Regulation No 804/68 in setting up the 1984/85 Christmas butter scheme because the competitive position of butter on the market was thereby not merely maintained but improved, with the result that there was a discriminatory interference with the balance of the market between margarine and butter, to the detriment of margarine, the following should be noted.

153. In so far as it is complained that there has been a breach of the principle of market stabilization or of the prohibition of discrimination, this claim has already been dealt with. All that remains to be done here, therefore, is to consider whether the Commission was entitled under Article 6 of Regulation No 804/68 to improve the competitive position of butter *vis-à-vis* margarine rather than merely maintaining it.

154. Article 6 (4) of Regulation No 804/68 must be interpreted in the light of the spirit and purpose of the intervention rules. Those rules are intended to safeguard the guaranteed price. In particular, products are bought in by the intervention agencies when they cannot be disposed of on the market at the price laid down by the Council. On the other hand, intervention does not represent a definitive withdrawal of products from the market; on the contrary, the products concerned must be returned to the market at an appropriate time. Hence if the competitive position of butter on the market is to be maintained, account must be taken of the fact that even fresh butter cannot be disposed of since if it could, butter would not have to be bought by the intervention agencies, and furthermore, storage gives rise to a certain loss of quality. In such a situation, maintenance of the competitive position of butter on the market almost necessarily means improving its competitive position. That can be done by developing new markets or by improving its competitive position *vis-à-vis* substitute products. It

follows that the measures in question do not have to be strictly neutral in regard to competition with such substitute products.

155. Taking that fact in isolation, the Commission has therefore performed the task assigned to it by Article 6 (4) of Regulation No 804/68. Its powers to take such measures are limited, if at all, not by Article 6 (4) but by other principles of Community law such as the principle of market stabilization or the prohibition of discrimination.

156. Thus, the applicants' complaint that the Commission has exceeded or misused its powers cannot be accepted.

Breach of the principle of free movement of goods

157. According to Article 5 (1) of Regulation No 2956/84, the butter is to be used exclusively for direct consumption in the Member State where the subsidy or price reduction is granted, apart from small quantities of a non-commercial character bought by private final consumers.

158. That provision excludes free movement of goods in regard to Christmas butter. The Commission's statement that 'trade in small quantities of a non-commercial character' is possible is not convincing since it is difficult to imagine trade of a 'non-commercial character'. The provision in Article 5 (1) of the regulation referred to here merely makes it possible for the final consumer to use butter purchased in one Member State in another Member State. One can only imagine that that enables the purchaser to pass on the butter as a gift to friends or acquaintances, perhaps. That has very little to do with the free movement of goods in a common market.

159. Article 38 of the EEC Treaty provides that the common market is to extend to agriculture and trade in agricultural products and that save as otherwise provided in Articles 39 to 46, the rules laid down for the establishment of the common market apply to agricultural products. After the transitional period, the provisions of Articles 39 to 46 cannot be relied upon to justify a unilateral derogation from the requirements of Article 34 of the EEC Treaty.[41] Although Articles 30 to 36 of the Treaty apply primarily to unilateral measures adopted by the Member States, according to the judgment of the Court of 29 February 1984[42] the Community institutions themselves must also have due regard to freedom of trade within the Community, which is a fundamental principle of the common market.

160. The Commission did not do that when it adopted Article 5 (1) of Regulation No 2956/84. In particular, that measure could not be based on Article 36 of the EEC Treaty since the conditions for the application of that article, if indeed they apply to measures adopted by the Community institutions, have not been fulfilled.

161. The Commission's argument to the effect that, by analogy with the judgment of the Court of 20 February 1979,[43] additional limits on the free movement of goods are possible in so far as they are necessary in order to satisfy the mandatory requirements of the agricultural policy, cannot be

41 — See the judgment of 16 March 1977 in Case 68/76 *Commission* v *French Republic* [1977] ECR 515.

42 — Judgment of 29 February 1984 in Case 37/83, cited above.

43 — Judgment of 20 February 1979 in Case 120/78, *REWE-Zentrale AG* v *Bundesmonopolverwaltung für Branntwein*, [1979] ECR 649.

accepted. The Commission refers here in particular to the 'welfare character', the 'restricted quantities' and the 'brief period involved'.[44]

162. However, it must be admitted in the Commission's favour that in the abovementioned decision the Court accepted limitations on the free movement of goods going beyond and in addition to those authorized by Article 36, in particular those dictated by the requirements of fairness of commercial transactions and the defence of the consumer. However, having regard to the fundamental importance of the principle of free movement of goods for the establishment of the common market, no further analogies may be drawn from that decision, which goes beyond the terms of Articles 30 and 36 of the EEC Treaty.

163. Even if it were possible to do so, it is clear that the Commission has not advanced sufficient grounds to show that it was absolutely necessary to close the frontiers in order to achieve the objectives of the Christmas butter scheme (disposal of additional quantities, rotation of stocks). None of the grounds put forward is sufficient to justify setting aside the free movement of goods, the establishment of which is one of the fundamental objectives of the EEC Treaty. However, such a justification is necessary for the application of the exceptions provided for in Article 36 as well as for the additional exceptions permitted by the Court.

164. The rules laid down in Article 5 (1) of Regulation No 2956/84 therefore conflict with the principle of free movement of goods within the meaning of Article 30 *et seq.* of the EEC Treaty.

44 — Regulation No 2956/84, Official Journal L 279 of 18 October 1984, ninth recital in the preamble.

165. However, the conclusion which the Netherlands applicants draw from the breach of the principle of free movement of goods, namely that not merely the provision concerned but the whole of Title I of Regulation No 2956/84 is unlawful, cannot be accepted. The exclusion of the free movement of goods in regard to Christmas butter is merely an ancillary measure, which does not make the rest of the Christmas butter scheme unlawful, at least not from that point of view. Even if the provisions excluding the free movement of goods were not contained in the regulation, the Christmas butter scheme could have been implemented. That shows that the exclusion of the free movement of goods was not so important a measure that it must be assumed that without it, the entire Christmas butter scheme could not have been carried out.

Breach of the principle of the protection of legitimate expectation

166. Finally, the Netherlands applicants claim that having regard to the Commission's public statements concerning the unsuitability of schemes such as the Christmas butter scheme, they were entitled to assume that no such scheme would be operated in 1984.

167. However, closer examination of the Commission's statements shows that it regarded schemes such as the Christmas butter scheme as insufficiently successful to justify the costs to which they gave rise. Other aspects, such as, for example, the suitability of a Christmas butter scheme as a means of rotating intervention stocks, were not discussed. It must be noted in particular that the Commission, as it rightly states, never gave any undertaking not to operate any further Christmas butter schemes in the future. It was only *after* the completion of

the Christmas butter scheme that it stated in its 1985 report on agriculture that it did not intend to repeat the Christmas butter scheme in the 1985/86 economic year because as a means of increasing sales of butter it had proved to be expensive and not cost effective. [45]

168. Thus, the Commission gave the applicants no reason to believe that no further schemes of the same kind as the 1984/85 Christmas butter scheme would be operated. On the contrary, as the Commission has quite rightly stated, the applicants, like all other traders in the milk sector, should have expected that, having regard to the state of the intervention stocks of butter, measures such as the Christmas butter scheme would be adopted in order to reduce those stocks. Furthermore, the applicants must in my view state what steps they took or refrained from taking on the strength of their belief that no further Christmas butter schemes would be operated. In my opinion, a simple reduction in turnover is not sufficient since that would also have occurred even if the applicants had had to take account of the possibility of Christmas butter schemes being operated.

Liability of the Community

169. Finally, it must now be considered whether the infringements of the law which have been noted are of such a nature as to give rise to liability on the part of the Community. According to the established case-law of the Court, the mere fact that a legislative measure adopted by a Community institution is unlawful is not sufficient to found liability. Other, more serious factors must also be present. The Community does not incur liability on account of a legislative measure which involves choices of economic policy unless 'a sufficiently serious breach of a superior rule of law for the protection of the individual' has occurred. [46] The fact that liability for legislative measures which are the result of choices of economic policy is incurred 'only exceptionally and in special circumstances' is explained by the consideration that the Community institutions necessarily have a wider discretion in regard to the arrangements they make in that field, and it is necessary to ensure that the Community institutions will not be hindered in making their decisions by the prospect of claims for compensation whenever they are required to strike a balance in the area of economic policy between the public interest and the interests of individuals. [47]

170. All legislative measures in the economic domain necessarily affect the interests of persons other than those to whom the measures are directly addressed. Even though account does not need to be taken of every possible interest so affected, a public authority has a duty, as the Court stated in its judgment of 12 June 1958 in Case 15/57, [48] to act with circumspection and to intervene only after carefully balancing the interests concerned while so far as possible restricting the foreseeable damage to third parties.

171. The Commission did not take sufficient account of those principles in implementing the 1984/85 Christmas butter scheme.

45 — *The Agricultural Situation in the Community*, 1985 report, paragraph 187.

46 — Settled case-law of the Court — see for example the judgment of 2 December 1971 in Case 5/71 *Aktien-Zuckerfabrik Schöppenstedt* v *Council of the European Communities* [1971] ECR 975 and the judgment of 6 December 1984 in Case 59/83, cited above.

47 — See the judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others* v *Council and Commission* [1978] ECR 1209.

48 — Judgment of 12 June 1958 in Case 15/57 *Compagnie des hauts fourneaux de chasse* v *High Authority of the ECSC* [1957 and 1958] ECR 211.

172. The first point to be made, briefly, is that the fact that the Christmas butter scheme set aside the principle of free movement of goods cannot give rise to liability on the part of the Community. It is undoubtedly true that the principle of free movement of goods is one of the fundamental principles of the common market, as has often been emphasized in the Court's case-law. However, the applicants can obtain no protection from that principle in this case. They have not shown, for example, that they themselves intended to engage in intra-Community trade in Christmas butter. Furthermore, the Commission has rightly pointed out that setting aside the principle of free movement of goods provided the Netherlands applicants with particular protection inasmuch as it was thereby made impossible for quantities of butter from intervention stocks in other Member States which could not be disposed of in those Member States to be exported to the Netherlands and thereby further saturate the butter and margarine market in that country.

173. There thus remains to be considered the breach of the principle of market stabilization and of the prohibition of discrimination represented by the unlawful aid granted by the Commission.

174. I deduce from the previous decisions of the Court on non-contractual liability that the prohibition of discrimination and the objective of stabilizing markets are provisions the infringement of which may give rise to liability.[49]

175. I regard the prohibition of unlawful aid as a comparable provision the infringement of which can also give rise to liability on the part of the Community. Protecting competition within the common market from distortion is not merely objectively necessary for the functioning of the common market; it also serves the interests of individual traders whose market opportunities are thereby protected from the activities of an unlawfully subsidized competitor.

176. The additional requirement imposed by the Court, namely the existence of a sufficiently serious breach of a rule of law for the protection of the individual, which, exceptionally and in special circumstances, gives rise to liability on the part of the Community because individuals active in areas subject to the economic policy of the Community can be expected, within reasonable limits, to accept certain disadvantageous effects which a legal measure may have on their economic interests without claiming compensation from public funds, is also present.

177. By granting unlawful aid, the Commission has exceeded its powers and thereby infringed the rules of the common organization of the market in milk and milk products, the rules laid down by the Council concerning the relationship between the market in oils and fats and that in milk, that is to say, the principle of market stabilization, and the prohibition of discrimination. The Commission did so with the purpose of disposing of or transferring from one place of storage to another butter surpluses which came into existence largely as a result of the conduct of Community institutions, in particular as a result of the way in which the milk market is organized and the Council's decisions on prices. The reasonable limits within which individuals must accept certain disadvantageous effects without having a claim to compensation are in any event exceeded when for the purpose of disposing of structural surpluses of an agricultural product, caused by the Community's own conduct, a Community

49 — See, *inter alia*, the judgment of 2 December 1971 in Case 5/71, cited above, the judgment of 13 November 1973 in Joined Cases 63 to 69/72, *Wilhelm Werhahn Hansamühle and Others* v *Council and Commission* [1973] ECR 1229, and the judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77, cited above.

institution interferes without having the power to do so with the economic interests of traders who themselves are not subject to the organization of the market the continued existence of which the unlawful measures in question were adopted to ensure.

178. It is true that the Court has already held on several occasions that an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time.[50] That principle must also apply to the balance established by the Council between two different market organizations, so that the applicants cannot claim a vested right in having the relationship between the common organization of the market in milk and milk products and that in oils and fats remain unaltered.

179. The Commission referred to that when it stated that there was absolutely no obligation to ensure the continuance of the present position of margarine manufacturers on the common market. The Community institutions are entitled to make major amendments to the rules governing the individual market organizations. During the oral procedure, the applicants accepted that argument, subject to an important reservation: the organizations of the market may be changed but only by the institution having powers so to do, which means, in this case, the Council of the European Communities.

180. It is perhaps possible to argue that the Council could have authorized a scheme such as the 1984/85 Christmas butter scheme. In any event, the Council is certainly entitled to reduce the price of butter, to grant or authorize aid for the consumption of butter, and thereby to interfere with the conditions of competition between butter and margarine. It could even remove the existing price advantage in favour of margarine, for example, by imposing a sufficiently high tax on fats. However, the competent institution is the Council, acting on a proposal from the Commission, and not the latter on its own initiative.

181. In that connection it should be noted, however, that although the Council may in principle alter the rules of the common organization of a market, there are certain limits to its powers. In its judgment of 14 May 1975 in Case 74/74,[51] the Court regarded as a violation of a superior rule of law the abolition of monetary compensatory amounts without warning and without adopting transitional measures and therefore held the Community liable for the consequences thereof. It was in particular critical of the fact that the Commission had failed to adopt transitional measures for the protection of the confidence which the traders concerned were entitled to have in the Community rules.

182. That consideration must also be relevant when the Council makes a fundamental amendment to a market organization or to the relationship between several market organizations. It must respect the reliance of traders on the existing Community rules, a reliance which must be protected, and adopt appropriate transtional measures which make it possible for traders to adapt to the changed economic conditions. If that is not done, then the

50 — See the judgment of 27 September 1979 in Case 230/78 *SpA Eridania-Zuccherifici Nazionali and Another* v *Minister for Agriculture and Forestry and Another* [1979] ECR 2749, and the judgment of 6 December 1984 in Case 59/83, cited above.

51 — Judgment of 14 May 1975 in Case 74/74 *Comptoir national technique agricole SA* v *Commission* [1975] ECR 533.

Community will be liable at the very least for the damage suffered by traders because of the sudden change from the old to the new market rules.

183. In other words, the applicants have no guarantee of being able to retain the share of the market in fats which they have obtained through the application of the common organizations of the market in oils and fats and in milk and milk products; what is guaranteed to them, however, is that that market share will not suddenly be reduced without transitional measures being adopted. The share of the market which the applicants have obtained is not thereby guaranteed to them. They are merely protected against a sudden collapse of the market. That applies *a fortiori* when a temporary intervention takes place in the market at short notice and at a time which was not known in advance, as was the case here when the Commission, on 18 October 1984, announced that its Christmas butter scheme would commence on 5 November 1984.

184. If the encroachment on the applicants' rights is caused by a decision adopted by an institution which did not have the power to adopt it and the applicants were unable in principle to defend themselves against that encroachment with the help of the competent body, the question arises whether it can be said that there has been a sufficiently serious violation of a rule of law protecting the applicants.

185. I am inclined to answer that question in the affirmative. It is certainly true that the internal division of powers in the Community is based first of all on practical considerations concerning the rational division of work and the tasks to be performed. However, it is also designed to protect traders, in particular when the Community institutions are empowered to interfere in their spheres of interest or to adopt rules providing for exceptions from the fundamental provisions of the Treaty. Although such powers are entirely reserved to the Council, the cooperation of several Community institutions is required in order to adopt such rules. The Commission must publish a proposal, the Parliament must in certain cases be consulted and only then can the Council decide. Those procedural rules provide traders with considerable protection from interference with their rights because several Community institutions must agree as to what is to be done before a burden is imposed on them, whereas that is not the case when the Commission acts alone.

186. I therefore regard the Commission's interference with the distribution of powers between the Community institutions, at least as regards its encroachment on traders' vested rights, as a violation of a superior rule of law sufficient to found liability on the part of the Community.

Liability for lawful conduct

187. The Netherlands applicants claimed, in the alternative, that on the basis of the principle of the protection of legitimate expectation they were entitled to compensation even if the Commission's conduct could be regarded as lawful.

188. I am inclined to answer that question in the affirmative if the Community, through lawful conduct in favour of butter producers, pushed margarine producers, which until then had been lawfully pursuing their activities on the market in edible fats, into a crisis which threatened their existence. The Community has a responsibility not merely to the butter producers, but also to the margarine producers. When, for overriding political reasons, the

margarine producers are required to make such a sacrifice, they must receive appropriate compensation for it. However, the applicants do not claim that they were required to make a sacrifice which threatened their very existence.

189. Whether a broader liability of the Community for lawful conduct can be accepted does not need to be definitively decided in these proceedings. Such broader liability may perhaps be deduced from the fact that the applicants should not have had to reckon with even lawful interference with their interests. However, the fact that the Commission gave the applicants no grounds on which to base such an expectation has already been shown in regard to the possible existence of a breach of the principle of the protection of legitimate expectation (paragraph 166 *et seq.*).

C — Conclusion

190. I would conclude by proposing that the Court decide as follows:

(1) The Commission must compensate the applicants for the damage suffered by them by virtue of the implementation of Regulation No 2956/84 of 18 October 1984.

(2) The parties shall inform the Court within six months of the delivery of this judgment of the amount of compensation to be paid, which is to be the subject of an agreement made out of court.

(3) If no agreement can be reached out of court, the parties shall inform the Court within the same time-limit of the precise amounts which they consider should be paid.

(4) Costs are reserved.