OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
delivered on 2 February 1988

My Lords,

These four joined cases constitute further chapters in the saga of Community aid paid to Greek producers of tomato concentrates within the common organization of the market in products processed from fruit and vegetables (at the relevant time governed by Council Regulation No 516/77, Official Journal 1977, L 73, p. 1, as amended). The purpose of the aid was to ensure that Community production of tomato concentrates was competitive with imports from third countries whilst at the same time ensuring a proper return for the growers of the fresh produce; it was calculated on the basis of a 'reference product' (which at the relevant time was 100 kg, immediate packaging included, of concentrate containing between 28% and 30% dry matter and packed in units of 1.5 kg) and then adjusted by coefficients to take account of variations in packaging and concentration.

By virtue of Article 103 of the Greek Act of Accession (Official Journal 1979, L 291, p. 17), the level of production aid for Greek producers of the concentrate was to be calculated differently from that of producers in other Member States. Two levels of aid were therefore fixed for the marketing years 1981/82, 1982/83 and 1983/84; the coefficients adopted for the year 1981/82 were retained for the two subsequent years and were the same for Greece and for the other Member States. (Aids: Regulation No 1963/81 (Official Journal 1981, L 192, p. 16), Regulation No 1585/82 (Official Journal 1982 L, 178, p. 20), Regulation No 1618/83 (Official Journal 1983, L 159, p. 52); coefficients: Regulation No 1962/81 (Official Journal 1981, L 192, p. 13), Regulation No 1602/82 (Official Journal 1982 L 179, p. 16) and Regulation No 1615/83 (Official Journal 1983 L, 159, p. 48.)

The first challenge to what the Commission had done came in Case 250/81 *Greek Canners* v *Commission* [1982] ECR 3535 in which the applicants sought the annulment of Regulation No 1962/81 on the basis that the coefficients fixed did not sufficiently take account of the small packagings generally used in Greece and the higher processing costs met there. This action was held inadmissible on the grounds that the regulation in question was not of direct and individual concern to the applicants within the meaning of Article 173 of the Treaty although it might affect them.

In Case 192/83 *(Greece* v *Commission* [1985] ECR 2791 which I shall call the '1983 annulment action'), Greece then challenged Regulation No 1618/83 (aids) and Regulation No 1615/83 (coefficients) which concerned only the marketing year 1983/84. In its judgment, the Court held that the Commission had 'committed a technical error in transposing, to a system of aid which differentiates between Greek

producers and those of other Member States, the machinery of standard coefficients for all producers in the form in which it had operated before the accession of the Hellenic Republic' (paragraph 33).

This led, in the Court's view, to 'an unjustified reduction of the aid granted to all Greek producers whose product does not match' the reference product. Although not intended, the result was a demonstrable disparity of treatment contrary to the second and third paragraphs of Article 40 (3) of the EEC Treaty requiring equal treatment for all producers and likely to jeopardize the objective of Regulation No 516/77, namely to ensure that Community products are competitively priced in relation to products from non-Member countries.

The Court therefore declared Regulation No 1615/83 void in so far as the coefficients fixed gave rise to unequal treatment as between Greece and the other Member States 'as a result of the use of packaging smaller than the standard packaging adopted' for the reference product (paragraph 35 and operative part of the judgment). The Court further held that 'it is the duty of the Commission under Article 176 of the EEC Treaty to fix new coefficients for Greece, or to devise some other system of compensation taking account of the fact that the aid scheme differentiates between Greece and the other Member States' (paragraph 36).

In other cases brought at the same time (Joined Cases 194-206/83 *Asteris and Others* v *Commission* [1985] ECR 2815 which I shall call the 'damages action'), the applicants, who were Greek producers of tomato concentrates, sought compensation for the loss they claimed to have suffered as a result of the way the coefficients were fixed for marketing years 1981/82 and 1982/83 by Regulations Nos 1962/81 and 1602/82 respectively (see paragraph 18 of the judgment). The Court referred to the finding in the 1983 annulment action, judgment in which was delivered on the same day, that the identical coefficients fixed for the 1983/84 marketing year by Regulation No 1615/83 were unlawful and held that 'that finding must be extended, for identical reasons, to Commission Regulations Nos 1962/81 and 1602/82 fixing coefficients for the 1981/82 and 1982/83 marketing years respectively' (paragraph 19). However, the Court held that the Commission's 'technical error' in fixing the coefficients could not be regarded as constituting a serious breach of a superior rule of law or as manifest and grave disregard by the Commission of the limits on its powers, although it led in objective terms to unfair treatment for Greek producers (which it had held in the 1983 annulment action to infringe the principle enshrined in Article 40 (3)). Accordingly, it was held that the Community was not liable under Article 215 (2).

Prior to the delivery of those judgments, the Commission had adopted Regulation No 1709/84 (Official Journal 1984, L 162, p. 8) by which coefficients were fixed for marketing years 1984/85, 1985/86 and 1986/87, at the end of which the transitional period laid down by Article 103 of the Greek Act of Accession expired. Article 4 and Annex V of that Regulation lay down coefficients applicable to production aid for tomato concentrates without distinguishing

between Greece and the other Member States.

Cases 97 and 99/86

Following the judgment in the 1983 annulment action, the Commission on 20 February 1986 adopted Regulation No 381/86 (Official Journal 1986, L 44, p. 16) providing for 'additional payment of production aid for certain sizes of packings with tomato concentrates obtained from Greek tomatoes during the 1983/84 marketing year'. It recited the need to remedy the inequality of treatment identified by the Court in its judgment, but the Commission has taken no action to increase the amount of aid paid or payable in respect of marketing years prior or subsequent to 1983/84. In particular, it has not amended Regulation No 1709/84 dealing with the years 1984/85, 1985/86 and 1986/87 and the inequality of treatment has been maintained.

The 15 undertakings who are the applicants in Cases 97/86 and 193/86 ('the producers') represent, so the Court is told, 99% of Greek production of tomato concentrates. They and Greece argue that the Court's judgments require the Commission to correct this state of affairs. The Commission concedes that it was and is able to take steps to supplement the aid for prior and subsequent years. However, it takes the position that the Court's judgments only obliged it to adopt measures concerning the 1983/84 marketing year which it did in Regulation No 381/86. For the other years it took a policy decision not to amend the system.

The producers and Greece seek identical results in the first pair of actions now before the Court (Cases 97 and 99/86 respectively), namely the annulment of Regulation No 381/86 and a positive order from the Court that the Commission comply with the judgments in the 1983 annulment action and the damages action and allocate further aid for marketing years 1981/82, 1982/83, 1984/85 and 1985/86 (and, in the case of the producers only, 1986/87) so as to put an end to the inequality of treatment of Greek producers. In its reply, the Greek Government limited the form of order sought to the annulment of Regulation No 381/86, but I read this as a compendious phrase and not as a restriction on what is asked for in the application. I also consider that it is clear from the Greek Government's pleadings taken as a whole that an order in respect of the 1986/87 marketing year is also sought, since that year is referred to in the arguments which apply equally to that year and to the earlier years. The Commission has taken no point on these two matters.

Although it is accepted that the case brought by Greece is admissible, the Commission contends that the application brought by the producers is inadmissible since Regulation No 381/86 is a purely legislative measure and therefore not of direct and individual concern to the applicants, as the Court held in respect of its predecessor, Regulation No 1962/81, in *Greek Canners*. The fact that the contested regulation, which has an effect on the sector

in which the producers are active, was adopted following a judgment of the Court, it is said, is irrelevant.

The producers contend to the contrary — the reference in paragraph 36 of the judgment in the 1983 annulment action to the Commission's duty under Article 176, taken with the finding in the damages action, suffices to make Regulation No 381/86, despite its outward form, a decision of direct and individual concern to the applicants.

In Joined Cases 16 and 17/62 *Confédération nationale des producteurs de fruits et légumes* v *Council* [1962] ECR 471, the Court held that the question whether a contested instrument was a regulation or a decision must be examined by reference to its object and content and not to its official title. The criterion for the distinction between the two 'must be sought in the general "application" or otherwise of the measure'. A regulation, essentially a legislative instrument, is 'applicable not to a limited number of persons, defined or identifiable, but to categories of person viewed abstractly and in their entirety . . . if a measure, entitled by its author a regulation, contains provisions which are capable of being not only of direct but also of individual concern to certain natural or legal persons, it must be admitted, without prejudice to the question whether that measure considered in its entirety can be correctly called a regulation, that in any case those provisions do not have the character of a regulation and may therefore be impugned by those persons under the terms of the second paragraph of Article 173' (pp. 478 and 479).

There was no doubt that Regulation No 1962/81 which applied throughout the Community was legislative in nature. Hence the applicants in *Greek Canners* had no *locus standi*. At first sight it might be thought that Regulation No 381/86, which is dealing with a similar matter, is in the same category and that, on the basis of previous rulings of the Court which considered that the provisions in Article 173 as to the *locus standi* of applicants other than Member States had to be interpreted in a somewhat restrictive way, the application of the producers must be rejected as inadmissible.

In the end, though the question is not entirely an easy one, this is in my opinion too simplistic a view.

In the first place, Regulation No 381/86 is dealing with a situation confined to Greece and to a limited number of traders who processed Greek tomatoes into Greek concentrates during the marketing year 1983/84: those responsible for 99% of production are now before the Court.

The Regulation was clearly dealing with such traders and only such traders and there is nothing to suggest that any of the applicants were not in business in 1983/84 or that, if it had wished to do so, the Commission could not have ascertained a complete list of those traders. It seems to me that it is accordingly more in the nature of a decision concerning and concerning only such traders than of a regulation of general import. Because the persons 'to whom the provisions referred were identifiable' at the time the 'Regulation' was made, it seems to me that they can reasonably be said to have been individually concerned (Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019 at

1030; Joined Cases 41-44/70 *NV International Fruit Company and Others* v *Commission* [1971] ECR 411; Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207; the latter case involving traders who had entered into contracts to supply yarn to French buyers before the protective measures were authorized).

There is no doubt that the national authorities had no discretion in the implementation of the measure. The traders were thus, in my view, affected by it directly and the measure is to be treated as of direct concern to them within the meaning of Article 173 of the EEC Treaty (*International Fruit Company* (supra). Even if it were felt that the national authorities enjoyed a theoretical discretion such a Community measure can be of direct concern to an individual (*Piraiki-Patraiki* (*supra*).

I would thus accept that the producers have the necessary standing to challenge this regulation deliberately adopted to correct a technical error made to their disadvantage in general legislation which did not adequately take account of their particular position.

By Article 176 of the Treaty an institution the act of which was declared void or the failure to act of which was declared contrary to the Treaty 'shall be required to take the necessary measures to comply with the judgment'. A successful party in proceedings before the Court is entitled 'to request the Court to rule on any failure by the institution to perform its obligation under the provisions applicable' (Case 30/76 *Küster* v *Parliament* [1976] ECR 1719 at 1725).

In the 1983 annulment action, Greece obtained a declaration that the Regulation covering 1983/84 was invalid. No declaration was sought in respect of earlier years and those regulations were not annulled even though the Court made it clear in the damages action that the regulations covering 1981/82 and 1982/83 were affected by the same illegality. The position for 1983/84 has been corrected (and no complaint is made of that) but clearly the coefficients adopted for the years from 1984 to 1987 in Regulation No 1709/84 of 19 June 1984 are not in compliance with the Court's judgment in the 1983 annulment action which was given on 19 September 1985.

Two principles have to be considered. The first is that the Treaty, in Article 173, lays down a limitation period for challenging the validity of the measures adopted by the Commission. If they are not challenged in time and subsequently annulled they are treated as valid. The second is that the Commission must take steps to comply with the Court's judgment.

As far as the former is concerned, clearly Greece failed to challenge in due time the validity of the Regulations dealing with 1981/82, 1982/83 and Regulation No 1709/84 dealing with the later years. Those Regulations thus stand unless amended by the Commission. In respect of marketing years which were completed by the date on which the judgment was given I consider that the Commission is entitled to rely on the time limitation laid down. If it were otherwise the limitation provisions could always be evaded if a Member State failed to challenge the regulations replaced annually until a late stage when it chal-

lenged a particular year and then sought to say that the earlier years must be corrected. The interests of legal certainty justify the rule that measures already implemented should stand even if they are recognized to have been dealt with on an erroneous basis.

I thus consider that the Court's judgment does not oblige the Commission to revoke or amend the regulations dealing with marketing years 1981/82, 1982/83 or 1984/85 which were all ended by the date of the Court's judgment, the last of such years having terminated on 30 June 1985.

On the other hand, the years 1985/86 and 1986/87 were not completed. Despite the arguments that Greece only has itself to blame for not seeking to challenge the validity of the relevant regulations including No 1709/84 in due time, it seems to me that to comply with Article 176 of the Treaty the Commission was obliged to put right the regulations dealing with the current and the subsequent marketing years. Even though there was no power in the Court to annul that regulation, the time for application having been allowed by Greece to go by, the Commission's failure to correct the position once it knew that the method adopted was defective is a breach of its obligations under Article 176 of the Treaty. Those obligations were not confined to dealing only with the year 1983/84 in respect of which the relevant Regulation was annulled. Greece was in time to challenge Regulation No 381/86 and is in my view entitled to a declaration that, in so far as it fails to deal with the years 1985/86 and 1986/87 on the basis indicated by the Court, Regulation No 381/86 is void.

It may at first sight seem strange that 1983/84 and 1985/86 *et seq.* should have to be treated on a proper basis but that 1984/85 should remain as it was. I do not think that this is an illogical position once it is recognized that Greece could have challenged the regulation in respect of that year and failed to do so.

The producers were not parties to the judgment annulling the Regulation in respect of 1983/84. None the less they were, in my view, entitled on the same basis as Greece to expect that Regulation No 381/86 would not only correct the position for that year but would also put right the position for the current and future years. They are entitled to say that it is at the least surprising that the Commission should wish to rely so resolutely on the limitation defence and to proceed on the basis declared to be unlawful for the marketing years still to be completed. The fact that the damages action failed is not conclusive. Articles 173 and 215 are independent and have a different purpose. The fact that the Court refused damages in the damages action does not in my view pose an obstacle to the producers succeeding in the current case. I consider, therefore, that in Case 97/86 they are entitled to the same declaration as Greece.

Cases 193/86 and 215/86

The applicants made it clear that the second pair of actions are alternative to the first. They do not need the second pair if they succeed on the first. On the conclusion I have reached, the second pair does not need to be considered.

If the applicants did not succeed in the first two cases, then their claims in the second pair need to be considered. Both are brought in time and in my view the parties had the necessary *locus standi* to bring the actions. I would therefore treat them as admissible.

Following the adoption of Regulation No 381/86, the producers and Greece by letters of 10 and 17 April 1986 respectively called on the Commission to comply with the judgments in the 1983 actions by fixing supplementary aid for the marketing years prior and subsequent to 1983/84. This request was expressly made pursuant to Article 175 of the Treaty. By letters of 11 and 19 June 1986 respectively, the Commission replied that it considered that it had complied with the judgment in Case 192/83 and that no further action was required of it. The applicants in both cases seek the annulment of that statement of position and of what the applicants see as the Commission's refusal to comply with the Court's judgment. It seems to me that these applications are intended to be based first under Article 175 on an alleged failure to adopt a position and secondly under Article 173 on the basis that there was a refusal to act, which is itself a decision to be challenged.

In my opinion the application under Article 175 fails because the Commission did adopt a position. It made it clear that it considered that it had to do nothing and that it would not act. I consider that that refusal is a matter which can, however, be reviewed under Article 173 as a failure to adopt a regulation dealing with the years other than the year 1983/84 — a failure which was of direct and individual concern to the producers and which they and Greece can seek to challenge. I consider that for the same reasons *mutatis mutandis* as applied in the first two actions the refusal to remedy the situation for the years 1985/86 and 1986/87 was a breach of the Commission's duty to comply with the Court's judgment but that in respect of earlier years, an application for the Regulations to be annulled not having been made in due time and the marketing years having come to an end, the Court's judgment did not require the matters to be reopened.

However, since this in my view merely duplicates the result in the first pair of actions, I would make no order on the second pair. If the producers' first action (Case 97/86) is held to fail as being inadmissible, I would hold the second action (Case 193/86) to be admissible and the producers would succeed on the substance in that action and Greece would succeed in the first case (Case 99/86) which is clearly admissible and there would be no order on the second Greek application (Case 215/86). If either or both of the first pair fail on the substance then it seems to me that the parallel actions in the second pair must also fail.

However, in the circumstances I consider that the applications in Cases 97 and 99/86 should succeed; Regulation 381/86 should be declared void to the extent that the Commission has failed to comply with the Court's judgment in the 1983 annulment action, taken with that in the damages action, by not fixing coefficients which remove the element of discrimination against Greek producers for the marketing years 1985/86 and 1986/87.

Since the applicants have succeeded in part and failed in part, I would order the Commission to pay half the costs of the applicants.