OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 7 March 1990 *

Mr President,
Members of the Court,

A — Facts

1. These proceedings concern an application for annulment and a claim for damages brought by an association of French undertakings in the tomato sector (Sonito) and some of its members against the Commission.

2. The application for annulment under Article 173 of the EEC Treaty is directed against the Commission's decision, apparent from its letter of 17 January 1989 to the applicants' legal representatives, to take no action on a complaint by which Sonito drew the Commission's attention to the fact that its members had suffered damage on account of fraudulent information supplied by Italian and Greek tomato producers regarding the quality and, above all, the quantity of their production in the marketing years 1983/84 to 1985/86. As a result of those frauds, in particular the notification of inflated processing figures, the production aid provided for by Regulation No 426/86 [1] was considerably reduced in the marketing years 1984/85 to 1987/88 [2] pursuant to Regulation No 989/84 [3] to the detriment of the tomato processing undertakings affiliated to Sonito. The reduction came about because the frauds caused the guarantee threshold laid down in Regulation No 989/84 to be exceeded. Moreover, the undertakings were exposed to a distortion of competition because the Italian and Greek processors received aids to which they were not entitled (Sonito's letters of 17 October 1986 and 19 September 1988 to the Commission). According to the applicants, the Commission has a duty, where necessary, to carry out investigations, to bring actions to establish an infringement of the Treaty against the Member States concerned when they have failed to fulfil their supervisory duties incumbent on them under Community law, and also to rectify the incorrect data and apply the aid accordingly (Sonito's letter of 17 October 1986 to the Commission). In a letter of 5 May 1987, Sonito took up the Commission's reply to a parliamentary question in which the Commission referred to frauds amounting to ECU 6.5 million. It asked the Commission to provide it with details, for each marketing year, of the cases found to exist in each of the Member States so that, as it explained, it could enforce its claims

* Original language: German.

1 — Council Regulation (EEC) No 426/86 of 24 February 1986 on the common organization of the market in products processed from fruit and vegetables (OJ 1986, L 49, p. 1)

2 — The aids in question were fixed by the Commission:
(i) for the 1984/85 marketing year, by Regulation (EEC) No 1925/84 of 5 July 1984 (OJ 1984, L 179, p. 15);
(ii) for the 1985/86 marketing year, by Regulation (EEC) No 2222/85 of 31 July 1985 (OJ 1985, L 205, p. 16);
(iii) for the 1986/87 marketing year, by Regulation (EEC) No 2077/86 of 30 June 1986 (OJ 1986, L 179, p. 11);
(iv) for the 1987/88 marketing year, by Regulation (EEC) No 2160/87 of 22 July 1987 (OJ 1987, L 202, p. 32).

3 — Council Regulation (EEC) No 989/84 of 31 March 1984 introducing a system of guarantee thresholds for certain processed fruit and vegetable products (OJ 1984, L 103, p. 19).

before the national courts. However, the Commission did not comply with that request.

3. After a fruitless exchange of opinions, the Commission sent to Sonito the contested letter of 17 January 1989, which concluded:

'In these circumstances, the Commission has decided not to take any action on the complaints[4] since there are no grounds for concluding that there has been an infringement by the Member States concerned.'

4. The applicants seek *a declaration* that 'the decision not to act on their complaint which was communicated to them by letter of the Commission dated 17 January 1989 *is void*'[5] because it is unlawful on a number of grounds.

5. With their claim for *damages* the applicants seek an order requiring the Commission to pay the following sums with interest *to the undertakings affiliated to Sonito that have brought the action*:

(i) the difference between the production aid they actually received in the marketing years 1984/85 to 1987/88 and the aid they would have received but for the abatement;

(ii) a further sum in compensation for economic loss, to be assessed by means of an expert's report.

6. In this context, the applicants also seek an order requiring the Commission to pay *Sonito* the legal costs it was obliged to incur in Italy in order to safeguard its rights.

7. In the applicants' view, the decision not to take any action on the complaint as well as the Commission's entire conduct towards them constitutes a wrongful act, which establishes the Commission's liability under the second paragraph of Article 215 of the EEC Treaty.

8. The Commission asks for the application to be rejected, with costs, as inadmissible, or in the alternative as unfounded, and it contests the applicants' submissions.

9. With regard to the facts, the parties are in dispute on the question of the extent to which the production data notified by Italy and Greece were reliable or distorted on account of frauds. I will deal only in so far as is necessary with the (otherwise undisputed) facts and the submissions of the parties in Part B of my Opinion. For the rest, I refer to the Report for the Hearing.

B — Opinion

I — *Application for annulment*

10. *1.* Before I can deal with the question whether the application for annulment is

4 — The letter also concerns another complaint, which relates to the peach sector and is unconnected with the present dispute.

5 — My emphasis.

admissible and, if so, well founded, I must begin by defining, by interpretation, the applicants' claim, in other words the subject-matter of the application contained in the application originating the proceedings. This step is necessary in this case because the dispute between the parties over this point could not be cleared up before the date set for the hearing, a matter to which I shall return directly.

11. I am referring here quite deliberately to the claim submitted in the application originating the proceedings because the Court has consistently held that, under Article 38(1)(c) of the Rules of Procedure, an applicant may not subsequently alter his claim; that is true for the reply stage and even more for the hearing.[6] The submissions of the parties concerning the subject-matter of the application, in particular the submissions of the applicants which are not contained in their application, can therefore only be taken into consideration as argument on the question of interpretation which has arisen.

12. As I mentioned at the beginning,[7] the application refers expressly to the contested letter of 17 January 1989 from the Commission. The extract quoted from that letter alone makes it very clear what is at issue there, namely the question previously raised between the parties as to whether the Commission should bring an action against Italy and Greece to establish an infringement of the Treaty. The letter concerned 'complaints submitted pursuant to Article 169 of the EEC Treaty' by Sonito and another association. The letter also expressly stated that the Commission had no evidence that Italy or Greece were in breach of their duties of inspection and supervision. In other respects too, the only conclusion which can be drawn from the application, which is in itself clearly defined by the reference to the abovementioned letter, is that the subject-matter of the dispute is the Commission's refusal to bring actions against Italy and Greece for infringement of the Treaty.

13. A different conclusion could be arrived at only if it were clear from the application originating the proceedings that, in so far as the Commission had also refused to correct the disputed data or refused to support the applicants in their actions before the national courts, that was also — or instead of the refusal to take action under Article 169 — the subject-matter of the dispute. In that case, because of the unambiguous wording of the claim, an equally unambiguous clarification would have been required to justify the assumption that the claim did in fact have a different or a wider subject-matter. There is no such clarification. On the contrary, page 2 of the application originating the proceedings states: 'The subject-matter of the present application for annulment under Article 173 of the EEC Treaty is the decision to take no action on the complaint notified by that letter of 17 January 1989 (Annex I)'. In so far as it is then a question of Sonito's request for the Commission to correct the disputed figures and/or to support the applicants in the criminal proceedings referred to, the application nowhere makes it sufficiently clear how the conduct of the

6 — Judgments of 25 September 1979 in Case 232/78 *Commission* v *France* [1979] ECR 2729 and of 18 October 1979 in Case 125/78 *GEMA* v *Commission* [1979] ECR 3173

7 — Section A.

Commission complained of in that regard is related to the letter in question and, consequently, to the application for annulment. The application states, in fact, that in the contested letter the Commission did *not* deal with the problem of the harm caused to French processors due to the effects of the guarantee threshold (my emphasis). In the reply, it is further pointed out that Sonito's request to the Commission that it should draw the necessary conclusions from the alleged frauds for the application of the guarantee threshold and consequently for the fixing of the level of aid, was not granted. That confirms once more what is already clear, namely the limited nature of the application.

14. Consequently, in my view, it must be assumed that the application for *annulment* relates only to the Commission's refusal to bring actions against Italy and Greece to establish an infringement of the Treaty. The applicants have described that interpretation, which is also the defendant's, in particular at the hearing, as incorrect, but they have not withdrawn the application. In so far as they now complain that the Commission *failed to act* because it *did not* reply to part of Sonito's complaint, it is conceptually impossible for that complaint to be taken into consideration in the context of the application for annulment. Since no action has been brought to establish a failure to act within the meaning of Article 175 of the EEC Treaty, I do not need to deal with that submission.

15. *2.* As far as the application for annulment regarding the non-commencement of proceedings to establish an infringement of the Treaty is concerned, it does not fulfil the conditions of admissibility laid down in the second paragraph of Article 173 of the EEC Treaty, for two reasons. Firstly, as the Court has stated, an application for an annulment of that kind is inadmissible in principle because 'the initiation of this procedure (procedure of Article 169) is part of the administrative stage thereof and no measure taken by the Commission during this stage has any binding force'.[8] Therefore, the subject-matter of the dispute is not a decision within the meaning of the second paragraph of Article 173.

16. Secondly, that provision requires that the applicant is not only directly but also individually concerned by the contested measure. That requirement is not met in the case of actions for annulment against a refusal to commence proceedings for breach of the Treaty, as the Court of Justice has only recently confirmed.[9]

17. The judgments of the Court of Justice cited by the applicants during the hearing[10] do not lead to a different conclusion either: those judgments concern essentially cases in which the Court upheld the right of action of third parties who were not addressees of the contested measure where, and because, those persons occupied a specially defined, legally protected place in the relevant administrative procedure owing to circumstances of fact and law, so that the measures could adversely affect their individual legitimate interests. In those cases, the

8 — Summary of the judgment of 1 March 1966 in Case 48/65 *Lütticke and Others* v *Commission* [1966] ECR 19.

9 — Judgment of 14 February 1989 in Case 247/87 *Star Fruit Company SA* v *Commission* [1989] ECR 291, paragraph 13.

10 — Judgments of 25 October 1977 in Case 26/76 *Metro* v *Commission* [1977] ECR 1875, of 4 October 1983 in Case 191/83 *Fediol* v *Commission* [1983] ECR 2913, of 11 October 1983 in Case 210/81 *Demo-Studio Schmidt* v *Commission* [1983] ECR 3045, of 20 March 1985 in Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849 and of 28 January 1986 in Case 169/84 *Cofaz and Others* v *Commission* [1986] ECR 391.

Court decided that the applicants were individually concerned by the measures in question.

18. With regard to that procedural aspect, it can be deduced from the scheme of the Treaty, as discernable in Articles 169 and 170 of the EEC Treaty, that only the Commission and the Member States are entitled to bring an action to establish an infringement of the Treaty. That would be difficult to reconcile with the granting of such a privileged position to private complainants in the preliminary procedure under Article 169. Moreover, there is no basis for doing so contained in the text of the Treaty. That is consistent with the position of such complainants in substantive law, with regard to which the Court has already stated that: [11]

'However, it is clear from the scheme of Article 169 of the Treaty that the Commission is not bound to commence the proceedings provided for in that provision but in this regard has a discretion which excludes the right for individuals to require that institution to adopt a specific position.'

19. The application for annulment with the subject-matter as described above should therefore be rejected as inadmissible without there being any need to settle the doubt whether, in the contrary case, not only its affiliated companies, but also Sonito would have a right of action. [12]

20. *3.* Any claim for annulment in respect of the Commission's refusal to adapt the production aids in the marketing years at issue on account of the modified production data would also be inadmissible. In that regard, reference should be made first to the clear provisions of Articles 5(5) and 22 of Regulation No 426/86 and Article 3(c) of Regulation 516/77 [13] on the one hand and Article 11 *et seq.* of Regulation No 1599/84 [14] and Article 4 of Regulation No 729/70 [15] on the other. According to those provisions, the Commission has the task of fixing the level of aid applicable for all economic operators whilst the Member States are responsible for the actual grant of the aid to individual applicants. [16] The applicants challenge the Commission's conduct in its field of competence and take the view that the Commission is under a duty to increase the aid. Such a measure would have to be adopted in the form of regulations amending the regulations fixing the aids for the marketing years 1984/85 to 1987/88. [17] In accordance with the stated

11 — Judgment of 14 February 1989 in Case 247/87 (see footnote 9), paragraph 11, in this regard, see the Opinion of Advocate General Gand in the early case of *Lutticke* v *Commission* (footnote 8) [1966] ECR 19, at p 31

12 — See in this regard the judgments of the Court of 14 December 1962 in Joined Cases 16/62 and 17/62 *Confédération nationale des producteurs des fruits et légumes and Others* v *Council* [1962] ECR 471, of 5 November 1986 in Case 117/86 *Ufade* v *Council and Commission* [1986] ECR 3255 and the order of 18 January 1989 in Case 167/87 *OPAGAC and Others* v *Commission* [1989] ECR 55, paragraph 7.

13 — Council Regulation (EEC) No 516/77 of 14 March 1977 on the common organization of the market in products processed from fruit and vegetables (OJ 1977, L 73, p. 1).

14 — Commission Regulation (EEC) No 1599/84 of 5 June 1984 laying down detailed rules for the application of the system of production aid for products processed from fruit and vegetables (OJ 1984, L 152, p. 16).

15 — Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition, 1970 (I), p. 218).

16 — See also in this regard the judgment of 21 September 1983 in Joined Cases 205/82 to 215/82 *Deutsche Milchkontor and Others* v *Federal Republic of Germany* [1983] ECR 2633, according to which under the institutional system of the Community and the provisions which govern the relations between the Community and the Member States, in the absence of a provision of Community law to the contrary, it is for the Member States to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory (see also the judgments of 6 June 1972 in Case 94/71 *Schluter* [1972] ECR 307 and of 7 July 1987 in Joined Cases 89/86 and 91/86 *L'Etoile commerciale and Others* v *Commission* [1987] ECR 3005)

17 — See footnote 2 above

purpose of Commission measures fixing aids,[18] the amending regulations would have general application under the second paragraph of Article 189. As the Commission correctly points out, the applicants would not be individually concerned by those measures; they would be concerned only in their objective capacity as producers of processed-tomato products, just like other producers operating in that sector in the Community. I see no way in which they could be identified within that group like individual addressees.[19] The question whether the applicants would, as they claim, be *directly* concerned by the amendments, may remain open.

21. Consequently, the application for annulment would also be inadmissible on that interpretation of the claim.

II — *The claim for damages*

22. *1.* (a) As I mentioned in my review of the facts, the applicants are seeking compensation for three different kinds of damage, in respect of which they rely essentially on three submissions. They submit that:

(i) the Commission was wrong not to bring an action for breach of the Treaty;

(ii) the Commission did not increase the aids, although amended figures would appear to have made this necessary — at least in favour of the French processors;

(iii) the Commission did not assist the applicants in pursuing actions before national courts; in particular it did not provide them with any information regarding the frauds of which it had become aware.

23. Basically, therefore, the admissibility and substance of each of those claims is to be considered below, taking into account the relevant submission in each case.

24. (b) In that context, however, we can immediately rule out consideration of the submission that the Commission wrongly failed to bring an action for breach of the Treaty. The applicants' claim for damages — like their claim for annulment — was based first of all on the claim that the Commission's failure to take any action on the complaint was unlawful. As I have already pointed out, that alludes to the submission that the Commission failed to commence proceedings to establish infringement of the Treaty.

25. However, it was not clear from the application what relationship is supposed to exist between that submission and the alleged damage for which the applicants are seeking compensation. In the reply the applicants then responded to the arguments set out in the defence by stating that, inasmuch as they submitted that the Commission was wrong not to take actions on their complaints, it should be taken into account that there were a number of aspects to the complaints. According to the applicants, they did not base their claims on the aspect of the non-commencement of

18 — See the final sentences in each of the regulations mentioned in footnote 2.

19 — As required by the established case-law of the Court; see most recently the judgment of 29 June 1989 in Joined Cases 250/86 and 11/87 *RAR* v *Council and Commission* [1989] ECR 2045, paragraph 19; see also the judgment of 21 November 1989 in Case C-244/88 *Les usines coopératives de déshydratation du Vexin and Others* v *Commission* [1989] ECR 3811.

proceedings for breach of the Treaty. The applicants' arguments at the hearing were along the same lines.

26. It therefore appears clear to me that — even if the application actually meets the requirements of Article 38(1)(c) — the applicants have abandoned the abovementioned submission in the course of the proceedings.

I see no reason not to accept that decision reached in the context of the arrangements between the parties. Therefore, consideration of that submission is unnecessary.

27. For the chances of success of this submission I refer to my comments on the admissibility of the application for annulment, where I have already explained that the case-law of the Court does not allow individuals the right to require proceedings for breach of the Treaty to be commenced.

28. 2. In so far as the applicants claim the difference between the aids which they actually received and those which they would have received without the abatement made as a result of the operation of the guarantee threshold (that difference estimated to be FF 82 749 312.72), they contend first of all that there was a wrongful administrative act committed by the Commission in adopting the regulations on the amount of production aids. In the applicants' opinion, the Commission should have either (1) corrected the allegedly incorrect figures and adjusted accordingly the sums of aid claimed by those entitled, or (2) structured the aid in such a way that the applicants would not have been adversely affected by the guarantee thresholds being exceeded as a result of frauds in Italy and Greece. All that can be discerned only very vaguely in the application. However, I think that that is the only way in which the arguments in question can be understood.

29. (a) In that regard, it is doubtful whether the claim is even admissible in view of Article 178 of the EEC Treaty under which the Court of Justice has jurisdiction in claims for damages only if they concern the Community's liability for damage caused by its institutions or servants.

30. The Commission has rightly referred to the distribution of tasks and competences among producers, Member States and the Commission in Regulation No 1599/84, according to which the producers are under a duty to provide all the information required by the Member States for the administration and systematic supervision of the aid scheme. Article 12 of Regulation No 1599/84 describes in detail the information to be included in applications, in particular concerning the weight of the raw materials and the finished products, and stipulates which documents are to accompany the application. In addition, the producers concerned are under a duty pursuant to Article 4(e) of the regulation [20] — independently of the information supplied in their applications — to make certain annual returns to the Member States, which Article 8 of Regulation No 2223/85, [21] pursuant to

20 — In the version in Commission Regulation (EEC) No 1455/85 (OJ 1985, L 144, p. 69).

21 — Commission Regulation (EEC) No 2223/85 of 31 July 1985 laying down detailed rules for the application of temporary measures for production aid to processed tomato products (OJ 1985, L 205, p. 19).

the quota rules laid down in Regulation No 1320/85,[22] makes even more detailed. Article 8 of Regulation No 1599/84 also provides that processors are to forward a copy of processing contracts within certain time-limits to the national authorities. Under Title VII of Regulation No 1599/84, processors are required to keep records of the data which is important for the grant of aid and to retain the relevant supporting documents. The Member States may carry out random checks and are required to examine the processors' records annually. They are to 'take all necessary measures to ensure correct application of the production aid system and all necessary steps to prevent and punish fraud in respect thereof' (Article 14(4) of Regulation No 1599/84). Pursuant to Article 19 of Regulation No 1599/84 the Member States then notify certain data to the Commission which is basically a summary of the data collected from the processors, for the Commission's purposes.

31. Thus the Commission does not draw up the important data itself but merely receives it. However, pursuant to Article 9(2) of Regulation No 729/70, it is entitled to carry out on-the-spot inspections itself; where it considers that irregularities or negligence have taken place, it may, by informing the Member States thereof, require them under Article 6 of Regulation No 283/72[23] to hold an inquiry themselves.

32. Given that legal position, the question arises whether the alleged unlawfulness emanates in fact from the defendant, the Commission, or from the national authorities. Only in the former case does the Court of Justice have jurisdiction under Article 178 of the EEC Treaty to rule on the claim for damages.[24] In the final analysis, it is a matter of considering in general the extent to which the alleged damage may have been caused, in any way whatever, by the conduct of the Commission at issue.

33. The Commission can rectify the relevant data, with consequences for the amount of the aid, only if discrepancies have been positively established. It is not sufficient for it merely to have gained the impression that irregularities have taken place, because, for example, the figures supplied do not seem plausible. As I have shown, both the Member States and the Commission are empowered to carry out the relevant checks. On the basis of its own checks, the Commission was unable to establish any irregularities,[25] which is not disputed by the applicants. On the other hand, the Member States' checks showed that on account of frauds certain sums of aid — which have still not been precisely determined by amount and marketing year — were wrongly paid.[26]

22 — Council Regulation (EEC) No 1320/85 of 23 May 1985 on temporary measures for production aid to processed tomato products (OJ 1985, L 137, p. 41).

23 — Regulation (EEC) No 283/72 of the Commission of 7 February 1972 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field (OJ, English Special Edition, 1972 (I), p. 90).

24 — Established case-law: see the judgments of 26 February 1986 in Case 175/84 *Krohn* v *Commission* [1986] ECR 753 and of 7 July 1987 in Joined Cases 89/86 and 91/86 *L'Étoile commerciale and CNTA* v *Commission* [1987] ECR 3005.

25 — See the Commission's reply of 30 January 1987 to the Parliamentary question of Michel Debatisse, Member of the European Parliament (OJ 1987, C 149, p. 22).

26 — See footnote 23 and the Commission's reply to the Court of Auditors' Special Report No 2/89 (OJ 1989, C 128, p. 44/76), cited by the applicants.

34. The parties are obviously at one in assuming that the changes that result therefrom were not reflected in the aids fixed for the marketing years 1983/84 to 1987/88. Unlike in the *Francesconi* case,[27] in which the Commission's duty to inform and supervise were at issue and not its legislative competence, it would be for the Commission, in accordance with the distribution of tasks described, to take account of those findings for reassessing the level of aid. Therefore, logic does not preclude the alleged damage being at least partly caused by the unlawful acts of the Commission. In my opinion, that must suffice to confirm the admissibility of the application. The question whether a wrongful act, damage and the necessary causal relationship actually exist, relates to the substance of the application.

35. Finally, in so far as the Commission relies on the judgments in *Krohn*[28] and *Plaumann*[29] to demonstrate the inadmissibility for the application, its argument cannot, in my view, be followed. The judgment in *Plaumann* shows that in the absence of a wrongful act a claim for damages is unfounded if the administrative act by which the applicant considers he has been damaged has not been annulled. In *Krohn* the Court then explained that those considerations related only to a particular exceptional case. According to that judgment, such a case exists only when the application is brought against an individual decision. However, as I pointed out in my observations on the admissibility of the application for annulment, this case involves legal acts of general application. Moreover, with regard to the question of the admissibility of claims for damages when they conflict with applications for annulment, the Court, in its judgment in *Krohn*, confirming what has been established case-law since the judgment in *Schöppenstedt*,[30] ruled that:

'As the Court has pointed out above, the action provided for by Article 178 and the second paragraph of Article 215 of the Treaty was introduced as an autonomous form of action with a particular purpose to fulfil. It differs from an action for annulment in particular in that its purpose is not to set aside a specific measure but to repair the damage caused by an institution'.[31]

36. The application for the payment of the difference in aid is therefore admissible in so far as it is based on the failure to adapt the amount of aid.

37. (b) With regard to the substance of the application, a claim under the second paragraph of Article 215 of the EEC Treaty, in accordance with the general legal principles to which that provision refers, lies only if the disputed action of the Community institution — in this case the Commission — is unlawful. Inasmuch as the applicants claim that the Commission should have structured the aids in such a way that the disadvantages arising from frauds, in so far as they play an important part in the exceeding of the guarantee threshold, were borne only by Italian and Greek producers, the Commission's actions cannot be regarded as unlawful a priori in view of the prohibition of discrimination laid down in

27 — Judgment of 4 July 1989 in Joined Cases 326/86 and 66/88 *Francesconi and Others* v *Commission* [1989] ECR 2087

28 — Op cit (footnote 24).

29 — Judgment of 15 July 1963 in Case 25/62 *Plaumann* v *Commission* [1963] ECR 213

30 — Judgment of 2 December 1971 in Case 5/71 *Schoppenstedt* v *Council* [1971] ECR 975

31 — Judgment in *Krohn*, cited above, paragraph 32.

the second subparagraph of Article 40(2) of the EEC Treaty. As the Commission has rightly pointed out, the restructuring of aid would unjustly discriminate against those producers in Italy and Greece who communicated accurate processing data. The principle of equal treatment, upon which the applicants rely, would thereby be turned on its head.

38. In so far as the Commission is accused of not having increased, in the regulations relating to the marketing years 1984/85 to 1987/88, the aids for all Community processors taking account of the frauds found to exist, that allegation concerns the Community's liability for legislative acts. Since the acts concerned involve choices of economic policy, a specific form of unlawfulness is required: such acts may give rise to the Community's liability only if a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred.[32] As is evident from Articles 5(1) and (3) of Regulation No 426/86 and Article 2 of Regulation No 1277/84,[33] even though certain guidelines must be observed when production aid is fixed, nevertheless, within those guidelines, the detailed fixing is at the Community's discretion. Article 5(1), especially, states that 'in particular' the factors listed therein are to be taken into account. Similar forms of words are found in Article 2(2) and (3) of Regulation No 1277/84. The first sentence of Article 5(1) of Regulation No 426/86 sets out an absolute limit to the discretion: 'The amount of aid shall be so fixed as to enable the Community product concerned to be marketed'.

39. In addition, a special feature of the present case is that subsequent amendments to the regulations are involved. It has not been suggested that the Commission did not take into consideration, when adopting the various regulations, specific proven discrepancies in the actual production figures supplied by processors. However, under Article 5(5) of Regulation No 426/86, the aid must be fixed before the beginning of each marketing year. I do not take the view that fixing the aid after that time is precluded in principle — at least not if the aid (in the event of an amendment) is to be increased; the provision is surely intended only to ensure that economic operators can adjust in good time to the situation in the new marketing year. Nevertheless, it is evident from that legal position that the Commission's wide discretion clearly extends to the question whether it intends to take account of the amendments notified subsequently.

40. Therefore, the question to be considered is whether in failing to adopt such an amendment the Commission committed a flagrant violation of the kind described above. In that respect, it is not sufficient to establish an infringement of the prohibition of discrimination laid down in the second subparagraph of Article 40(3) of the EEC Treaty, which could be seen, in this case, in the relationship between the 'honest' processors and those which forwarded inflated figures in the marketing

32 — Established case-law; see the judgment of 2 December 1971 in Case 5/71, op cit.; most recently confirmed in the judgment of 28 November 1989 in Case C-122/86 *Epicheiriseon and Others* v *Commission and Council* [1989] ECR 3959.

33 — Council Regulation (EEC) No 1277/84 of 8 May 1984 laying down general rules for the system of production aid for processed fruit and vegetables (OJ 1984, L 123, p. 25).

years in question: the institution in question must have manifestly and gravely disregarded the limits attaching to the exercise of its powers. [34]

41. In my view, the condition of 'gravity' has clearly not been met. In so far as there are any undisputed cases of fraud which were discovered subsequently and which were not therefore initially taken into account, they concern, firstly, a sum of ECU 6.5 million over four marketing years and, secondly, a sum of approximately ECU 9 million, the attribution of which is not certain. The applicants' vaguely expressed view, which is contested by the Commission, that every case of the guarantee threshold being exceeded was due to the fraudulent data provided by Italian and Greek processors is totally unsubstantiated and in the final analysis not material, because, as already stated, the Commission can take into account only those discrepancies which have been established with certainty. Nor have the applicants adduced in support of their submission any evidence, which, in my view would be practically impossible to provide in view of the size of the abatement due to the guarantee threshold being exceeded, as is also evident from the table produced in Annex 9 to the application (approximately 19% in the marketing years in question). Therefore, the abovementioned undisputed amounts must be used as a basis.

42. In view of those facts, reference should be made to the judgment of the Court of 4 October 1979 in Case 238/78 *Ireks-Arkady* v *Council and Commission*, [35] which concerned the Community's liability for legislation in the maize sector. The Court decided that the infringement in question in that case was grave and manifest. In my opinion, it is evident that the 'gravity' of the infringement was accepted by the Court precisely because, firstly, a limited and clearly defined group of undertakings was affected and, secondly, the damage went beyond the bounds of the economic risks inherent in the activities in the economic sector concerned. [36]

43. The present case exhibits exactly the opposite characteristics. Viewed in absolute terms, interference in the legal sphere of those concerned is, as far as we know, negligible. The applicants, upon whom it was incumbent to prove that the conditions for a grave infringement, as mentioned above, existed, have not provided any tangible evidence in this regard. In fact, it may even be assumed that the amounts of aids unquestionably obtained through fraud (ECU 6.5 + 9 million) are not of the same order as the amounts to which Community processors would have been entitled during the marketing years in question if the guarantee threshold had not been exceeded. [37] The economic risk for

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

35 — Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, Joined Cases 241, 242 and 245 to 250/78 *DGV und Rheinische Kraftfutterwerke and Others* v *Council and Commission* [1979] ECR 3017, Joined Cases 261/78 and 262/78 *Interquell und Diamalt* v *Council and Commission* [1979] ECR 3045

36 — In so far as the Court found that equal treatment had been abandoned in the sector in question without a sufficient statement of reasons, it is probably referring to the manifest nature of the infringement; on this interpretation of the case-law, see also the Opinion of Mr Advocate General Darmon of 10 March 1989 in Case 20/88, paragraph 52 (judgment of 30 May 1989, ECR 1553, at p. 1561).

37 — For the sake of completeness only, I set out the following approximate calculation; in Annex 9 to the application, the applicants calculate that if the threshold had not been exceeded, they would have received aid amounting to ECU 50 million in the marketing years in question. Since, according to the tables produced by the Commission, which the applicants do not dispute — at least as far as their order of magnitude is concerned — French processors had a share of Community production of about 5%, the only amount to be considered certain, which is an amount of ECU 15.5 million of aid wrongly granted on account of fraud, would represent scarcely more than 1.2% of the total amount of aid due to processors in the Community (if the threshold is not exceeded).

processors, which is supposed to be limited by the aid scheme, is not significantly increased and, in particular the situation with regard to competition is not substantially changed.

44. Finally, as the Commission rightly points out, *all* processors in the sector are affected by this interference, and not a clearly defined group. Even though under the rules governing the financing of the common agricultural policy the Member States are obliged to recover aid unduly granted and those amounts are not borne by the Community when EAGGF accounts are cleared, it is inherent in the nature of the aid scheme — of which the applicants themselves have availed themselves — that the burden of fraud is always borne to a certain extent by those who act honestly, if only because the true facts are not discovered.

45. From all the foregoing, it follows that the special conditions which must be met in order for an infringement of the law to give rise to the Community's liability for legislative acts have not been fulfilled. Therefore, the application is unfounded in so far as the applicants seek payment of the amount of the abatement applied on account of the guarantee threshold.

46. *3.* In addition, the applicants also seek compensation for their economic damage and base their claim firstly on the submission that the Commission did not increase the amount of aid and secondly on the accusation that the Commission did not support Sonito in the criminal proceedings to which Sonito was, or wished to be, made a civil party.

47. (a) As far as the question of admissibility is concerned, this claim could be rejected on the sole ground that the applicants have still not put a figure on the damage. In the case of claims for damages of the kind in question, the Court has apparently regarded the conditions laid down in Article 38(1)(c) and (d) of the Rules of Procedure as having been met if the applicant has brought an *action for a declaration that the Community has incurred liability.*[38] From the judgments cited it can be deduced that, as a minimum requirement, the applicant must define his initially unquantified claim at a later stage within the context of an action for a declaratory judgment; in that case, an application for the drawing up of an expert's report can then be made in the proceedings following the judgment on the merits of the claim for damages. In my opinion, that requirement should not be further relaxed. The claim for compensation for economic damage, including the accompanying application for the appointment of an expert (point 3 of the claim), is therefore quite inadmissible.

48. (b) Should the Court not take my view, I would suggest that the application should be dismissed as unfounded in any event. Since the submission that the Commission was wrong not to amend the aid regulations

38 — See the judgment of 14 May 1975 in Case 74/74 *CNTA* v *Commission* [1975] ECR 523, paragraph 1 and of 2 June 1976 in Joined Cases 56 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, paragraph 1.

fails for the reasons given above, only the second submission need be considered, namely that the Commission failed to cooperate with the applicants in the proceedings before the national courts. In that regard, it is not evident how the conduct of the Commission complained of was instrumental in causing the damage allegedly suffered by the applicants. They have not demonstrated how the desired information could in fact have been able to assist them in pursuing civil law claims which they could not enforce without that assistance. The applicants have themselves admitted that the criminal proceedings in which they participated as civil parties did not have the successful outcome they desired. It is not clear how the communication of information — in whatever form — by the Commission would have changed the outcome. The same considerations apply with regard to the criminal proceedings which the applicants remained unaware of because of the Commission's silence.

49. Finally, it is likewise unclear to what extent the applicants would have expected compensation for the economic damage which they allegedly suffered because of the effects on the guarantee threshold — for which they seek compensation in full — if they had received the desired information. Compensation in the amount indicated, including compensation for the damage arising from production stoppages in various factories is, in my view, completely out of the question. A claim restricted to compensation for the damage specifically caused by the Commission's refusal has not been made by the applicants.

50. For that reason the claim is, in any event, unfounded.

51. *4.* Finally, with regard to the claim for compensation for the legal costs which Sonito incurred, for the reasons given in relation to the claim just dealt with, I regard it as inadmissible, too, because it is not quantified. That is particularly so since the amount claimed could easily have been defined at a later stage because, as the hearing revealed, it relates to proceedings which took place in the past.

52. In any case I also consider the claim unfounded since Sonito incurred the costs of its own volition and has not shown what the Commission should have done or refrained from doing in order to spare Sonito those costs. In particular, there is no obvious connection between the alleged infringement of the Commission's duty to provide information and the costs at issue.

53. The claim must therefore be dismissed.

III — *Costs*

54. Costs are to be awarded pursuant to Article 69(2) of the Rules of Procedure.

C — Conclusion

55. In conclusion, I propose that:

(a) the application for annulment (claim 1) should be dismissed as inadmissible;

(b) the claim for damages (claims 2 and 3)

(i) should be rejected as unfounded in so far as it relates to the difference between the aid actually granted and that which the applicants ought to have received but for the abatement;

(ii) for the rest, should be rejected as inadmissible, but in any event as unfounded;

(c) the applicants should be ordered jointly to pay the costs.