JUDGMENT OF THE COURT (First Chamber)

9 November 2006 *

In Case C-243/05 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 6 June 2005,

Agraz, SA, established in Madrid (Spain),

Agrícola Conservera de Malpica, SA, established in Toledo (Spain),

Agridoro Soc. coop. arl, established in Pontenure (Italy),

Alfonso Sellitto SpA, established in Mercato San Severino (Italy),

Alimentos Españoles, Alsat, SL, established in Don Benito, (Spain),

AR Industrie Alimentari SpA, established in Angri (Italy),

Argo Food — Packaging & Innovation Co. SA, established in Serres (Greece),

* Language of the case: French.

Asteris SA, established in Athens (Greece),

Attianese Srl, established in Nocera Superiore (Italy),

Audecoop Distillerie Arzens — Techniques séparatives (AUDIA), established in Bram (France),

Benincasa Srl, established in Angri,

Boschi Luigi e Figli SpA, established in Fontanellato (Italy),

CAS SpA, established in Castagnaro (Italy),

Calispa SpA, established in Castel San Giorgio (Italy),

Campil — Agro Industrial do Campo do Tejo L^{da}, established in Cartaxo (Portugal),

Campoverde Srl, established in Nocelleto di Carinola (Italy),

Carlo Manzella & C. Sas, established in Castel San Giovanni (Italy),

Carnes y Conservas Españolas SA, established in Mérida (Spain),

CO.TRA.PO Soc. coop. arl, in liquidation, established in Adria (Italy),

Columbus Srl, established in Parma (Italy),

Compal — Companhia Produtora de Conservas Alimentares, SA, established in Almeirim (Portugal),

Conditalia Srl, established in Nocera Superiore,

Conservas El Cidacos, SA, established in Autol (Spain),

Conservas Elagón, SA, established in Coria (Spain),

Conservas Martinete, SA, established in Puebla de la Calzada (Spain),

Conservas Vegetales de Extremadura, SA, established in Villafranco del Guadiana (Spain),

Conserve Italia Soc. coop. arl, established in San Lazzaro di Savena (Italy),

Conserves France SA, established in Nîmes (France),

Conserves Guintrand SA, established in Carpentras (France),

Conservificio Cooperativo Valbiferno Soc. coop. arl, established in Guglionesi (Italy),

Consorzio Casalasco del Pomodoro Soc. coop. arl, established in Rivarolo del Re ed Uniti (Italy),

Consorzio Padano Ortofrutticolo (Copador) Soc. coop. arl, established in Collecchio (Italy),

Copais Food and Beverage Company SA, established in Nea Ionia (Greece),

Tin Industry D. Nomikos SA, established in Marousi (Greece),

Davia Srl, established in Gragnano (Italy),

De Clemente Conserve Srl, established in Fisciano (Italy),

De.Con Srl, established in Scafati (Italy),

Desco SpA, established in Terracina (Italy),

Di Leo Nobile SpA — Industria Conserve Alimentari, established in Castel San Giorgio,

Ditta Emilio Marotta, established in Sant'Antonio Abate (Italy),

E. & O. von Felten SpA, established in Fontanini (Italy),

Elais SA, established in Athens,

Emiliana Conserve Srl, established in Busseto (Italy),

Enrico Perano & Figli Spa, established in San Valentino Torio (Italy),

FIT — Fomento da Indústria do Tomate, SA, established in Águas de Moura (Portugal),

Faiella & C. Srl, established in Scafati,

Feger di Gerardo Ferraioli SpA, established in Angri,

Fratelli D'Acunzi Srl, established in Nocera Superiore,

Fruttagel Soc. coop. arl, established in Alfonsine (Italy),

Giaguaro SpA, established in Sarno (Italy),

Giulio Franzese Srl, established in Carbonara di Nola (Italy),

Greci Geremia & Figli SpA, established in Parma,

Greci — Industria Alimentare SpA, established in Parma,

Greek Canning Co. SA 'Kyknos', established in Nauplie (Greece),

'Grilli Paolo & Figli Sas' di Grilli Enzo e Togni Selvino, established in Gambettola (Italy),

Heinz Iberica, SA, established in Alfaro (Spain),

IAN — Industrias Alimentarias de Navarra, SA, established in Vilafranca (Spain),

Indústrias de Alimentação Idal, L^{da}, established in Benavente (Portugal),

Industrie Rolli Alimentari SpA, established in Roseto degli Abruzzi (Italy),

Italagro — Indústria de Transformação de Produtos Alimentares, SA, established in Castanheira do Ribatejo (Portugal),

La Cesenate Conserve Alimentari SpA, established in Cesena (Italy),

La Doria SpA, established in Angri,

La Dorotea di Giuseppe Alfano & C. Srl, established in Sant'Antonio Abate,

La Rosina Srl, established in Angri,

Le Quattro Stelle Srl, established in Angri,

Louis Martin Production SAS, established in Monteux (France),

Menu Srl, established in Medolla (Italy),

Mutti SpA, established in Montechiarugolo (Italy),

National Conserve Srl, established in Sant'Egidio del Monte Albino (Italy),

Nestlé España, SA, established in Miajadas (Spain),

Nuova Agricast Srl, established in Verignola (Italy),

Pancrazio SpA, established in Cava De' Tirreni (Italy),

Pecos SpA, established in Castel San Giorgio,

Pomagro Srl, established in Fisciano (Italy),

Raffaele Viscardi Srl, established in Scafati,

Rodolfi Mansueto SpA, established in Ozzano Taro,

Salvati Mario & C. SpA, established in Mercato San Severino,

Sefa Srl, established in Nocera Superiore,

Serraiki Konservopia Oporokipeftikon Serko SA, established in Serres,

Soc. coop. arl. A.R.P. — Agricoltori Riuniti Piacentini, established in Gariga di Podenzano (Italy),

Sociedade de Industrialização de Produtos Agrícolas — Sopragol SA, established in Mora (Portugal),

Spineta SpA, established in Pontecagnano Faiano (Italy),

Star Stabilimento Alimentare SpA, established in Agrate Brianza (Italy),

Sugal Alimentos, SA, established in Azambuja (Portugal),

Sutol Indústrias Alimentares, L^{da}, established in Alcácer do Sal (Portugal),

Tomsil — Sociedade Industrial de Concentrado de Tomate, SA, established in Ferreira do Alentejo (Portugal),

Zanae — Nicoglou levures de boulangerie, Industrie commerce alimentaire SA, established in Thessalonica (Greece),

represented by J. L. da Cruz Vilaça, advogado, and D. Choussy, avocat,

applicants,

the other party to the proceedings being:

Commission of the European Communities, represented by F. Clotuche-Duvieusart, M. Nolin and L. Visaggio, acting as Agents,

defendant at first instance,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, K. Lenaerts (Rapporteur), and J. N. Cunha Rodrigues, Judges,

Advocate General: M. Poiares Maduro,
Registrar: M. Ferreira, Principal Administrator,

having regard to the written procedure and further to the hearing on 11 May 2006,

after hearing the Opinion of the Advocate General at the sitting on 7 September 2006,

gives the following

Judgment

1 By their appeal, the appellants request the Court to annul in part the judgment of the Court of First Instance of 17 March 2005 in Case T-285/03 *Agraz and Others* v *Commission* ECR II-1063 ('the contested judgment'), by which it rejected their action seeking compensation for the loss allegedly suffered as a result of the method adopted for calculation of the amount of production aid provided for by Commission Regulation (EC) No 1519/2000 of 12 July 2000 setting for the 2000/2001 marketing year the minimum price and the amount of production aid for processed tomato products (OJ 2000 L 174, p. 29), on the ground that the alleged loss was not certain and accordingly the conditions for the Community to incur non-contractual liability were not met.

Legal context

Regulation No 2201/96

2 Article 2 of Council Regulation (EC) No 2201/96 of 28 October 1996 on the common organisation of the markets in processed fruit and vegetable products (OJ 1996 L 297, p. 29; 'the basic regulation') provides:

'1. A system of production aid shall apply to the products listed in Annex I obtained from fruit and vegetables harvested in the Community.

2. Production aid shall be granted to processors who have paid producers for their raw materials a price not less than the minimum price under contracts between, on the one side, producer organisations recognised or provisionally authorised under Regulation (EC) No 2200/96, and processors on the other.

...'

3 Article 4 of the basic regulation states:

'1. The production aid may not exceed the difference between the minimum price paid to the producer in the Community and the price of the raw material in the main producing and exporting third countries.

2. The amount of production aid shall be so fixed as to enable the Community product to be disposed of within the limit set in paragraph 1. In establishing the amount of the aid, without prejudice to the application of Article 5, account shall be taken in particular of:

(a) the difference between the price of the raw material in the Community and that obtaining in the major competing third countries;

(b) the amount of the aid fixed or calculated before the reduction provided for in paragraph 10, if applicable, for the previous marketing year; and

(c) where Community production of a product accounts for a substantial share of the market, trends in the volume of external trade and in the prices obtaining in such trade, where the latter criterion results in a reduction in the amount of the aid.

3. The production aid shall be fixed in terms of the net weight of the processed product. The coefficients expressing the relationship between the weight of raw material used and the net weight of the processed product shall be defined on a standardised basis. They shall be regularly updated on the basis of experience.

...

5. The price of the raw material in main competing third countries shall be determined mainly on the basis of the prices actually applying at the farm-gate stage for fresh products of a comparable quality used for processing, weighted on the basis of the quantities of finished products exported by those third countries.

6. Where Community production accounts for at least 50% of the quantities of a product making up the Community consumption market, the trends in prices and the quantities of imports and exports shall be assessed by comparing the data for the calendar year preceding the start of the marketing year with the data for the previous calendar year.

7. In the case of products processed from tomatoes, the production aid shall be calculated for:

(a) tomato concentrate falling within CN code 2002 90;

...

9. The Commission shall fix the amount of the production aid before the start of each marketing year, in accordance with the procedure laid down in Article 29. The coefficients referred to in paragraph 3, the minimum quality requirements and the other detailed rules for the application of this Article shall be adopted in accordance with the same procedure.

10. For products processed from tomatoes, the overall expenditure must not exceed, for each marketing year, the amount that would have been reached if the French and Portuguese quotas for concentrates for the 1997/1998 marketing year had been set as follows:

— France: 224 323 tonnes,

— Portugal: 670 451 tonnes.

To that end, the aid fixed for tomato concentrates and their derivatives in accordance with paragraph 9 shall be reduced by 5.37%. A supplement may be paid after the marketing year if the increase in French and Portuguese quotas is not entirely used up.'

Regulation No 1519/2000

4 Regulation No 1519/2000 provides in Article 2(1) that '[f]or the 2000/01 marketing year the level of production aid referred to in Article 4 of [the basic regulation] shall be as set out in Annex II'. The amount of the production aid was fixed at EUR 17.178 per 100 kg net of tomato concentrates with a dry weight content of 28% or more but less than 30%.

Background to the dispute

5 The background to the dispute is set out in the contested judgment as follows:

'5. By letter of 4 February 2000, the Commission requested the Chinese authorities to provide it as quickly as possible with the information necessary to fix the aid for the 2000/01 marketing year in the processed fruit and vegetable sector, by completing the attached questionnaire. That letter went unanswered.

6. Following the adoption of Regulation No 1519/2000, a number of delegations and associations representing producers of products processed from tomatoes from Spain, France, Greece, Italy and Portugal informed the Commission of their objections and challenged the failure to take the price of Chinese tomatoes into account in fixing the amount of the aid granted.

7. The Organisation européenne des industries de la conserve de tomates ("the OEICT") and the Associação Portuguesa dos Industriais de Tomate submitted a number of requests to the Commission to adjust the amount of the aid granted. One of those requests was accompanied by a copy of a contract containing the price for the product paid to the Chinese producer.

8. By letter of 5 March 2001 to the Portuguese Minister of Agriculture, in answer to his request to revise the calculation of the amount of the aid, the Commission stated that the amount of the aid for the processing of tomatoes for the 2000/01 marketing year was fixed in strict compliance with Articles 3 and 4 of the basic regulation. It further confirmed having received, on 13 December 2000, a letter from the OEICT communicating the price of a contract concluded in China, but also stated that it was unable to amend its decision on the basis of the price specified in a single contract and not confirmed by the national authorities concerned.

9. In September 2001 the Spanish diplomatic services in Peking obtained a certificate issued by the Chinese authorities setting out, for the 1999 and 2000 marketing years, the average price for tomatoes paid to producers in the province of Xinjiang, which represents approximately 88% of the total Chinese processed tomato production. That document was communicated to the Member of the Commission responsible, Mr Fischler, on 9 November 2001, by the Portuguese Minister for Agriculture and also on 7 December 2001 by the OEICT.

10. On 31 January 2002 the Commission replied to the OEICT and again emphasised that the amount of the aid had been fixed in conformity with Articles 3 and 4 of the basic regulation. Relying, moreover, on the fact that the situation did not penalise the Community tomato industry, which in the Commission's view had reached a record processing level, the Commission therefore did not consider it necessary to revise Regulation No 1519/2000.

11. Following a meeting held on 6 November 2002 and various letters sent by the applicants to the Commission, the Commission declared, by letter of 7 January 2003, that it had no reason to reconsider Regulation No 1519/2000.'

The proceedings before the Court of First Instance and the contested judgment

6 By application lodged at the Registry of the Court of First Instance on 18 August 2003, the appellants brought an action seeking an order that the Commission compensate them for the loss which they suffered following adoption of Regulation No 1519/2000.

7 After noting that in order for the Community to incur non-contractual liability a series of conditions must be met relating to the unlawfulness of the conduct alleged against the Community institution, the reality of the damage and the existence of a causal link between the unlawful conduct and the alleged damage, the Court of First Instance found that the Commission had acted unlawfully.

8 In paragraph 54 of the contested judgment, it held, firstly, that 'the Commission's failure to act after sending the letter of 4 February 2000 [constituted] a sufficiently serious breach, within the meaning of the case-law, of the principles of care and of sound administration'.

9 In paragraph 61 of that judgment, the Court of First Instance held, secondly, that 'in so far as the terms of Regulation No 1519/2000 take no account whatsoever of the price of the raw material in one of the main producing and exporting third

countries, namely China, that regulation fails to comply with the mandatory conditions laid down in Article 4(1) and (2) of the basic regulation. Such an illegality, which constitutes a sufficiently serious breach of a rule intended to confer rights on individuals, is capable of engaging the non-contractual liability of the Community owing to its harmful consequences'.

10 With regard to the alleged loss, the Court of First Instance held as follows:

'70 It must be borne in mind that, according to the case-law (Case 51/81 *De Franceschi* v *Council and Commission* [1982] ECR 117, paragraph 9; Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, paragraph 9; and Case T-478/93 *Wafer Zoo* v *Commission* [1995] ECR II-1479, paragraph 49), the damage for which compensation is sought must be actual and certain.

71 It is for the applicant to produce to the Court the evidence to establish the fact and the extent of the loss which he claims to have suffered (Case 26/74 *Roquette Frères* v *Commission* [1976] ECR 677, paragraphs 22 to 24; Case T-575/93 *Koelman* v *Commission* [1996] ECR II-1, paragraph 97; and Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraph 60).

72 The applicants evaluate their loss at the precise difference between the amount of the aid fixed in Regulation No 1519/2000 and that which would have been applied had the Commission taken the Chinese prices into consideration.

73 First of all, it is appropriate to observe that the Chinese prices on which the applicants base their argument are those which they obtained through the

Spanish diplomatic services in Beijing. The relevant price was the average price for tomatoes paid to producers in the province of Xinjiang, representing, according to the applicants, approximately 88% of Chinese production of processed tomatoes. Those figures are disputed by the Commission, in that they represent a low average. Nor was the Commission in a position to ascertain whether they were consistent with the provisions of the basic regulation. When evaluating a complex economic situation, the Commission's discretion also applies to the finding of the basic facts (see, to that effect, Case 138/79 *Roquette Frères* v *Council* [1980] ECR 3333, paragraph 25).

74 As the basic regulation confers on the Commission a certain discretion in fixing the amount of the aid, it is impossible to determine with certainty what the impact on the amount of the aid would have been had the price paid to Chinese tomato producers been taken into account. Article 4(1) [of the basic regulation] does not provide that the production aid must be equal to the difference between the minimum price paid to the producer in the Community and the price of the raw material in the main producing and exporting third countries. It merely fixes an upper limit.

75 In that regard, it should be observed that the fact that the Commission may in the past have fixed the amount of the aid at a level which precisely reflected the difference between the minimum amount paid to the producer in the Community and the price of the raw material in the main producing and exporting third countries did not in any way require it to maintain the aid at that level. It would even be contrary to the letter and the purpose of the basic regulation for the Commission not to take account of developments in the situation of international markets and possibly thereby make the disposal of the Community product more difficult.

76 The applicants cannot therefore rely on a right to a maximum aid equivalent to the difference between the minimum price paid to the producer in the Community and the price of the raw material in the main third countries after the Chinese prices had been taken into account.

77 Accordingly, the damage calculated by the applicants and set out in the table in Annex A.27 to the application cannot be certain.'

11 Taking the view that all conditions for the establishment of the non-contractual liability of the Community had not been met, the Court of First Instance dismissed the action.

Forms of order sought and the procedure before the Court of Justice

12 The applicants claim that the Court should:

— set aside in part the contested judgment in so far as it held that the damage was not specific and dismissed the application;

and, in a new decision,

— principally, find that the conditions for the establishment of the non-contractual liability of the Commission are satisfied in the present case, order the Commission to pay the balance of the production aid to each of the appellant companies together with interest at rates to be fixed by the Court of Justice with effect from 12 July 2000 — or, in the alternative, from 13 July 2000 or, in the

further alternative, from 16 July 2000 — up to the date on which payment is actually made; and order the Commission to pay all of the costs in both sets of proceedings including those incurred by the appellants;

— in the alternative, refer the case back to the Court of First Instance for an adjudication on the amounts of compensation to be paid to the appellants, after they have been heard again, and order the Commission to pay the costs — including those incurred by the appellants — in the proceedings on appeal and in the proceedings at first instance before the Court of First Instance.

13 The Commission contends that the Court should:

— dismiss the appeal as being partly inadmissible and, at any event, totally unfounded;

— order the appellants to pay the costs.

14 By order of the President of the Court of Justice of 19 October 2005, Carmine Tagliamonte & C. Srl, Cbcotti Srl, Cirio del Monte Italia SpA, Fratelli Longobardi Srl, G3 Srl, La Regina del Pomodoro Srl, La Regina di San Marzano di Antonio, Felice e Luigi Romano Snc, Lodato Gennaro & C. SpA, Pelati Sud di De Stefano Catello Sas, Prodakta SA, Rispoli Luigi & C. Srl, Saviano Pasquale Srl, Sevath SA, Silaro Conserve Srl and Transformaciones Agrícolas de Badajoz, SA, who discontinued their appeal, were removed from Case C-243/05 P and they were ordered to pay the costs of the appeals brought by them.

The appeal

Arguments of the parties

15 In support of their appeal, the appellants put forward four pleas in law. The first plea is based on an error of law in the classification of the loss. The second is based on an infringement of the adversarial principle and of the right to be heard. The third is based on a distortion of the forms of order sought by the appellants. The fourth is based on the disregard by the Court of First Instance of its unlimited jurisdiction and of its duty to adjudicate, and a denial of justice.

16 The first plea is divided into two parts. The first of these is based on a failure to have regard to Community case-law and the principles established by the national judicial orders in relation to non-contractual liability in so far as the Court of First Instance wrongly interpreted the concept of 'certain damage' and confused the finding of the nature of the damage and the exact calculation of its amount. The second part is based on the fact that the Court of First Instance failed, with regard to recognition of the appellants' right to compensation, to draw the necessary consequences from its findings in relation to the unlawfulness of the Commission's conduct.

17 In the context of the first part of the first plea, the appellants submit that the fact that the Commission enjoys a margin of discretion in the fixing of the amount of production aid does not mean that the alleged damage may be regarded as uncertain. Provided that it was foreseeable with sufficient certainty and quantifiable, damage may give rise to compensation regardless of the fact that it has not yet been quantified. In the present case, the alleged damage has actually been defined and quantified. Any remaining uncertainty concerns only the determination of the amount of that damage. If the Court of First Instance did not possess all the

information necessary to calculate that amount, in the view of the appellants, it should have ordered measures of inquiry or organisation of procedure or have delivered an interlocutory judgment.

18 The appellants argue that, whilst the existence of actual and certain damage is excluded in the absence of actual infringement of a right or a legitimate interest, such damage does exist where, as in the present case, the alleged damage follows from prevention of the exercise of a right, the existence of which is established, by reason of the unlawful conduct of the institution concerned.

19 They argue that the finding of the Court of First Instance infringes principles accepted by national legal systems with regard to the concept of certain damage.

20 With regard to the Commission's argument raised in its reply that the appellants have not established that there was actual loss since they failed to show that the amount of aid set in Regulation No 1519/2000 would not have allowed the purpose assigned for the grant of production aid to be achieved, that is to say the disposal of Community production, the appellants submit that the argument is a new one and therefore inadmissible.

21 In any event, that purpose cannot be taken into account on its own since that would unjustifiably exclude the existence of any damage from the moment when disposal of the Community production was complete, even though the amount of aid granted to the processors to take account of the difference between the minimum price fixed by the Commission and the price of the main third countries was fixed at a lower level than that deemed to follow from the application of the relevant provisions.

22 The Commission disputes the existence in the contested judgment of an error in law.

23 It submits that, having regard to the margin of discretion which it has in such matters, the damage alleged by the appellants cannot be classified as certain. Moreover, nothing gave grounds to suppose that, at the time, it would fail to make use of that margin of discretion. In particular, at no time did it give any assurance which would cause the processors to entertain legitimate expectations that it would take account of Chinese prices for the fixing of aid for the 2000/01 marketing year.

24 Furthermore, the Commission submits that the ground of appeal raised by the appellants that the Court of First Instance did not quantify the amount of their damage or take measures of inquiry for that purpose is based on a new plea concerning the existence of actual damage which must, therefore, be declared inadmissible.

25 In any event, in the Commission's opinion, in order to establish the fact of the damage alleged the appellants should have shown that the purpose of the aid, which is to permit disposal of the Community production, has not been fulfilled. The appellants have never established or even claimed before the Court of First Instance that the amount of aid fixed by the Commission did not allow that purpose to be fulfilled.

Findings of the Court

26 According to settled case-law, the Community's non-contractual liability under the second paragraph of Article 288 EC is subject to the satisfaction of a set of conditions as regards the unlawfulness of the conduct alleged against the

Community institution, the fact of damage and the existence of a causal link between the conduct of the institution and the damage complained of (see, inter alia, *Birra Wührer and Others* v *Council and Commission*, paragraph 9, and Case C-295/03 P *Alessandrini and Others* v *Commission* [2005] ECR I-5673, paragraph 61).

27 The second condition, relating to damage, requires that the damage for which compensation is sought be actual and certain (see, to that effect, *De Franceschi* v *Council and Commission*, paragraph 9, and *Birra Wührer and Others* v *Council and Commission*, paragraph 9), which it is for the appellants to prove (see *Roquette Frères* v *Commission*, paragraph 24, and Case C-362/95 P *Blackspur DIY and Others* v *Council and Commission* [1997] ECR I-4775, paragraph 31).

28 In the event, the Court of First Instance held that the damage alleged by the appellants was uncertain.

29 It took the view, firstly, that the discretion conferred on the Commission by the basic regulation to fix the amount of the aid makes it impossible to determine with certainty what the impact on the amount of the aid would have been had the price paid to Chinese tomato producers been taken into account. Secondly, it noted that the Commission disputed whether the data relating to the Chinese prices, on the basis of which the appellants quantified their damage, was representative.

30 In that regard, it must be noted that the fact that the Community institution has a wide discretion in the matter concerned cannot, as such, lead automatically to the damage alleged, which is the result of unlawful conduct by that institution, being regarded as uncertain.

31 To claim the contrary would be to deprive actions for compensation of all useful effect in those areas, such as the common organisation of markets, where the Community institutions enjoy, in the exercise of their regulatory or decision-making powers, wide discretion having regard, inter alia, to the economic imperatives and choices inherent in these matters.

32 Recognition that the institution concerned has discretion has not, moreover, prevented the Court, in a number of cases, from finding the existence of damage capable of compensation (see, inter alia, Case 74/74 *CNTA* v *Commission* [1975] ECR 533 and Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955).

33 In those circumstances, it is appropriate to verify, in the light of the particular facts of the present case (see, to that effect, Case C-237/98 P *Dorsch Consult* v *Council and Commission* [2000] ECR I-4549, paragraph 25), whether the Court of First Instance was entitled to consider that the margin of discretion enjoyed by the Commission in fixing the amount of production aid under the basic regulation is such as to preclude a finding that the damage alleged by the appellants is certain.

34 In that regard, it should be noted that the existence of that discretion, and the reservations issued by the Commission regarding the representativeness of the Chinese price data put forward by the appellants, were indeed of such a nature as to prevent the Court of First Instance from determining with certainty the exact effect on the amount of the aid at issue of the Commission's unlawful omission to take account of the Chinese prices.

35 Furthermore, taking account of that discretion, it is not certain that the appellants are entitled to the exact amount in which they valued their damage before the Court of First Instance, that is to say, as stated in paragraph 72 of the contested judgment, the amount corresponding 'exactly to the difference between the amount of the aid fixed in Regulation No 1519/2000 and the price that would have been applied if the Commission had taken the Chinese prices into account'.

36 However, such considerations authorise the Court of First Instance only to find that there is uncertainty with regard to the exact extent of the damage claimed, but not to find that the very existence of the damage is uncertain.

37 As the Court of First Instance held in paragraph 50 of the contested judgment, it is common ground that China was considered at the time when the aid was fixed to be one of the major third countries whose production was competing with Community production.

38 Furthermore, the unlawful failure by the Commission to take account of the Chinese prices led to an estimated tomato price for the main producing and exporting third countries appreciably higher than it would have been had those prices been taken into account. The Court of First Instance noted in paragraph 67 of the contested

judgment the Commission's assertion that taking those prices into account would have led to an 'appreciable' reduction in the estimated price of the raw material in the main producing and exporting countries.

39 Before the Court of First Instance, the appellants sought to establish that, taking those factors into account, the amount of production aid, in the absence of the illegal conduct on the part of the Commission, would of necessity have been fixed at a higher level than that laid down in Regulation No 1519/2000.

40 As the Advocate General has observed in point 32 of his Opinion, in those circumstances it was for the Commission, in order to maintain that an increase in the aid invoked by the appellants was not certain, to establish that maintaining the aid at the level fixed by Regulation No 1519/2000 was compatible with the correct application of the criteria laid down in Article 4(2) of the basic regulation. Such an analysis was manifestly lacking, since the Commission merely stated that it had discretion in the matter, as is apparent from paragraph 67 of the contested judgment.

41 Consequently, the Court of First Instance erred in law by finding that the damage alleged was uncertain on the basis of the factors mentioned in paragraph 29 of this judgment.

42 Moreover, even assuming, in accordance with the Commission's submissions at the hearing before the Court of Justice, that a factor such as that referred to in

Article 4(2)(c) of the basic regulation, concerning the development of trade on the international markets, may give rise to a different weighting in the context of a calculation taking account of the Chinese prices, the inevitable conclusion is, in the light of the points made in paragraphs 37 to 40 of this judgment, that the appellants would of necessity have been in a better position if the Commission had not unlawfully failed to take the Chinese prices into consideration when fixing the amount of the production aid. Far from being hypothetical or merely possible, the existence of the damage alleged by the appellants is thus indisputable. Despite the continuing uncertainty regarding its exact quantification, it is moreover possible to put an economic value on that damage.

43 The above analysis cannot be challenged by the Commission's argument that there were no difficulties in disposing of the Community production during the marketing year in question.

44 Without it being necessary to rule on the admissibility of that argument, it is appropriate to note that the system of production aid instituted in favour of processors by the basic regulation to compensate them for the difference between the minimum price paid to Community producers and the average price paid in third countries is coupled, by Commission Regulation (EC) No 504/97 of 19 March 1997 laying down detailed rules for the application of ... Regulation (EC) No 2201/96 as regards the system of production aid for products processed from fruit and vegetables (OJ 1997 L 78, p. 14), with a system relying on the conclusion, before the planting period, of preliminary contracts between the processors and the producers and on the fixing of production quotas, intended to ensure coherence between the quantities produced and the quantities processed, and, therefore, to avoid difficulties of disposal which could arise from a considerable increase in production (see the fifth recital in the preamble to the basic regulation and the seventh recital in the preamble to Regulation No 504/97).

45 As the Advocate General has observed in point 39 of his Opinion, the processors are thus encouraged, by means of preliminary contracts, to undertake to dispose of

Community production limited according to the real needs of the processing industry, in exchange for aid intended, in compliance with the imperative criteria laid down in Article 4(2) of the basic regulation, to compensate them for all or part of the commercial risk inherent in the purchasing of tomatoes in the Community at a higher price than that charged by the producers of non-member countries.

46 In those circumstances, the fact that the planned management system made it possible to ensure disposal of the Community production during the marketing year in question does not permit one to discount the existence of commercial loss suffered by the appellants following the fixing, for that marketing year, of the amount of aid at an inadequate level by reason of the fact that the Commission, on that occasion, in breach of Article 4(2) of the basic regulation, failed to take account of the Chinese prices.

47 Having regard to the foregoing, and without there being any need to consider its second part, the first plea must be considered well founded.

48 Without there being any need to examine the other pleas in law in the appeal, the Court must set aside the contested judgment in that it dismissed the claims of the appellants to the present appeal on the ground that the alleged loss was not certain and, consequently, in that it ordered them to bear five sixths of their costs and ordered the Commission to pay a sixth of the appellants' costs and to bear its own costs.

Referral of the case back to the Court of First Instance

49 Under the first paragraph of Article 61 of the Statute of the Court of Justice, the Court, where it quashes a decision of the Court of First Instance, may either itself

give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for final judgment.

50 In the present case, since the determination of the exact extent of the damage suffered by the appellants involves complex factual assessments, the case must be referred back to the Court of First Instance in order that it may itself give final judgment on the amount of compensation for that damage.

51 Since the matter is referred back to the Court of First Instance, the costs relating to the present appeal proceedings must be reserved.

On those grounds, the Court (First Chamber) hereby:

1. **Sets aside the judgment of the Court of First Instance of the European Communities of 17 March 2005 in Case T-285/03 *Agraz and Others* v *Commission* in that it dismissed the claims of the appellants to the present appeal on the ground that the alleged loss was not certain and, consequently, in that it ordered them to bear five sixths of their costs and ordered the Commission to pay a sixth of the appellants' costs and to bear its own costs;**

2. **Refers the case back to the Court of First Instance of the European Communities;**

3. **Reserves the costs.**

[Signatures]