2. Orders the applicant to pay the costs, including those of the intervener.

Mertens de Wilmars | Bosco | Touffait

Due | Pescatore | Mackenzie Stuart | O'Keeffe

Koopmans | Everling | Chloros | Grévisse

Delivered in open court in Luxembourg on 15 September 1982.

For the Registrar

H. A. Rühl

Principal Administrator

J. Mertens de Wilmars

President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 9 JUNE 1982 [1]

Mr President,
Members of the Court,

1. This action has been brought against the Council and the Commission by a German undertaking, Kind, which imports and markets fresh meat from the Federal Republic of Germany and the United Kingdom. That undertaking seeks compensation for the loss it claims to have incurred as a result of the introduction by Council Regulation No 1837/80 of 27 June 1980 of a special export levy, and the failure on the part of the Commission to suspend that measure.

It will be remembered that the regulation established the common organization of the markets in mutton, lamb and goat's meat, the organization being based principally on the rules governing prices (a Community basic price, regionalized reference prices and prices recorded on representative markets in the Community), on the granting of a premium to producers to offset a loss of earnings resulting from the introduction of the common organization of the

1 — Translated from the Italian

market, and on other forms of intervention designed to regulate the market. Among the measures in that last category should be mentioned purchases by the intervention agencies when the recorded price falls to a certain level, as provided for in Article 7 (2), and payment of a "variable slaughter premium", governed by Article 9. The premium may be paid by the Member State concerned when the prices recorded on the representative market in that country are below a "guide level" corresponding to 85% of the basic price provided, however, that in that State ancillary measures in the form of purchases by intervention agencies are not applied. Payment of the variable slaughter premium might, however, distort conditions of competition in the case of slaughtered meat intended for export outside the territory of the Member State concerned. In order to avoid such adverse effects Article 9 (3) provides that the necessary measures are to be taken "to ensure, in the event of payment of the [variable slaughter] premium ..., that an amount equivalent to that premium is charged for [the same] products ... when those products leave the territory of the Member State concerned". That is the special export levy application of which is alleged to have caused the loss of which the applicant undertaking complains: that is to say, a considerable reduction in turnover between October 1980 and March 1981.

Detailed rules for applying the variable slaughter premium were laid down subsequently in Commission Regulation (EEC) No 2661/80 of 17 October 1980. In particular, although the State authorities decide when to grant the premium, subject to fulfilment of the requisite conditions, it is for the Commission to fix each week and for each Member State concerned both the level of the premium (see Article 3) and the amount to be charged on departure of the products in question from its territory (see Article 4).

During the 1980 to 1981 marketing year the market price for mutton and lamb in the United Kingdom fell below the guide level. The slaughter premium was therefore paid by the British authorities. At the same time measures were taken to collect on exports of mutton and lamb an amount equivalent to the premium, as required by the above-mentioned Article 9 (3). As far as the months following November 1981 are concerned, the information supplied by the Council (in its note of 14 May 1982) shows that market trends did not justify payment of the premium or justified one too small to have any noticeable influence on either internal or intra-Community trade.

In view of the serious difficulties in which it found itself in April 1981 Kind requested the Commission to submit to the Council of Ministers a proposal for an amendment to Article 9 of Regulation No 1837/80 or at least to suspend collection of the export levy. The latter request was based on Article 33 of the regulation, which states that "the Commission may adopt appropriate measures to facilitate the transition from the system in force in each Member State before the application of this regulation to the system established by this regulation". The Commission declined to do so, however, and therefore Kind brought, on 4 May 1981, the action with which my opinion today is concerned.

2. In support of its action Kind submits, first, that the provision

contained in Article 9 of Regulation No 1837/80 concerning the export levy are unlawful owing to the absence of a statement of the reasons on which they are based. It contends that that is contrary to Article 190 of the EEC Treaty which stipulates that regulations, like directives and decisions, are to state the reasons on which they are based. That criticism is wholly unfounded, however. The second recital in the preamble to the regulation in question gives an indication of the reasons for adopting the intervention measures, and in particular for paying slaughter premiums in regions where the system of purchases by the intervention agencies is not in force, and points out that the measures are necessary in order to attain the objectives of Article 39 of the Treaty, and in particular to help stabilize the markets and ensure a fair standard of living for the agricultural community concerned. In addition, the reasons for introducing an export levy are set out at the end of that recital, where it is stated that in the case of exports of meat from the territory of the Member State which pays the slaugther premium an amount equivalent to the premium should be recovered "in order to avoid all disturbance in competition".

I am of the opinion that that information, while necessarily concise, explains sufficiently the reasons for adopting that part of the regulation which concerns us and therefore is entirely in accordance with the requirement laid down in Article 190 of the Treaty. In this context it should be noted that the Court has held that in the case of general measures, especially regulations, the requirements laid down in that article are satisfied if the statement of reasons given explains in essence the measures taken by the institutions: "a specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided such details fall within the general scheme of the measures as a whole" (judgment of 12 July 1979 in Case 166/78 *Government of the Italian Republic* v *Council of the European Communities* [1979] ECR 2575). In this instance I think the preamble to Regulation No 1837/80, which comprises 18 recitals, may be considered to be sufficiently ample and detailed.

3. Secondly, the plaintiff submits that Article 9 of Regulation No 1837/80 has introduced what amounts to a charge having an effect equivalent to customs duties, contrary to Articles 9, 12, 13 and 16 of the EEC Treaty. Counsel for Kind found support for this submission in the judgment of this Court of 20 April 1978 (Joined Cases 80 and 81/77 *Les Commissionnaires Réunis* v *Receveur des Douanes*, [1978] ECR 927). The question at issue in those cases was whether a Community provision authorizing wine-producing Member States to introduce and levy on intra-Community trade in wine charges having an effect equivalent to customs duties was compatible with Article 13 of the EEC Treaty, which provides for the abolition by the end of the transitional period of charges having an effect equivalent to customs duties on imports. The Court rightly held that the elimination between Member States of customs duties and charges having equivalent effect was the subject of a fundamental principle of the common market to which no exceptions had been permitted. However, reference to that precedent provides no support for the applicant's argument: in the cases decided by the judgment cited above the issue concerned payment of a French

import charge on table wine (or wines suitable for making table wine); the charge had been introduced, as I said, on the basis of a Community provision authorizing it. In our case, however, we are concerned with nothing more than a mechanism for recovering, at the moment of exportation, Community aid which had been paid to producers and which was intended to be a subsidy designed to operate exclusively on the internal market in the State in question. The export levy is strictly dependent, in fact, on the character of the slaughter premium. Since the latter is intended to maintain price stability in a given market it is necessary to prevent its effects from spreading outside that market, and therefore the amount already collected is recovered when the mutton and lamb leaves the territory of the State concerned. The mechanism merely operates, therefore, to restore prices to their usual level as far as external trade is concerned and to restrict the effects of the intervention measures to the internal market.

Even if the argument attributing to the levy in question the character of a charge having an effect equivalent to a customs duty were accepted, I think none the less that the complaints in question would prove to be equally unfounded. The truth is, as we know, that the Community is not considered by the Court to be liable for the consequences of a legislative measure which, as in this instance, involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (see, in particular, the judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL Vermehrungsbetriebe and Others* [1978] ECR 1209). That was recently confirmed by the Court when it stated (in its judgment of 4 October 1979 in Case 238/78 *Ireks-Arkady* [1979] ECR 2955, in particular at paragraph 9 of the decision) that "in the context of Community provisions in which one of the chief features was the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community did not incur liability unless the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers". However, there is certainly no reason in this case to conclude that the measure with which we are concerned was a seriously arbitrary one. The introduction of the export levy provided for in Article 9 of Regulation No 1837/80 was in any case a decision which was justified by objective cirumstances and fell within the discretionary area of economic policy. I need only mention what was pointed out by the Commission's representative, in particular, in regard to the requirements which led both to the introduction of the slaughter premium and the recovery of an equivalent amount in the case of export. The special position of the United Kingdom (which is both the major producer and the major consumer of mutton and lamb) was of decisive importance in this respect.

Prior to the creation of the common organization of the market in the sector in question producers in the United Kingdom enjoyed a government subsidy of an amount equal to the difference between the market price and a price fixed by the administration. That system, which was known as the "deficiency payments" scheme, was intended to keep

prices on the domestic market at a relatively low level but operated at the same time as an aid to exports inasmuch as the subsidy was also paid for meat produced in the United Kingdom and subsequently exported. When the system was replaced by the common organization of the market the slaughter premium of which I have spoken was substituted for the deficiency payment because it was necessary to avoid any sudden substantial rise in prices on the domestic market with a consequent reduction both in consumption and in imports from non-member countries. In that respect it should be noted, too, that any significant reduction in imports from non-member countries would have also created problems within the framework of the General Agreement on Tariffs and Trade, since it might have called in question the agreements which had been concluded concerning the level of customs duties levied upon entry into the Community.

In view of the circumstances in which the slaughter premium was introduced it is thus clear that this is not an arbitrary measure and that even its restriction to the domestic market of the Member State making payment was not arbitrary in nature; the restriction was guaranteed, as I have said, by the mechanism of the export levy. It is therefore clearly not correct, in the case of Article 9 of Regulation No 1837/80, to speak of a serious breach of a superior rule of Community law. That provision was in fact the result of a choice of economic policy justified by objective market conditions and above all by the market in the United Kingdom in the sector of mutton and lamb.

4. The third objection raised by Kind with regard to Regulation No 1837/80 is that the slaughter premium and its recovery in the case of export is incompatible with the second indent of Article 40 (3) of the EEC Treaty according to which the common organization of the market "shall be limited to pursuit of the objectives set out in Article 39 and shall *exclude any discrimination* between producers or consumers within the Community". The introduction of a slaughter premium to be applied at regional level is said to amount to discriminatory treatment inasmuch as it ensures the application of rules which favour consumers and producers in certain countries in this case, the United Kingdom, as against those in other countries in the Community in which market conditions do not permit the application of that kind of intervention measure.

As to that, I would observe that the common organization of the market in mutton and lamb is based in many respects on the criterion of regionalization: in particular, the fixing of reference prices (Article 3 (1) of Regulation No 1837/80), payment to producers of the premium which is intended to offset any loss of income resulting from the establishment of the common organization of the market (Articles 6, 7 and 9). Are all of these supposed to constitute breaches of the principle that there is to be no discrimination between producers and consumers within the Community? The answer must be, in my opinion, that they do not, for the difference in treatment on the regional level in the sector in question is justified by the objective conditions of the market the features of which vary greatly in the various regions listed in Article 3 (1). Needless to say, such divergences must be gradually

eliminated: the objective, in conformity with the general aims of the Community, must be to achieve uniform conditions within a reasonable period of time. That essential requirement, however, is met by the regulation in question inasmuch as the regionalized measures were intended to be arrangements of a transitional nature. The transitional character of the measures is demonstrated particularly by the provisions contained in Article 3 (4), concerning the reference price (that is to say, the element to which all the rest is directly or indirectly linked): it provides that over a period of four years the convergence of national prices so as to ensure a single fixed Community reference price valid throughout the Community is to be achieved. Further confirmation of the transitional nature of the measure is to be found in the provisions contained in Article 34, according to which the Commission is to submit to the Council before 1 October 1983 a report on the functioning of the common organization of the market and, in particular, on the intervention and premium systems, in order to enable the Council to examine the systems and take appropriate measures, if required, before 1 April 1984.

Finally, I do not wish to neglect the point that the regional differentiation established in Regulation No 1837/80 takes effect, as far as the intervention measures are concerned, not in the form of an advantage (or group of advantages) conferred on a particular region which might thus be said to be privileged as against the others, but by providing for measures subject to the existence of objective conditions which may obviously vary from one region to another. In particular, the slaughter premium is granted only, as I have already had occasion to explain, if prices established on the representative market in a Member State are below a level which corresponds to 85% of the basic price. That being so, I do not consider that there is any basis for maintaining that those provisions are discriminatory.

5. The applicant's fourth objection to Regulation No 1837/80 is that it infringes Article 43 (3) (b) of the Treaty, according to which the common organization of the market may replace national market organizations "if ... such an organization ensures conditions for trade within the Community similar to those existing in a national market". Kind maintains that the introduction of the scheme for recovery of the slaughter premium when meat is exported has seriously affected the functioning of trade between the United Kingdom and the Federal Republic of Germany so as to make it no longer profitable (or at least far less profitable) to import mutton and lamb from the United Kingdom into the Federal Republic of Germany.

That calls for a reminder that the advantage in importing mutton and lamb from the United Kingdom into the Federal Republic of Germany prior to the entry into effect of the common organization of the market derived principally — as all the parties concede — from the fact that the United Kingdom authorities granted a production premium even for exported mutton and lamb. As a result, not only was the price on the United Kingdom market maintained at an artificially low level, but German importers were able to take

advantage of the situation. Because of that the common organization of the market merely had the effect of abolishing an aid to exports, thus rectifying an anomaly which was distorting conditions of competiton. Moreover, the United Kingdom authorities themselves could at any time have abolished the subsidy granted by them, thereby disturbing the equilibrium of the market which had depended on that subsidy: there was nothing stable about the advantage enjoyed by German importers, for it was based on a subsidy on the indefinite continuance of which they could not in any case rely.

Lastly, I am aware that the regional character of the slaughter premiums could in fact have the effect of making conditions on the national markets differ from conditions in intra-Community trade. However, the considerations to which I have referred in connection with the regional character of certain aspects of the common organization of the market in mutton and lamb lead me to consider that such a divergence is justified on objective grounds.

6. Counsel for the applicant also suggested — especially at the hearing — that the scheme introduced by Article 9 of Regulation No 1837/80 was unlawful inasmuch as it permitted the amount of the slaughter premium and the corresponding export levy to be fixed at an unduly high level.

To counter that argument it seems to me sufficient to point out that fixing the amount of the premium in relation to the requirements of the agricultural policy is a typical example of the exercise of a discretion in technical matters which, at least as a rule, is not subject to judicial review. The Commission regulation I cited earlier, Regulation No 2661/80 of 17 October 1980 (Article 3 (1)), requires the institution to fix *weekly*, for each Member State concerned, the level of both the slaughter premium and the corresponding export levy: thus the Commission took into account the need to adjust the amount to market conditions and to any variations which might appear in those conditions. However, the reduction in turnover of which the applicant undertaking complains is not a suitable basis of assessment since the reduction is essentially the result of the loss of the aids which the United Kingdom authorities, prior to the entry into effect of the common organization of the market, also granted in respect of exports of mutton and lamb, and is thus, as I said earlier, the consequence of the loss of a position of advantage on whose continuance traders were not entitled to rely.

7. Lastly, the applicant charges that the Commission failed to suspend the application of Article 9 (3) of Regulation No 1837/80 in exercise of its power under the first paragraph of Article 33 of that regulation to adopt appropriate measures to facilitate the transition from the system in force to the common organization of the market. The applicant points out that, on the basis of that very article, the Commission provided in Regulation No 3191/80 of 9 December 1980 that the slaughter premium would not be charged on exports of mutton, lamb and goat's meat from the Community. That precedent ought to have entailed a similar suspension of the collection of the levies in question in intra-Community trade.

The first objection which, it seems to me, ought to be raised in that respect is that deciding which measures are "appropriate" within the meaning of Article 33 is clearly a matter for the Commission itself. If that institution considered it appropriate to derogate from Article 9 (3) of Regulation No 1837/80 *on a transitional basis* (see the second recital in the preamble to Regulation No 3191/80) solely in the case of exports from the Community, it is difficult to see how that approach could engender any right to a more extensive derogation. The Commission indicated as the reason for the derogation the "appreciable difficulties" for export from the Community to which Article 9 (3) had given rise. It must therefore be assumed that such difficulties were not encountered in intra-Community trade. In my view, the appraisal required by Article 33 is not open to review.

I would add that despite the reference to Article 33 contained in the preamble to Regulation No 3191/80 I have grave doubts as to the permissibility of suspending, even temporarily, the rules contained in a Council regulation such as Regulation No 1837/80 by means of a measure intended to facilitate the transition from the original system to the common organization of the market. The lawfulness of Regulation No 3191/80 obviously lies outside the subject-matter of this dispute. Let that not prevent me from saying, however, that in my view the "appropriate measures" which the Commission has a discretion to adopt must remain within the limits of the implementation of Regulation No 1837/80 and thus are subordinate to the rules to be implemented and that a derogation from those rules would seem to exceed the scope of the Commission's powers, in view also of the general principle contained in Article 155 of the EEC Treaty (according to which "the Commission shall ... exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter").

8. In conclusion I suggest, for the reasons which I have set out, that the Court dismiss the application for compensation for damage submitted by Julius Kind KG against the Council and the Commission of the European Communities by application lodged on 4 May 1981. In accordance with the rule that the unsuccessful party must pay the costs, the applicant will have to pay the costs of the defendant institutions.