OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 22 JUNE 1982 [1]

Mr President,
Members of the Court,

1. Introductory remarks

In this case the Court is once again confronted with an action to establish the Community's non-contractual liability as provided for in Article 178 and the second paragraph of Article 215 of the EEC Treaty. Such an action is not in itself unusual but the singular feature of this case is that this time the Court is expressly asked to decide the intriguing question whether an action for damages for liability arising from lawful acts of the Community institutions is also conceivable in Community law.

2. The organization of the market in olive oil

By Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organization of the market in oils and fats (Official Journal, English Special Edition 1965-1966, p. 221) olive oil was brought within the ambit of the common agricultural policy. Two of the main features of that organization of the market are the fixing each year of single prices (Article 4) and machinery for providing production aids (Article 10). The reason for the production aids, to which the common agricultural policy rarely has resort, is the relatively low prices of substitute products which do not enable producers to be guaranteed an income that is considered sufficient by means of a price guarantee alone. Imports and exports of olive oil are subject to levies (Article 13) and refunds (Article 18) and governed by a system of licences and deposits. The refund system is implemented *inter alia* by Regulation No 171/67/EEC of the Council of 27 June 1967 on export refunds and levies on olive oil (Official Journal, English Special Edition 1967, p. 136). The seventh recital in the preamble to that regulation reads as follows:

"Whereas traditional exports of olive oil should be maintained; whereas to this end exporters should at all times be able to procure supplies of raw materials to meet their export requirements at a price which does not exceed the world market price; whereas to this end provision should be made for granting the export refund in the form of an authorization to import, free of levy, a quantity of olive oil corresponding to the quantity exported."

That recital reflects the intention of the draftsmen of the regulation to maintain traditional exports of this Mediterranean product while at the same time meeting the shortage in Community supplies of olive oil caused by its exportation. With that aim in view Article 9 (1) provides for what is known as an "Exim" procedure:

[1] Translated from the Dutch.

"1. On application by the party concerned, the export refund on olive oil shall be granted in the form of an authorization to import, free of levy, a quantity of olive oil corresponding to the quantity of olive oil exported, provided that it is proved that exportation was effected before importation and provided that importation is effected within a time-limit still to be determined."

In 1978 the organization of the market in olive oil was reformed inasmuch as thereafter consumption aids were granted as well as production aids. That amendment was introduced by Council Regulation (EEC) No 1562/78 of 29 June 1978 amending Regulation No 136/66/EEC (Official Journal 1978, L 185, p. 1). However, the implementation of the new system of aid in this sector was accompanied by many difficulties and as a result it did not prove possible for it to enter into force on 1 November 1978, the beginning of the 1979 marketing year, and it could not be expected to enter into force before 1 March 1979. As regards 1979 prices were accordingly fixed for the period 1 January to 28 February (representative market price: 148.43 units of account (u.a.) per 100 kg; threshold price: 145.43 u.a. per 100 kg) and for the period 1 March to 31 October (representative market price: 122.78 u.a. per 100 kg; threshold price: 119.44 u.a. per 100 kg). Those prices were fixed by Council Regulation (EEC) No 3088/78 of 19 December 1978 (Official Journal 1978, L 369, p. 11 of 29 December 1978). However, in February it transpired that the date of 1 March 1979, fixed for their entry into force, could not be adhered to either, whereupon the Council, by Regulation No 3088/78 (Official Journal 1979, L 46, p. 1 of 23 February 1979), deferred the date from which the new prices were to apply from 1 March 1979 to 1 April 1979. As a result, as from 1 April 1979 the threshold price for olive oil fell by 25.99 u.a. per 100 kg which meant that the import levies on olive oil also fell. For cases in which the levy had been fixed on the basis of the prices applicable before 1 April 1979 but in respect of olive oil to be imported after that date the Commission adopted transitional measures in Regulation (EEC) No 884/79 of 3 May 1979 (Official Journal 1979, L 111, p. 18 of 5 May 1979). Those measures consisted in a reduction of the levy on imports from non-member countries by an amount of 24.18 u.a. per 100 kg, slightly less than the reduction in the threshold price. However, such measures were not adopted for the benefit of importers using the "Exim" procedure who had exported olive oil under that procedure before 1 April 1979 and imported olive oil after that date.

3. The facts

As the report for the hearing shows, the facts of this case are in no way free from dispute. The Italian undertaking SA Oleifici Mediterranie (to which I shall refer as "OLMESA") used the "Exim" procedure for a quantity of 194.805 tonnes of olive oil thereby incurring the alleged loss for which it claims compensation in this action. As far as the *export* part of the operation is concerned, the documents show that on 27 January 1979 OLMESA invoiced a delivery of 268 tonnes of olive oil to the National

Supply Corporation of Libya at a price in the Community at that time was approximately LIT 1 720 per kg. However, the Commission disputes that that transaction was part of the "Exim" procedure because not only do the quantities not correspond to those imported but also OLMESA could not produce any export certificate for a quantity of 190 tonnes. As far as the *importation* is concerned, OLMESA submitted two import certificates for a total of 194.805 tonnes, one for approximately 33 tonnes, valid until 30 May 1979 and for approximately 161 tonnes valid until 30 June. It also produced seven invoices relating to the purchase of olive oil from Spanish undertakings during the period from 12 May to 13 June 1979. According to the Commission, those invoices add up to only 104 tonnes whilst 57.4 tonnes of that figure represent refined olive oil to which the "Exim" procedure does not apply. The import price was approximately LIT 1 630 per kg. The Commission and the Council dispute that the price was at that level after 1 April. The Commission contends that during the period in question the price was between LIT 2 507 and 2 508 per kg. In any event OLMESA considers that it has made a loss on the imported consignment because it could not be sold at the price in force under the old system. According to its own testimony, owing also to the withdrawal of the refunds it incurred a loss of approximately LIT 100 million on the exportation whilst the importation only yielded a profit of approximately LIT 42 million. I shall come back to the question of the plausibility of that alleged damage and the way in which it is quantified.

4. The submissions put forward and analysis of them

The action based on Article 178 and the second paragraph of Article 215 of the EEC Treaty is for the payment of damages by the Community in the sum of 50 629 u.a. together with interest at 8% from 4 May 1979 and for an order requiring the Community to pay the costs. The action against the Commission relates to liability for the damage allegedly suffered as a result of Regulation No 884/79 which, as I have said, did not provide for any transitional measures as regards the "Exim" facility. The applicant's *primary* contention is that in this case the legislative act in question did *not* involve choices of economic policy. It is therefore argued that it is unnecessary to demonstrate that the strict requirements which, where there is such a choice of policy, must be satisfied for an action based on the second paragraph of Article 215 to succeed, are fulfilled. As the Court will be aware, this is the condition formulated by the Court in its judgment in Case 5/71 *Schöppenstedt* [1971] ECR 975 and in Joined Cases 9 and 11/71 *Compagnie d'Approvisionnement et Grands Moulins de Paris* [1972] ECR 391 to the effect that a sufficiently flagrant breach of a superior rule of law for the protection of the individual must have occurred. OLMESA argues *in the alternative* that if its primary contention is not upheld such a breach has indeed occurred in this case

because Regulation No 884/79 fails to respect the principle of equal treatment and the principle of the protection of legitimate expectation. The action against the Council is alternative to the action against the Commission. In that action damages are also sought for liability incurred not as a result of an unlawful act of the Council but as a result of a lawful act. OLMESA's contention in that action is that Council Regulations Nos 1562/78, 3088/78 and 360/79, though lawful in themselves, nevertheless caused it to suffer damage for which the Council is liable. By that action the Court is therefore asked to rule on the question whether Community law will admit an action to establish liability for damage caused by lawful acts of the Community institutions. In the rest of my opinion I shall deal with those submissions in the order indicated. As regards the primary claim against the Commission, my examination will cover the three requirements which, in its decisions on unlawful acts of the Community, the Court has held must be met for the second paragraph of Article 215 to be satisfied: the acts of the Commission, whether legislative or not, must be unlawful; there must be a causal link between the damage allegedly suffered by OLMESA and those acts; and the damage must be real and quantified. Examination of those matters will allow me to deal briefly with the conditions as to causality and damage as far as the action against the Council is concerned which I shall consider afterwards When considering that head of application I shall however also give some thought to the question which, as I have said, is an intriguing one, whether Community acts which are lawful in themselves may give rise to liability without fault

5 The action against the Commission

Before examining the question whether the Commission may be accused of unlawful conduct it is necessary to reply to OLMESA's argument to the effect that what is at issue is not "a legislative act involving choices of economic policy". It contends that there is therefore no need to show a sufficiently serious breach of a superior rule of law for the protection of the individual in order to prove that the Commission has exceeded its discretion. The thrust of OLMESA's argument is that in this case the Commission had no choice of economic policy but was simply under the duty to implement the amendments made by the Council to the organization of the market in oils and fats. In my view that argument cannot be accepted since a delegation of powers, even if formulated in the form of a binding instruction, does not necessarily mean that the Commission has no scope for exercising its discretion. That is all the more true in this case in which Commission Regulation No 884/79 refers back to the sixth paragraph of Article 16 of Regulation No 136/66 pursuant to which the Commission adopts the implementing provisions in accordance with the procedure laid down in Article 38 of that regulation for referring matters to the Management Committee. In view of the nature of that procedure and the Court's decisions in Case 25/70 *Einfuhr- und Vorratsstelle für Getreide* v *Köster, Berodt & Co* [1970] ECR 1161 and Case 30/70 *Otto Scheer* v *Einfuhr- und Vorratsstelle für Getreide* [1970] ECR 1197 it certainly cannot be maintained that the Commission has no freedom of choice in the management of the common organ-

izations of the markets. OLMESA's argument would also mean that by not adopting transitional measures for the "Exim" facility the Commission infringed the relevant Council regulations. In that case, in fact, the Commission would have no discretion as regards transitional measures. However, OLMESA does not contend or demonstrate that such an infringement occurred.

Therefore the action against the Commission really turns on the alternative submission that if the act in question is a legislative act involving choices of economic policy, in which case a sufficiently serious breach of a superior rule of law for the protection of the individual must have occurred, that condition is also satisfied. OLMESA contends in this regard that by not adopting transitional measures for the "Exim" facility the Commission offended against the principle of equality as well as the principle of legitimate expectation.

That first head of the alternative submission is based on the premise that the "Exim" facility and the import and export rules which operate through advance fixing and certificates are objectively comparable arrangements. It may be said right away that the correctness of that premise is questionable in view of the principle of Community preference which the Court has frequently declared to be one of the guiding principles of the common agricultural policy. According to that principle, the common market has preference over the markets of non-member countries. The system of levies and refunds on imports and exports from and to non-member countries must be regarded as a product of that principle, the effect of which is to make such imports and exports mainly dependent on the market situation prevailing within the Community. According to the recital in the preamble to Regulation No 171/67 which I have cited, the "Exim" facility serves however to maintain traditional exports and reflects the wish to avoid totally disturbing the traditional Mediterranean market for olive oil. Viewed in that light it is difficult to consider the "Exim" facility as anything other than an exception to the general arrangements. Those general considerations also seem to be borne out by the relevant legal provisions. In the first place, the system of import and export certificates offering the possibility of advance fixing is of general application to Community agricultural products. The rules of the system are laid down in Commission Regulations Nos 192/75 and 193/75 (Official Journal 1975, L 25, pp. 1 and 10). On the other hand there are no general rules for the "Exim" facility but it is applied in each sector as the need arises. *Secondly,* the fact that the "Exim" facility is an exception to the general import and export system is also shown by Article 9 (1) of Regulation No 171/67 which I have quoted. It consists in fact of a special kind of refund on the export of olive oil. This special nature of the "Exim" facility is also reflected in Article 9 of Regulation No 2041/75 of the Commission on special detailed rules for the application of the system for import and export licence and advance-fixing certificates for oils and fats (Official Journal 1975, L 213, p. 1). The same conclusion may also be deduced

from the decisions of the Court. It has been clear since the judgment in Case 73/69 *Oehlmann* [1970] ECR 467 that the rules governing the general system of advance fixing do not readily lend themselves to application by analogy to cases not involving advance fixing. The crucial factor for the Court was the coming into being, as the result of advance fixing, of a firm relationship between the trader on the one hand and the authorities responsible for the management for the organization of the market on the other, consisting of an obligation to import or export reinforced by the deposit of a security. In the judgment in Case 68/77 *IFG* v *Commission* [1978] ECR 353, in which "Exim" arrangements came under scrutiny, the Court took that interpretation further. In paragraph 8 of that judgment (loc. cit. p. 369) it held in very clear terms that owing to that relationship, which arises as a result of advance-fixing, between the trader and the authorities responsible for the management of the organization of the market, "Exim" arrangements are not to be compared with the general import and export procedure. In this regard I also refer to Mr Advocate General Capotorti's very firm opinion on this point.

In so far as the relevant head of the submission put forward is based on the premise that this case is concerned with objectively comparable situations, I do not believe that this can be accepted in view of what I have said. I should, however, add that at the hearing in particular OLMESA also endeavoured to construe the principle of equality in a material sense in this case. The gist of its argument was to the effect that, in so far as there may be any question of a difference between advance fixing and the "Exim" arrangements, in principle the trader who has obtained advance fixing runs no risk of price changes occurring in the meantime but the trader voluntarily using the "Exim" arrangements does. The absence of transitional measures for the "Exim" procedure might be acceptable if the trader using it were not thereby exposed to disproportionately large or abnormal risks. Although I would not dismiss that argument out of hand I do not think that it holds good in this case because OLMESA has not demonstrated that in its case there was such a disporportionately large risk or that it was accompanied by exceptional damage.

However, the argument put forward by OLMESA also partly concerns the question how far OLMESA could or could not have anticipated the price changes. That argument therefore goes hand in hand with the submission on the failure to respect the principle of legitimate expectation.

The second part of OLMESA's submission is to the effect that although it was known that prices would be altered as a result of the introduction of consumption aids in the olive-oil sector the time when that would happen was uncertain because the Council had already twice postponed the introduction of those aids. In this connection I should remind the Court that it transpired to be impossible to adhere to the dates of 1 November 1978 and 1 March 1979. In essence that argument therefore amounts to saying that OLMESA was entitled to count on further postponements. Out of respect for that legitimate expectation the Commission ought to have either adopted transitional measures or suspended the "Exim" procedure. In my view it is quite clear that, generally

speaking, a person confronted with rules whose entry into force is postponed may not expect further postponements on the basis of that postponement alone. That expectation must at the least be created by facts other than the postponement itself and such facts have not been adduced by OLMESA. On the contrary, it is quite clear that after the publication of Regulation No 3088/78 of 19 December 1978 OLMESA knew or was in a position to know the extent to which and at what time prices would change. Until 23 February 1979 there was no reason for it to suppose that there would be a second postponement as occurred with Regulation No 360/79 published on that date. In so far as OLMESA used the "Exim" facility before 23 February 1979 it ought therefore to have assumed that prices would change with effect from 1 March 1979, with the ensuing consequences for imports to be carried out after that date. The fact that on 23 February 1979 the date of 1 March was changed to 1 April was at best OLMESA's good fortune and something which a prudent trader would not be entitled to expect. In not acting in the light of that imminent change but speculating for yet another postponement of the introduction of the new system OLMESA certainly did not act as a "prudent" trader might have been expected to act. Such unfounded expectations form no basis for the adoption of transitional measures. According to the judgments of the Court in *inter alia* Joined Cases 95 to 98/74 *Coopératives Agricoles de Céréales* v *Commission and Council* [1975] ECR 1615 (paragraph 45 of the decision) and Case 169/75 *Compagnie Continentale* v *Council* [1975] ECR 117 paragraph 28 of the decision) if a plea based on the principle that legitimate expectation should be respected is to succeed, this requirement that the trader must have acted with care or prudence, that is to say in accordance with the market conditions which are known or foreseeable (in this case, at the time of export), must in any event be fulfilled.

In the present case the requirement of causality means that there should be a causal link between the damage allegedly suffered by OLMESA and the absence from Regulation No 884/79 of transitional measures relating to the "Exim" facility. It is already clear from the foregoing examination of the second part of the alternative submission that there is no such link because the damage allegedly suffered did not arise from the absence of transitional measures but from the unfounded expectation that the introduction of the new system would be postponed yet again. Even with regard to the requirement of causality OLMESA has not satisfied the obligation to show care. In this regard I refer in particular to paragraphs 11 and 28 of the judgment of the Court in Case 169/75 cited above.

In its application OLMESA calculates the damage which it has allegedly suffered at 50 629 u.a. assuming that the difference between the old and the new threshold price is taken (145.43 u.a. per kg — 119.44 u.a. per 100 kg = 25.99 u.a. per 100 kg) or at 47 103 u.a. assuming that the difference between the old and new import levy is taken. Quite

understandably OLMESA prefers the first figure. In an annex to its reply it attempts to evaluate the damages in Italian lire.

With regard to the requirement of damage stipulated in the second paragraph of Article 215 I have already had occasion in my opinion in Joined Cases 197 to 200, 243, 245 and 247/80 to remind the Court of the judgment which it gave in Case 47/49 *Richard Pool* v *Council* [1980] ECR 569. According to paragraphs 10 and 11 of that judgment it is necessary not only to demonstrate the existence of actual damage but also to quantify it in a sufficiently precise manner. On the question whether damage was actually suffered, in view of my earlier observations on the submission in question I would think that OLMESA has not succeeded in showing that it suffered damage as a result of the conduct of the Commission and the Council. Admittedly it has reason to complain in view of the profit which it lost owing to the fall in prices after 1 April but it is quite clear that this was attributable to its unfounded expectations as to the introduction of the new system of rules for the market in olive oil.

Similarly OLMESA has not succeeded in quantifying the damage allegedly suffered in a sufficiently precise manner. As far as the damage expressed in units of account is concerned, this figure is based only on the changes in the Community prices which, unless the contrary is demonstrated, do not necessarily reflect the actual conditions on the market affecting the operations in question. According to the Commission and the Council, the market price in the Community for imported olive oil was in fact much higher than that stated by OLMESA. To quantify the damage it is those real market prices which matter and not theoretical calculations about the effects of changes in the organization of the market on the level of prices. What is more, as regards the assessment of damages in Italian lire in connection with the import and export operations, the Commission in particular has put forward powerful objections which have not been refuted by OLMESA either in its reply or at the hearing. In particular OLMESA has not managed to show the correspondence, which is necessary in the "Exim" procedure, between the quantities exported and imported.

6. The action against the Council

Quite apart from the question whether the second paragraph of Article 215 also covers cases of liability in which there is no question of any illegal action on the part of the Community institutions, it may still be said that even if that question is answered in the affirmative the requirements as to causality and damage must also be satisfied. Examination of the submissions directed against the Commission shows however that as far as the action against the Council is concerned those requirements are not satisfied either so that OLMESA must fail in this action too. So that there can be no misunderstanding I should explain that there can be no causal link between the Council regulations in question, Nos 1563/78, 3088/78 and 360/79, and the damage allegedly suffered for the simple reason that the non-introduction of transitional measures for the "Exim" facility is a matter falling within the sphere of the Commission's powers. It is the Commission which is responsible for adopting, by way of the procedure for referring matters to the Management Committee, the measures for implementing Council Regulation No 1562/78

under which transitional measures for the "Exim" facility could have been adopted. Owing to the considerations set out above it is unnecessary for the Court to examine the question of the place occupied by the concept of liability without fault in Community law. However, since that question, which underlies the submission, is expressly raised before the Court I feel compelled to make a few observations on this subject. It should be stated right away that in its reply in particular the applicant's argument is framed in more precise terms inasmuch as it is contended that the liability in question is for serious and exceptional damage and reference is also made to the principle of "égalité devant les charges publiques" [equality of all citizens in sharing public burdens] which is difficult to express in any language other than French. That implied reference to French administration law is not at all fortuitous since that branch of law does contain a number of principles which form the basis for recognition that liability without fault may be incurred for lawful administrative acts, particularly legislative acts. However, I should add at once that the conditions under which such liability may be incurred are extremely restrictive and accordingly the principle is not applied very frequently. Although in France a statute may not as such be challenged by the courts nevertheless in its judgment of 14 January 1938 (*Société la Fleurette*) the Conseil d'Etat held that the administration may in fact incur liability under the aforesaid principle of "egalite devant les charges publiques". As those words indicate, one of the conditions for such liability to be incurred is that a person or a group of persons must, as a result of the legislative measure, have suffered considerable damage compared to others. However, even if French case-law on this question were capable of being incorporated into Community law, OLMESA could not successfully bring an action on the basis of it because, as the Council has submitted without being convincingly contradicted by OLMESA, the strict conditions which that case-law imposes are not satisfied in OLMESA's case. Moreover, there are several reasons why it is difficult to imagine such an incorporation. In the first place comparative law shows that the French law on this subject occupies a rather exceptional place. Although the concept of liability without fault is not entirely unknown in the law of other Member States, the obligation to provide compensation derives from other principles (for example, the law of property) or is laid down in specific legislation (for example, legislation on the environment). It should also be borne in mind that in Community law general legislative acts may be reviewed in the light of superior rules of law to a greater extent than in France. In Community law it is not inconceivable that where such kinds of acts cause serious and exceptional damage this might constitute a breach of a superior rule of law which might render the act itself unlawful. The judgment in *CNTA*, to which I shall return, provides an example. Although it is therefore difficult, as I have said, to imagine the incorporation of the French system it is not entirely inconceivable that situations such as that in point in the *Fleurette* judgment and in other cases decided by French courts might arise in Community law as well. The wording of the second

paragraph of Article 215 does not rule out such a possibility nor is it inconceivable that the principle of the Netherlands doctrine of "bestuurs-compensatie" [the requirement that compensatory measures be adopted by the administrative authorities] might also be applied in Community law in the context of that provision [1]. According to that doctrine, for acts to be lawful the institution may be required by general principles of law or principles of good administration to take account in those acts of the harmful effects on those to whom they apply. That may mean that the administration must examine to what extent the disadvantages could be offset within the framework of the rules in question (for example, by means of transitional measures) or, where such transitional measures are inconceivable or impossible to implement within the framework of the rules in question, the administration must grant an indemnity (monetary compensation). The Court's judgment in Case 74/74 *CNTA* [1975] ECR 533 could be interpreted in that sense. In that judgment, concerning the withdrawal of monetary compensatory amounts, the Court held that if in the absence of an overriding matter of public interest monetary compensatory amounts are unforeseeably withdrawn the Commission may be under the duty to adopt transitional measures to alleviate (so far as possible) the injury caused or to grant an indemnity to prevent there being any question of a violation of legitimate expectation as a superior rule of law. I am referring here in particular to paragraphs 43 and 44 of that judgment. In any event I consider it possible to deduce from the decisions of the Court that developments towards a more precise definition of the administration's liability for legislative acts are not ruled out. Although there are indications in the judgment in *CNTA* that the Court's case-law on unlawful acts will be able to cope with such development, I would not at this stage recommend that the possibility that liability may be incurred for exceptional and avoidable injurious consequences caused by Community action which is in itself lawful should be entirely ruled out. However, for the reasons which I have already given, such liability cannot be incurred by virtue of the Council regulation in question.

7. Conclusion

On the basis of the foregoing considerations I conclude that:

1. The actions brought against the Community for damages for non-contractual liability must be dismissed;

2. The applicant should be ordered to pay the costs.

1 — For a [illegible] on that doctrine see B. [illegible] "Een Be[illegible] [illegible] [illegible] Rechtmatige Overheidsdaad" [An important development in [illegible] administrative acts], [illegible] 122 and also the bibliography and [illegible].