OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN DELIVERED ON 27 OCTOBER 1983

My Lords,

Article 13 of Council Regulation (EEC) No 2727/75 of 29 October 1975 (OJ L 281, 1. 11. 1975, p. 1) provides for a levy to be charged on imports of maize and certain other products covered by the common organization of the market in cereals. That levy, fixed by the Commission, was to be equal to the threshold price for the Community, fixed pursuant to Article 5 of the regulation, less the cif price. The cif price has to be calculated for Rotterdam on the basis of the most favourable purchasing opportunities on the world market, determined for each product on the basis of the quotations and prices of that market after adjustment for any differences in quality as compared with the standard quality for which the threshold price is fixed. Detailed rules for determining cif prices had been laid down in Commission Regulation No 156/67of 23 June 1967 (OJ 2533, 27. 6. 1967, p. 67) and that was treated as having been made under Regulation No 2727/75. The basic rule is that, "when fixing the cif prices . . ., the Commission shall take into account all offers made on the world market of which it has knowledge through Member States or by its own means and the quotations of the main international commercial exchanges. The Commission shall fix the cif prices on the basis of the most favourable purchasing opportunities of which it has knowledge", subject to certain exceptions and adjustments. The Commission is empowered to exclude certain offers, e.g. if small unrepresentative quantities are involved or if the trend of prices in general or if information available leads the Commission to believe that the offer price in question does not reflect the true trend of the market.

The Commission must thus fix the cif prices on the basis of information available to it, though as I see it this involves the Commission taking steps to ensure that it has sufficient information to enable it properly to carry out its task. Subject to that, a certain discretion is left to the Commission as to the determination of the cif price. Once the cif price is determined the fixing of the levy is a purely arithmetical exercise.

By letter dated 12 October 1981, apparently subsequent to an earlier telephone conversation, counsel for Tradax Graanhandel BV told the Commission that his clients had from time to time wondered, when they had been asked to pay a levy on cereals, in what practical way the Commission went about fixing the cif prices which was necessary to establish the levy. They in particular had wondered in what way and by what methods the Commission

had fixed a cif price of USD 164 for 28 October 1980 and USD 167 for the three days following. Having drawn the Commission's attention to the factors to be taken into account under the Regulation, he asked (a) whether any adjustments had been made under the provisions of the regulation, (b) to be told the precise elements taken into account in fixing these prices, and, (c) to see the relevant documents.

Not having received a reply, the applicants' counsel wrote in similar terms on 24 November 1981 reserving the right to apply to the Court under Article 175 of the Treaty if the Commission had not adopted a position in two months.

The Commission's reply of 14 December 1981, (signed by Mr Williamson, the then deputy director general for agriculture) was simply that the prices had been determined in strict compliance with the rules.

Tradax accordingly sought (a) a declaration under Article 175 of the Treaty that the Commission had failed to address to Tradax an act, having been called upon to state its position; (b) an order pursuant to Article 173 annulling the Commission's letter of 14 December which was said to be a decision addressed to Tradax and (c) an order unter Article 215 that, by refusing to give the facts and to produce the papers, the Commission had committed an irregularity which had caused Tradax damage which it estimated at 1 Dutch Florin.

The Commission contends that each claim is inadmissible or unfounded in itself and, in any event, contends that, if the first claim is inadmissible, the others must be rejected on the grounds of inadmissibility because they are subsidiary to the first. I would not in any event accept this latter contention. It seems to me to be open to the claimants to claim the three forms of relief in the alternative. They obviously cannot succeed both on the first and the second, but if they fail on the first because the Commission has taken up a position, there may remain a question as to whether any relevant decision is vitiated by illegality. I do not see any sound reason in this case why the three claims should not be joined in the alternative, the primary contention being put first, the others subsequently if the first should fail.

The Commission contends that the claim under Article 175 is inadmissible because there was no obligation on the Commission to do what was asked; alternatively, Mr Williamson's letter did take a position in that it stated that the rules had been observed, and that there was no need to give further information particularly as Mr Williamson's letter left open the possibility of coming back for more details. Moreover, it is said that this reply was similar to an opinion or a recommendation and therefore ought not to be treated as subject to the Article 175 procedure. It was in any event an

application to get information or a decision of general application which ought to have been addressed to the Council, rather than one relating particularly to Tradax.

Whether there was a legal duty to give the information asked for is the essential question raised under each of the claims and it seems to me to be more properly categorized as one of substance than of admissibility. I would not, therefore, reject the claim under Article 175 as being inadmissible by a preliminary ruling on the existance of the duty. Nor would I accept the argument that this claim is inadmissible because the reply was similar to an opinion or a recommendation. It does not seem to me to have been either, and I can see no justification for creating a further category of exemptions from acts which can be challenged consisting of "acts assimilated to recommendations or opinions". Moreover, although Tradax's requests made it plain that the company is interested in the general practice of the Commission, it must, I think, be accepted, despite the lack of supporting evidence on the point, that Tradax did import on the four days in question, was required to pay the levy, and does consider that the cif prices determined by the Commission, on the basis of which those levies were fixed, were too low. I would accordingly reject the argument that the claim is inadmissible because of the general nature of the claim.

Whether the Commission took a position is in a sense a question which can be categorized as going to admissibility or to substance. Since an order under Article 175 may be appropriate if no position is taken, I prefer to regard the question, which involves an interpretation of the letter, as going to substance.

In my opinion, it is not possible to regard this letter as one which was meant to keep open the discussion, or to invite further requests for details of the specific days referred to. Nor should it be regarded as a bland statement of what one would expect, namely that the Commission had followed the rules, but as not including a decision as to whether details and documents should be given.

In my view the letter is to be read as a refusal to give that information — a position consistent with the Commission's case that at that stage it was not obliged to give the information. In those circumstances I consider that the Commission did define its position, and did not fail to address a decision to the applicants on their request. In my view the claim under Article 175 should be dismissed on that ground.

So far as Article 173 is concerned, it is said (in addition to the point already made about joining the claims) that the claim is inadmissible because there is no "decision" within the meaning of that article; it did not have any binding character, was not intended to produce juridical effects, did not define the institution's position as a final stage of a process, and was not in any event signed by an authorized official.

Although not in the shape of a formal decision, this letter ist in my opinion to be read as a refusal to give the information sought, and an implicit rejection of any entitlement on the part of the applicants to have the information at that stage. I accept the Commission's argument that because the Commission is shown to have acted for the purposes of Article 175 it does not follow that what it did constituted a decision for the purposes of Article 173. Nevertheless, and despite all the Commission's arguments as to the wording of the letter, and the factors which it is said must be shown to be present before an act can constitute "a decision", this letter made the Commission's attitude clear, it defined the applicant's position so far as the Commission was concerned and it could only be challenged if at all through legal proceedings. In my view it was a decision for the purposes of Article 173. Moreover, the Commission has not made out its case that this was a letter which Mr Williamson was not authorized to sign. To reply to the applicants' letters in this case is just the kind of matter one would expect to find within his authority on behalf of the Commission. For my part I would not, therefore, reject the claim under Article 173 as being inadmissible.

So far as the claim for damages is concerned, the Commission's case is that this is inadmissible on the basis of a number of decisions of the Court that there can be no claim unless there is a breach of an overriding principle of law or at least a clear and serious irregularity on the part of the Commission. I do not think that the Court's decisions relating to economic policy matters necessarily govern the approach in this case. In any event, in a case like the present, I prefer to regard the question as one of substance rather than one of admissibility. I do not consider that the fact that the damage flowing from the failure to give the information is assessed as a nominal one florin necessarily rules out the case in limine. If the only way a party can bring a case before the Court is by claiming nominal damages he may be entitled to do so. I would not, therefore, reject the claim for damages on the basis that it is wholly inadmissible.

The central question under Article 173 (if there is a decision) and under Article 215 (whether or not there is a claim under Article 173) is (as under Article 175 it would be if the Court took the view that there was no taking of a position) whether there is any legal duty binding on the Commission to supply the information sought. Essentially the applicant's position is that this is a levy which can only lawfully be imposed in a way which is defined in the regulations; a person who is to pay the levy is entitled to be satisfied that the Commission is acting lawfully; he can only do so if he knows the materials upon which the cif price was determined and thereafter the levy automatically fixed. It is time-consuming and an abuse of the judicial process if he has to begin proceedings challenging a levy when he does not

know the information available to the Commission, which may show what they did was justified even if, on the material available to him, the cif price fixed looked wrong. This is all particularly important in view of the fact that the decision has to be taken on information available to the Commission rather than on material ascertainable from a defined external source.

The Commission counters that these levies have to be fixed rapidly, frequently and in respect of many commodities covered by the various organizations of the market. It would cause administrative chaos if all the constituent factors leading to a determination of a cif price had to be given on demand to anyone who asked. Moreover, some of the information could be sought for speculative purposes and might lead to difficulties in the future if traders outside the Community became less willing to give information.

Clearly the Commission's decision fixing a cif price under the regulations on the conditions laid down, must be subject to judicial review as to its legality, even allowing for the area of discretion as to obtaining information, assessing it and making adjustments which is given to the Commission. For such a review the information relied on by the Commission must be available to a court conducting the review. The Commission has made it clear that the information would be made available if the lawfulness of a particular levy were in issue before a competent court.

Are they required to do more than that? There can be no question of the Commission being liable to give this information to anyone other than an importer required to pay the levy, and the question is whether he has a legal right to it, even if proceedings have not been brought. There ist no provision in the regulations themselves that it should be supplied on demand, but the applicants contend that the right of an importer to have the information, both as to the general practice and as to particular dates, is to be derived from certain overriding principles of Community law. To refuse to supply was a violation of the general principle of good administration, of legality and the protection of legal rights, of legal certainty and the protection of legitimate expectations.

The principles of legal certainty and the protection of legitimate expectations do not seem to me to be in point in a case like the present, where the only right claimed is one to information, rather than, for example, a right that the law should not, subject to overriding need, be changed so as to affect commercial transactions entered into on the basis that it would not change, at any rate without transitional measures, or that legal rules should be clearly stated. Nor do I consider, as is submitted, that there is any generalized principle of law that what is required by good administration

will necessarily amount to a legally enforceable rule. To keep an efficient filing system may be an essential part of good administration but is not a legally enforceable rule. Legal rules and good administration may overlap (e.g. in the need to ensure fair play and proportionality); the requirements of the latter may be a factor in the elucidation of the former. The two are not necessarily synonymous. Indeed, sometimes when courts urge that something should be done as a matter of good administration, they do it because there is no precise legal rule which a litigant can enforce. Nor does it seem to me that there is any general or absolute principle of Community law, as is suggested, which requires information to be disclosed by the institutions of the Community to persons affected by Community acts in the absence of express provision and in the absence of litigation. The provisions of the laws of Member States which have been cited requiring disclosure of information in the possession of governments, in the interests of more open government, may support an argument that there should be specific or general measures laying down some rules. it does not seem to me to establish a general principle of "unwritten law" which aids the applicants in this case. Moreover, the fact that in competition and staff cases the Court has recognized that, before a decision is taken affecting an individual he has a right to be heard and to know the case against him, does not seem to me to lead to the conclusion that after a levy is fixed for all traders (since it is not contended that there is a right to the information before the levy is fixed) the information must be given to individual traders.

The real question to my mind is whether the principles of legality and protection of legal rights require that the trader should be given this information on request so that he can be satisfied that the law is being observed by the Commission when it fixes the prices.

I do not consider that the fact that information has to be obtained and assessed, perhaps each day, under pressure of time is an answer to a claim that information should be given later; nor does the suggestion that information might be used for speculative purposes carry great weight if there is a gap between the date of the contracts or offers referred to and the date when the information is supplied. On the other hand, although administrations not infrequently oppose requests for liberalising decisions by the courts in this kind of area by a cry that "the flood-gates will be opened", a fear which often proves to have been unjustified, there can be little doubt that for the Commission to be obliged to disclose all the details of the material it has on all the products concerned on any day or days to any importer liable to a levy, could cause administrative difficulty.

I would not allow that difficulty to prevail if there were no other satisfactory ways of protecting the citizen's rights to

challenge the vires of what was done. It is said that there may be difficulties for the trader to challenge the vires, (a) because he cannot individually bring proceedings under Article 173 to attack the validity of a decision fixing the levy and (b) because if he does not know what information the Commission had, he cannot plead sufficiently the invalidity of a decision. Since the Commission will not necessarily be a party to proceedings before a national court, he may not be able to get an order for the information to be given.

Even assuming, without deciding, that the first objection taken is right, it seems to me that if before a national court a point is taken by someone being sued for a levy, or who seeks to challenge the intervention agency's right to claim it, on the basis of the legal validity of the rate fixed, the Commission is under a duty, since the question at issue is one of Community law, to produce to the Court and to the applicant such information as is necessary or relevant to decide the issue. There may be special considerations of confidentiality in particular cases, but subject to those, it seems to me right that what the Commission is prepared to do as a practice, namely to disclose the information, should be recognized as a legal rule.

This does mean, theoretically, that a trader may have to start proceedings before he can compel disclosure of documents, which if he had had them, would have shown that he had no case. That is unfortunate but less troublesome than to give unlimited access. The remedy is in the Commission's hands. It seems to me that in the situation where a trader questions the validity of a particular levy or cif price with sufficient reasons or facts to call for a reply, the Commission should, as a matter of good administrative practice, though not as a legal obligation, give him the facts on which the assessment was based. They are apparently willing to do this if on checking they find they have made a mistake. In my view they should do it also if they find they were right. A trader has in any event a difficult task in showing an error of law in such an area, and to know that the system is working properly may be just as satisfactory as knowing that his suspicions were right. If the trader does not get sufficient information or an answer which satisfies him, then his rights are in my view protected by the production of the information in the course of proceedings to challenge the validity of a levy.

It is not impossible that on particular facts a duty to give information of the kind in issue here might arise at an earlier stage than legal proceedings if, for example, a case arose in which the material calling for an explanation was so strong that the Commission ought, as a matter of law, to give the information on which its determination had been

based. It is not, however, easy to define such a rule in general terms without opening up the possibility of greater difficulties than exist if the legal duty in the ordinary case arises only when proceedings have been commenced, subject always to the opportunity which the Commission has to avoid litigation by giving the relevant information in appropriate cases.

In any event, I do not consider that the Commission was in breach of any legal duty in the present case. In the first place the questions raised were general, relating to the methods of determining the price. It would, I consider, have been better if a fuller explanation of the practice laid down had been set out, even if specific facts and figures were not given. In the second place, the questions listed referred to four specific dates. There was nothing contained in the two letters to show that a question of validity arose on the basis of any facts or arguments put forward.

Accordingly, in my view, the applicants have failed to substantiate their case under Articles 173, 175 or 215 of the Treaty. The applications should, in my view, be dismissed and the applicants should pay the Commission's costs.