In Joined Cases 83 and 94/76, 4, 15 and 40/77

The undertaking BAYERISCHE HNL VERMEHRUNGSBETRIEBE GMBH & Co. KG, Gut Heinrichsruh,

BERND ADLEFF, sole trader, Grasslfing,

The undertaking F. X. ZOLLNER KG, Regensburg, and

CHRISTOF SCHWAB, agricultural engineer, Gut Schwaben,

Counsel: F. Modest, A. Heemann, J. Gündisch, G. Rauschning, K. Landry, W. Röll, B. Festge, H. Heemann, P. Wegemer, of Hamburg, with an address for service in Luxembourg at the Chambers of Félicien Jansen, Huissier de Justice, 21 Rue Aldringen,

and JOHANN SEIDL, Regenstauf, represented by Messrs von Boetticher, Bernet and Partner, Munich, with an address for service in Luxembourg at the Chambers of Ernst Arendt, 34 B Rue Philippe II,

applicants,

v

THE EUROPEAN ECONOMIC COMMUNITY, represented by its institutions,

1. THE COUNCIL, represented by its Legal Adviser, Bernhard Schloh, acting as Agent, with an address for service in Luxembourg at the office of J. N. Van den Houten, Director of the Legal Service of the European Investment Bank, 2 Place de Metz,

   and

2. THE COMMISSION, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, with an address for service in Luxembourg at the office of its Legal Adviser, Mario Cervino, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION pursuant to the second paragraph of Article 215 of the EEC Treaty for damages in respect of the loss allegedly suffered by the applicants as a result of the effects of Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (Official Journal L 67, p. 18),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco, (Presidents of Chambers), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, procedure, conclusions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. The common organization of the market in milk and milk products provides for a system of prices based *inter alia* on a target price for milk as well as on intervention prices fixed mainly for butter and skimmed-milk powder.

Despite this price system, the Community is experiencing a surplus of milk which takes the form, in particular, of the accumulation of considerable intervention stocks of skimmed-milk powder.

2. Among the measures which the institutions of the Community have adopted in order to reduce those stocks is Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (Official Journal L 67, p. 18).

That regulation imposed an obligation to purchase skimmed-milk powder held by intervention agencies for use in feeding-stuffs for animals other than young calves (Article 1).

In order to ensure compliance with this obligation, the grant of aid for certain vegetable foods (colza and rape seeds, soya beans etc.) is made subject to the provision of a security or the presentation of a document, of standard Community form, made out by the competent authority of the Member State which is responsible for denaturing, hereinafter referred to as "attestation of purchase denaturation" (Articles 2 and 6).

Free circulation in the Community of imported vegetable foods (such as oil seeds, flour from these seeds, certain animal food preparations etc.) is subject to the presentation of a "protein certificate" (Article 3 (1)).

That certificate is issued by Member States to any applicant. The issue thereof is conditional on the provision of a security or the submission of an "attestation of purchase and denaturation" (Article 3 (2)).

In the case of contracts concluded before the date of entry into force of the regulation, the successive buyers of the products referred to in Articles 2

and 3, or of protein products processed therefrom, are to bear the burden of the costs arising under the arrangements laid down in the regulation (Article 5).

The regulation, which entered into force on 15 March 1976, was applied until 31 October 1976 (Article 11).

3. The applicants are engaged in the production and sale of chickens, breeding of laying hens and production of eggs. They claim that they have suffered damage by reason of the increase in the price of feeding-stuffs as a result of Regulation No 563/76.

4. This same problem is the central issue in the references for preliminary rulings which have given rise to Case 114/76, *Bela-Mühle Josef Bergmann KG* v *Grows-Farm GmbH & Co. KG*, to Case 116/76, *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten and Produktschap voor Margarine, Vetten en Olien* and to Joined Cases 119 and 120/76, *Kurt A. Becher* v *Hauptzollamt Bremen-Nord* and *Ölmühle Hamburg AG* v *Hauptzollamt Hamburg-Waltershof*.

5. The applications were lodged on 19 August and 30 September 1976, 10 January, 31 January and 6 April 1977 respectively.

By orders of 10 November 1976, 31 January and 15 February 1977, the Court decided to join Cases 83 and 94/76 and 4 and 15/77 for the purposes of the written and oral procedure.

6. The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to hear, at the hearing on 3 May 1977, the observations of the parties in these cases on the question concerning the liability of the Community with regard to Regulation No 563/76, except for the causal connexion between the regulation and the damage suffered and the nature and extent of the latter.

7. In three identical judgments of 5 July 1977 ([1977] ECR 1211, 1247 and 1269) in the references for preliminary rulings which gave rise to the cases mentioned under point 4 above, the Court declared that Regulation No 563/76 was null and void.

8. As a result of those judgments the Court, continuing the procedure in these cases, sent the parties letters worded as follows: "The parties are requested to supply all appropriate information with a view to establishing whether there is a direct and necessary connexion between the provisions of that regulation and the damage claimed by the applicants. In particular, they are requested to indicate in this connexion whether the applicants could have countered those effects in their relationship with their suppliers by preventing the latter from passing on to the price of the feeding-stuffs the effects of the system established by the regulation."

By documents lodged respectively on 13 September, 5 and 23 August 1977, the applicants in Joined Cases 83 and 94/76, 4 and 15/77 and the Council and the Commission expressed their opinions on the effects of the invalidity of Regulation No 563/76 and replied to the questions put by the Court.

By documents lodged respectively on 4, 22 and 23 November 1977, each of the parties then adopted a viewpoint on the replies given by the other parties.

9. In its reply lodged on 13 October 1977, the applicant in Case 40/77 considered it unnecessary to give its views on the invalidity of Regulation No 563/76. The reply therefore dealt merely with the effects of that invalidity and at the same time contained the applicant's replies to the questions put by the Court. The Commission lodged its rejoinder in Case 40/77 on 23 November 1977, which also dealt merely with the effects of the invalidity of Regulation No 563/76.

By order of 9 January 1978, the Court decided to join Case 40/77 to Joined Cases 83 and 94/76, 4 and 15/77 for the purposes of the oral procedure.

10. After hearing the report of the Judge-Rapporteur and the views of the Adovcate General, the Court then decided to hear at the hearing on 1 February 1978 the observations of the parties in these five cases on the effects of the invalidity of Regulation No 563/76, excluding however the estimate of the damage.

II — Conclusions of the parties

The *applicants* claim that the Court should:

1. Order the defendant to pay by way of damages
   (a) DM 175 506.32 (Case 83/76)
   (b) DM 33 527.02 (Case 94/76)
   (c) DM 18 694.14 (Case 4/77)
   (d) DM 21 098.81 (Case 15/77)
   (e) DM 28 274.28 (Case 40/77)
2. Order the defendant to bear the costs.

The *defendants* contend that the Court should:

1. Reject the applications as unfounded;
2. Order the applicants to bear the costs.

III — Submissions and arguments put forward by the parties with regard to the validity of Regulation No 563/76

In this connexion, the parties put forward submissions and arguments identical to those put forward by the parties to the procedure in Cases 119 and 120/76, which were references to the Court for preliminary rulings.

IV — Submissions and arguments put forward by the parties as a result of the judgments of the Court of 5 July 1977 declaring Regulation No 563/76 to be null and void

1. Serious breach of a rule of law and causal connexion between the breach of that rule and the alleged damage

(a) The *applicants* observe that the concept of serious breach of a rule of law as applied by the Court may be understood from two points of view, that of the provision and that of its effects on those concerned.

The brevity of the grounds of the decisions in the judgments of the Court of 5 July 1977 shows that the Court considered that the obligation to purchase constituted such a serious breach of the principle of proportionality and of the prohibition on discrimination that it was unnecessary to discuss that breach at greater length in the judgment or to limit its scope to certain particular aspects of the rules.

There is no precedent whereby the Court has concluded that a measure of economic policy taken by the Community institutions was illegal while subsequently refusing the right to compensation on the ground that the illegality which had been found was not sufficiently serious.

The applicants cannot accept that the concept of serious breach of the right is based on that of a special sacrifice suffered in the general interest (*Sonderopfer*, hereinafter referred to as "special sacrifice"), which is recognized in German law.

The liability of the Council for its legislative measures is not comparable with the liability for legislative measures adopted by the parliamentary institutions in the Member States. Council regulations cannot be treated as equivalent to the legislation of the

Member States but only as regulations in respect of which the legal limits on power have been determined restrictively. Even if the theory of "special sacrifice" is accepted, it is apparent that in the present case such a "special sacrifice" was imposed on the applicants: the obligation to purchase constitutes, according to the judgments of the Court, "a discriminatory distribution of the burden of costs between the various agricultural sectors". This means that the Court recognized that there was a particularly heavy burden on the poultry industry for the benefit of the dairy industry.

The applicants add, with regard to the problem of "special sacrifice", that the determining factor is not the number of persons concerned but whether it is possible to distinguish them as a group from the community as a whole. This is so in the present case. The Court has explained that the financial effects of the sale of surplus skimmed-milk powder had imposed a substantial burden on producers of pig meat and poultry breeders. These groups may be clearly demarcated. The applicants emphasize in this connection that of all the economic categories affected by the obligation to purchase, the only ones to have suffered damage are animal breeders who have not been able to pass on these price increases to their buyers.

The applicants have drawn up, on the basis of information from their suppliers, tables according to which the burden resulting from Regulation No 563/76 is between DM 0.36 and DM 2.34 per 100 kilogrammes. The applicants have also either lodged invoices relating to supplies of feeding-stuffs, or, in cases in which they considered that those invoices were too voluminous for the Court file, arranged those invoices in tables and had the accuracy of the quantities indicated therein certified by the respective suppliers.

The applicants consider that it is impossible to impose upon them the burden of showing in detail how the increase in price is calculated and how it arose. They claim that those are calculation factors which are beyond their sphere of influence or knowledge.

The applicants consider that they have suffered serious damage: they state that in Case 83/76, the damage is 50 % more than the annual profit of the applicant. In Case 94/76, the damage corresponds approximately to the declared annual profit. In Case 4/77 and Case 15/77, the damage represents approximately 20 % of the annual profit.

The applicants point out, with regard to the causal connexion, that no additional obstacles to the lodging of a claim for damages should be set up once a regulation has been declared null and void. It is only possible to require that, in application of the general rules on causality applicable with regard to the law on the liability for damages of public authorities, abnormal, in other words, inappropriate or totally unforeseeable harmful consequences are not included in the liability incurred by the Community.

(b) The *Commission* makes by way of introduction the fundamental observation that there has been a serious breach of a rule of law. The fact that there has been a breach of superior rules of law is not as such sufficient to fulfil that criterion. In view of the weak basis for the acceptance of a principle of law common to the Member States with regard to the liability of the legislature for legislative measures, the Commission considers that the Community may only be liable in such cases where there is specific and serious damage, in other words that the concept of serious breach must be defined at least also so far as the category of persons concerned and the nature of the damage is concerned.

In the cases which have hitherto been brought before the Court and in which the Community has been declared liable in principle what was involved was either a law covering a special case (Joined Cases 5, 7 & 13 to 24/66, *Firma E. Kampffmeyer and Others* v *Commission of the EEC*, judgment of 14 July 1967 [1967] ECR 245: Case 30/66, *Firma Kurt A. Becher* v *Commission of the European Communities*, judgment of 30 November 1967 [1967] ECR 285), or a very limited category of persons (Case 74/74, *CNTA S.A.* v *Commission of the European Communities*, judgment of 14 May 1975 [1975] ECR 533).

In the present case an almost incalculable number of traders is concerned. With regard in particular to the group of applicants, the Commission emphasizes that all poultry breeders and egg producers are uniformly affected. There has therefore been no specific damage nor "special sacrifice" but the burden has been divided uniformly over the whole of an economic sector.

In addition there has been no serious damage. In this respect it is necessary to determine the extent of the damage suffered. It is also necessary to examine as a whole the policy pursued by the Community institutions in the poultry-meat and egg sectors.

The Commission emphasizes that the judgments of the Court of 5 July 1977 do no more than state quite generally that the burdens have been divided between the various agricultural sectors. Whether the damage alleged by the applicants, which can only have arisen at the third or fourth link in the chain of causation, may be attributed with certainty to the regulation declared null and void is a quite different question. Moreover, in applications of the present kind there must be a direct causal connexion, and this is lacking in the present case.

In order to corroborate its opinion as to the seriousness of the damage and the causal connexion, the Commission determines any additional costs which might arise from Regulation No 563/76 with the aid of examples:

	Additional costs if security is lost per 100 kg of feeding-stuffs	Additional costs if skimmed-milk powder is used per 100 kg of feeding-stuffs	
		Situation at end of March 1976	Situation in July 1976
Feeding-stuffs for laying hens	DM 1.09	DM 0.77	DM 0.63
Per egg	0.17 Pf	0.12 Pf	0.10 Pf
Feeding-stuffs for pullets	DM 1.29	DM 0.91	DM 0.74
Per pullet	10.98 Pf	7.74 Pf	6.3 Pf
Feeding-stuffs for fattening	DM 1.95	DM 1.37	DM 1.12
Per kg of chicken	3.5 Pf	2.5 Pf	2 Pf

The Commission concludes by stating that any increase in price as far as final products are concerned is less than 1 % of the selling price. In these circumstances it is impossible to state that the applicants have suffered serious damage.

In fact, the effect of the additional burden is ultimately so minimal that it is no longer possible to ascertain any damage at the level of the selling prices. This finding is in addition confirmed by the fact that in the case of the products in question the increase in price caused by the increase in the price of broken soya beans is four times higher than that caused by the effect of the costs

resulting from the actual incorporation of skimmed-milk powder.

It is in addition difficult to determine *a posteriori* the respective effects of the proportion of soya and that of skimmed milk on the increase in the price of feeding-stuffs for poultry. The Commission has the impression that in the Spring of 1976 the feeding-stuffs industry took advantage of the opportunity afforded by the rules relating to the obligation to purchase in order to impose a general increase in prices and therefore merely stamped the invoices: "The price of the feeding-stuffs includes the burden resulting from the obligatory use of skimmed-milk powder".

The Commission adds that it is well known that in many cases suppliers of feeding-stuffs for animals passed on to their buyers the full amount of the security while they themselves only bore the smaller burden resulting from the admixture of the skimmed-milk powder. Since the loss of the security could probably have been avoided in most cases, the additional costs which result therefrom should in principle be borne by the person responsible for the loss, in other words, in general, the importer.

The Commission is surprised by the statements made by the applicants with regard to profits, in particular in Cases 83/76 and 94/76. Since the increase in the cost of feeding-stuffs for animals resulting from the increase in the price of soya is many times higher than that resulting from the rules relating to the obligation to purchase and since the fluctuations in the price of soya are a normal phenomenon, the Commission cannot understand how in those circumstances the applicants could have kept their undertakings in operation.

(c) The *Council* notes that the meaning of serious breach has not hitherto been specified in the case-law of the Court of Justice. It must be a breach which is particularly blatant, a particularly clear infringement and a manifestly grave violation of the basic content of a principle.

The Council considers that the considerations upon which the obligation to purchase was based were not *a priori* erroneous from a macro-economic point of view and were not in principle indefensible. Consequently, there can be no question of serious breach.

With regard to the damage, the Council likewise considers that there must be serious damage in each individual case. The amount of the damage should differentiate the person or persons adversely affected from the community as a whole, but the number of persons adversely affected must also differentiate them from the community as a whole. The concept of the award of damages to the person or persons adversely affected by an unlawful measure adopted by the legislature must be linked to the concept of "special sacrifice". The Council considers that in the present case these conditions have not been fulfilled.

The Council shares the Commission's view on the question whether there is serious damage, taking into account the amount thereof.

The Council takes the view that the applicants have in no way been particularly affected by the obligation to purchase. On the contrary, the costs have risen for all consumers of feeding-stuffs for animals within the Community. The Council makes reference to the German and French systems of administrative law to support its view in this connexion.

The Council adds that the adoption of Regulation No 563/76 was an alibi to conceal other increases in price using the pretext of the obligation to purchase. It is necessary to exclude these increases from the calculation. To the extent to which additional burdens result from the loss of the security and

not from the obligation to purchase, those amounts should also be excluded.

The Council considers moreover that the causal connexion is not sufficiently close to justify the applicants' claims for damages because those damages only occured at the third or fourth link of the chain of causation.

2. The possibility of the applicants' passing on to their customers the effect of the charges resulting from Regulation No 563/76

(a) The *applicants in Cases 83 & 94/76* have produced several sales contracts and invoices from which they claim that it follows that before and after the entry into force of Regulation No 563/76 they obtained in principle the same selling price for their pullets.

In addition they produced an experts' report drawn up by Professor Friedrich Hülsemeyer and Dr Siegfried Graser in November 1976 entitled "The Effects of the European Communities' Regulations on Skimmed-Milk Powder on the Market in Pullets and Eggs in the Federal Republic of Germany". It follows from this report that in the pullet-breeding sector there is no oligopolistic market structure. In fact, the report emphasizes the fact that the widespread homogeneity of production and the free access of competing foreign suppliers to the domestic market virtually make it impossible for producers to impose prices upon their customers.

At the same time the report shows that over a period of three quarters, the variations in the price of compound poultry feeding-stuffs have had no significant influence on the chicken hatch of laying strains. Since the supply of chicks of laying strains has not reacted to the alteration in the price of animal feeding-stuffs it is possible to conclude from this, on the basis of the laws of supply and demand, that the prices of those products could not have been altered either. For this reason the report summarizes thus: "The increases in costs cannot be passed on to the following stage of production either in the case of day-old chicks or in that of pullets; they must rather be absorbed in the profit-margin of breeding undertakings".

The applicants in Cases 83 and 94/76 claim in addition that the system of levies applicable to the importation of poultry-meat and poultry-meat products merely makes it possible to prevent imports from third countries from exercising pressure on prices. The system has therefore no influence on imports from other Member States and in particular from the Netherlands which are very competitive in the poultry-meat sector. Moreover, the increases in costs caused by the obligation to purchase were not taken into consideration when the levy was fixed since the latter is only adjusted on the basis of variations in the difference between the price of forage on the Community market and on the world market but not on the basis of the variations in other factors.

(b) The *applicants in Cases 4 and 15/77*, who are egg producers, observe that, contrary to the prices of pullets and day-old chicks, the prices of eggs undergo great seasonal variations. Regulation No 563/76 was in force principally during the six summer months. It is impossible to deduce from a comparison between the prices during the six summer months and the prices during the six winter months whether the increase in the cost of animal feeding-stuffs as a result of the effects of the obligation to purchase has had an effect on the price of eggs. That question can only be answered on the basis of abstract principles of economics and industrial management. The applicants refer in this connexion to the above-mentioned experts' report and to a supplementary report of 5 September

1977 on the effects of the Community regulations on skimmed-milk powder on the market in eggs in the Federal Republic of Germany, in the present case, the factors which have determined the development of the price of eggs in 1976. It follows from that report that throughout 1976 the prices of eggs were higher than those in 1975. That report shows moreover that that increase in prices must be attributed to a reduction in supply on the market, a reduction in the eggs for hatching laid by laying strains and a reduction in the chicken hatch of laying strains. The experts summarized their remarks as follows:

"The results of the analyses of the development of supply and prices on the market in eggs in the Federal Republic of Germany during the past two years, in other words

— the explanation for the distinct rise in the price of eggs in 1976 by comparison with the previous year caused by restrictions on production for economic reasons as early as 1975,

— the definition of the conduct of traders in the market in eggs as that of autonomously adjusting the quantities of products, and, finally,

— the completely inelastic reaction of the domestic supply of eggs to the temporary increase in the price of animal feeding-stuffs caused by the Community rules on skimmed-milk powder,

therefore enable the conclusion to be drawn with certainty with regard to the market in eggs for consumption in the Federal Republic of Germany that the additional cost of feeding-stuffs for animals brought about by the system of securities has been borne entirely by producers."

(c) The *applicant in Case 40/77*, who runs an undertaking which breeds and fattens chickens, states that as a member of an association of producers which entered into long-term outline agreements for the conclusion of individual sales contracts relating to all products of their breeding farms, with Franz Zimmerer, a slaughterer, it must abide by the results of the negotiations on prices conducted by the management of that association of producers with that slaughterer. Since that situation existed as early as 1976, the applicant is unable from a legal viewpoint to sell its fattened poultry to slaughter-houses other than Franz Zimmerer.

Quite apart from that, the applicant, extremely vulnerable from the economic point of view, actually found it impossible in 1976 to sell its products to other slaughter-houses. Because its business is situated in an under-populated region in which communications are poor it was financially unable to transport its chickens ready for slaughtering to more distant slaughter-houses, especially since the selling prices which it could obtain in 1976 in the case of the slaughter-houses which came into consideration within a reasonable radius of 100 kilometres were no higher than those offered by the slaughter-house Franz Zimmerer and since transport would therefore in every case have given rise to harmful additional costs for the applicant.

In addition negotiations have been conducted in vain with the slaughter-house Franz Zimmerer *inter alia* by the management of the association of producers to which the applicant belongs in an attempt to pass on to purchasers of the applicants' products the increases in the price of feeding-stuffs for animals attributable to the application of Regulation No 563/76.

The applicant in Case 40/77 has also lodged invoices relating to its sales from which it is clear that before and after the entry into force of Regulation No 563/76 it allegedly obtained the same prices for its products.

(d) The *Commission* considers that it was or would have been possible for the applicants in *Cases 83 and 94/76* to pass on to their customers the increase in the cost of the feeding-stuffs. The Hülsemeyer-Graser report does not deal with the strong position on the market of breeders and producers.

With regard to the choice of the invoices produced by the applicants relating to the sale of their products, the Commission observes that it seems to be rather arbitrary. Thus, invoices of 28 January 1975, 15 May 1974, 6 February 1974 and 28 January 1974 have been produced by the applicant in Case 83/76 for the purpose of comparison with the proceeds of sale for the period from March to September 1976. The applicant in Case 94/76 has only produced two invoices from the period outside the period of application of Regulation No 563/76.

In the field of *egg production* the market situation is fundamentally different. In this field there is in fact extraordinarily keen competition between egg producers and their market position in relation to their customers is weak. The question whether it was possible to pass on prices in spite of this situation depends accordingly on the market conditions. These conditions made it possible for the burden to which Regulation No 563/76 gave rise to be passed on, in particular because of the export refunds and the import mechanisms provided for in the common organization of the market.

In fact exports of eggs in shell increased by 21 % in 1976 in comparison with 1975 and accordingly relieved the Community market. The additional amounts fixed in 1976 (see Article 8 of Regulation No 2771/75, Official Journal L 82 of 1 November 1975, p. 49) in the case of eggs and egg products were permanently at a high level in 1976 and in this way had a prohibitive effect on imports from third countries. The average prices obtained by producers for unsorted eggs on delivery to a packing centre increased by 29 %; the selling prices of the packaging centres to traders rose by 24 %. The other distribution channels also benefited from these improvements in prices.

The Commission points out with regard to *Case 40/77* that even if the applicant is said to have obtained no more on average in the period in question on the sale of its products than previously that would ultimately be of little significance with regard to the present question. In fact it is not known what other factors have influenced the individual formation of prices in the contractual relationship between the applicant and its customers. The Commission claims that if the various accounts produced by the applicant are examined the "rise and fall" of the selling prices, which obviously has nothing to do with the general situation as regards costs, is astonishing (see for example the invoice of 7 May 1976: DM 1.99 per kilogramme, 3 July 1976: DM 1.93 per kilogramme and 14 September 1976: DM 1.97 per kilogramme). Once more, the general development of prices in this sector is certainly indicative. In spite of increased supply in 1976 compared to 1975 the prices at all stages of distribution were above the level of the previous year. Producers experienced an increase of 8.5 %: the average return on fattened poultry rose from DM 1.75 per kilogramme live weight to DM 1.90 per kilogramme live weight. The selling prices of the slaughter-houses increased by 9.3 % compared to 1975. These returns at least suggest that the rise in the cost of feeding-stuffs affected the selling price.

The price policy pursued by the Community in the poultry-meat sector contributed substantially to those returns and therefore enabled or in any case facilitated the passing on of costs. The Commission is in a position to

influence present supply by means of export refunds and the application of the import mechanisms provided for in the common organization of the market and thus indirectly to influence price formation. These instruments were intensively used by the Commission throughout the period of the campaign for the use of skimmed-milk powder.

While exports of chickens were stagnant in 1974 and 1975, there was a rise of 34 % in 1976. In addition to the levy an additional amount was fixed for imports from all third countries throughout 1976 so that in 1976 a total of only approximately 5 000 tonnes of chicken was imported into the Community. These imports are minimal in comparison with the production of the Community, which amounts to 2.2 million tonnes.

(e) The *Council* states that when it adopted Regulation No 563/76 it assumed that the purchase price of skimmed-milk powder would be included as a cost factor in the price of feeding-stuffs and would finally be passed on to the consumer. If all traders without any distinction had compulsorily to accept a higher cost factor for some of their feeding-stuffs it is logical to expect these higher costs to be passed on to the final consumer.

3. *Prevention of the damage*

(a) The *applicants* state that they are not in a position to resist the concerted demands of their suppliers of feeding-stuffs for an increase in the price of feeding-stuffs for the following reasons: because of the amount of feeding-stuffs used by them poultry breeders cannot build up large reserves; it would only be possible to store the feeding-stuffs for a period longer than two weeks by suffering great disadvantages through the segregation of the components thereof and the decline in quality; if for example laying hens are deprived of feeding-stuffs albeit for only one day, egg production falls by 20 %; the resulting loss to the applicants would have been substantially higher than accepting the price increase charged by the manufacturers of feeding-stuffs; to change from the feeding-stuff of one supplier to that of another might also lead to a fall in production; manufacturers of feeding-stuffs which had increased their prices in fact account for approximately 80 to 90 % of the production of industrially manufactured compound feeding-stuffs in Bavaria; for that reason and because of the considerable supplies of feeding-stuffs required by the applicants it was impossible to change from these large manufacturers of feeding-stuffs to other small manufacturers of feeding-stuffs; the applicant in Case 94/76 protested in vain against the increases in the price of feeding-stuffs.

The applicants considered that it was impossible to claim repayment from their suppliers of feeding-stuffs of the additional costs imposed upon them.

In a statement of 6 October 1977 the Commission provided for repayment of the securities only under certain conditions. However, the applicants' suppliers of animal feeding-stuffs did not waive the security deposited. They therefore do not benefit from the arrangements for repayment and for that reason cannot in their turn pass on any refunds to the applicants.

(b) The *Commission* asks whether the applicants could not have defended themselves more successfully by uniting or through their associations. In view of the relatively strong market position of the applicant in Case 83/76 the appraisal in this connexion might however be slightly different. The Commission adds that the question of the passing-on of costs between undertakings belonging to a group is quite different.

The Commission and the *Council* consider that Case 114/76 shows in addition that there were cases in which the other party to a contract was able to prevent costs being imposed on it. In addition the Commission observes that in those cases in which the security deposited is repaid to those concerned as a result of the fact that Regulation No 563/76 has since been declared to be null and void, subsequent parties to contracts can now claim the repayment from their suppliers of costs imposed on them.

4. *Wrongful act or omission*

(a) The *applicants* claim that in the case-law of the Court of Justice until now no particularly strict conditions have been laid down with regard to the requirement that the institutions of the Community must have been guilty of a wrongful act or omission. According to that case-law, it is possible to conclude that there has been a wrongful act or omission where a serious breach of a superior rule of law for the protection of individuals has occurred.

In the present case, however, there are additional features which confirm that there has been a wrongful act or omission because serious opposition had been shown to the regulation in question as early as the preliminary deliberations. The wrongful act or omission of the Commission is based on the fact that it proposed the regulation in question to the Council and promoted it energetically.

(b) The *Commission* observes that the Court of Justice has hitherto always adhered to the principle of wrongful act or omission in the case of applications under Article 215 of the EEC Treaty. It concludes that, in view of its statements on the question whether a serious breach of a rule of law has occurred, it is doubtful whether there has been a sufficiently wrongful act or omission. If the principle of wrongful act or omission is abandoned the criterion of serious breach of a rule of law however acquires particular importance.

(c) The *Council* takes the view that according to the present state of the law it is necessary to assume that an application for damages is only well founded if there has been a wrongful act or omission. In this connexion it refers to the grounds of the decision in the judgment of the Court of 31 March 1977 in Joined Cases 54 to 60/76 (*Compagnie Industrielle et Agricole du Comté de Loheac and Others* v *Council and Commission* [1977] ECR 659).

The Council considers that its conduct has not been wrongful. In this connexion it refers to its conclusions concerning the question of serious breach.

In case the Court of Justice considers that the Council has been guilty of a wrongful act or omission through infringement of the principle of proportionality, the Council takes the view that since in the present case it is necessary for a sufficiently serious breach to have occurred only a serious wrongful act or omission may be taken into consideration. The fact that in the field of economic policy simple decision in the negative or affirmative are hardly ever involved confirms this view. There has been no such serious wrongful act or omission in this case.

V — Oral procedure

1. The applicants in Cases 83 and 94/76 and 4 and 15/77, represented by J. Gündisch, the Council, represented by its Legal Adviser, B. Schloh, acting as Agent, and the Commission, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, presented oral argument at the hearing on 3 May 1977.

The Court of Justice had requested the Commission and the Council to supply the necessary explanations on the costs of the dehydration of skimmedmilk and on the costs of denaturing in connexion with the compulsory use of skimmed-milk powder for animal feeding-stuffs and to compare those costs with the value of liquid milk as a feeding-stuff.

The *applicants* stated with regard to this question that the three items of dehydration, storage and denaturing amount to approximately 27 units of account or approximately DM 95 per 100 kilogrammes. The value of 100 kilogrammes of skimmed-milk powder as a feeding-stuff is approximately DM 50 to 65.

The *Commission* claimed that the manufacturing costs of skimmed-milk powder amounted to an average of 15 units of account per 100 kilogrammes. The costs of denaturing incurred by the contested regulation amounted to between one and three units of account per 100 kilogrammes according to the method of denaturing. The value of skimmed-milk powder as a feeding-stuff depends upon whether the product is used for feeding calves or feeding pigs and poultry. In the first case the selling price fixed by the Community for this method of use determines the market price. The selling price during the period in question amounted to 52 units of account per 100 kilogrammes of skimmed-milk powder. In the second case the market price of the product depends upon its value as a feeding-stuff in comparison with substitute products, in particular on the price of soya meal. During the period of application of the contested regulation the price of soya meal was approximately 18 units of account per 100 kilogrammes. The price of soya is at present 25 units of account per 100 kilogrammes.

The Advocate General delivered his opinion at the hearing on 7 June 1977.

2. Following the judgments of the Court of Justice of 5 July 1977 declaring that Regulation No 563/76 was null and void, the applicants in Joined Cases 83 and 94/76 and 4 and 15/77, represented by J. Gündisch, the applicant in Case 40/77, represented by J. Körnig, the Council, represented by its Legal Adviser, B. Schloh, acting as Agent, and the Commission, represented by its Legal Adviser, P. Gilsdorf, acting as Agent, presented oral argument at the hearing on 1 February 1978.

The *applicants* in Cases 83 and 94/76 and 4 and 15/77 referred to the fact that the feeding-stuffs which they had bought had contained 50 to 80 % more soya meal or other vegetable components containing protein than the feeding-stuffs which the Commission used with the help of sample calculations as the basis for the fixing of the additional burden under Regulation No 563/76 (14 % soya meal in the case of feeding-stuffs for laying hens and 25 % in the case of feeding-stuffs for pullets). It is impossible to fulfil the requirements of German legislation with regard to the necessary protein content with the proportion of soya meal laid down by the Commission. The applicants point out in addition in this connexion that the protein content of maize is only 7.5 %. Since the feeding-stuffs only contain between 40 % and 48 % maize, the protein contained in this cereal constitutes only a very small proportion of these feeding-stuffs. The other protein carriers such as lucerne are also affected by the burdens arising from Regulation No 563/76.

The applicants do not share the Commission's view that the export refunds on eggs granted during the period in which Regulation No 563/76 was in force had made it possible to mitigate the difficulties which had arisen in the poultry industry as a result of the obligation to purchase; these difficulties were on the contrary intensified by

them. The difference between the refund and the proportion designated as the "cereal factor" — which corresponds to the difference between the price on the Community market and the price on the world market for the quantity of cereals necessary for the manufacture of the product in question in the Community — was in fact between 5 and 12 units of account in 1975 and only between 2 and 4.5 units of account during the period of the obligation to purchase.

The *Commission* stated that soya is not the only component containing protein. Maize for example contains approximately 10 % protein. Where there is a high proportion of cereal components in the feeding-stuffs there is a high proportion of protein; the Commission's conclusion is therefore not rebutted. Moreover, the feeding-stuffs also contain animal protein carriers.

The export refunds on eggs were relatively high in 1975 because the price situation in this sector during that period was difficult.

With regard to fattened chickens the Commission states that the refunds rose from 5 to 8 units of account in July 1976.

The Advocate General delivered his opinion on 1 March 1978.

Decision

1 The applicants claim that the European Economic Community, represented by the Council and the Commission, should be ordered to compensate them for the damage allegedly suffered as a result of the effects of Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs (Official Journal 1976, L 67, p. 18).

2 Since the cases have been joined for the purposes of the written and oral procedure, they should continue to be joined for the purposes of the judgment.

3 In three judgments of 5 July 1977 in Case 114/76 *(Bela-Mühle)*, Case 116/76 *(Granaria)* and Joined Cases 119 and 120/76 *(Ölmühle Hamburg AG* and *Firma Kurt A. Becher)* ([1977] ECR 1211 *et seq.*) referred to the Court of Justice for preliminary rulings the Court declared that Regulation No 563/76 was null and void. It reached this conclusion on the ground that the regulation provided for the obligation to purchase at such a disproportionate price that it was equivalent to a discriminatory distribution of the burden of costs between the various agricultural sectors without being justified as a measure in order to obtain the objective in view, namely the disposal of stocks of skimmed-milk powder.

4 The finding that a legislative measure such as the regulation in question is null and void is however insufficient by itself for the Community to incur non-contractual liability for damage caused to individuals under the second paragraph of Article 215 of the EEC Treaty. The Court of Justice has consistently stated that the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

5 In the present case there is no doubt that the prohibition on discrimination laid down in the second subparagraph of the third paragraph of Article 40 of the Treaty and infringed by Regulation No 563/76 is in fact designed for the protection of the individual, and that it is impossible to disregard the importance of this prohibition in the system of the Treaty. To determine what conditions must be present in addition to such breach for the Community to incur liability in accordance with the criterion laid down in the case-law of the Court of Justice it is necessary to take into consideration the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals by legislative measures. Although these principles vary considerably from one Member State to another, it is however possible to state that the public authorities can only exceptionally and in special circumstances incur liability for legislative measures which are the result of choices of economic policy. This restrictive view is explained by the consideration that the legislative authority, even where the validity of its measures is subject to judicial review, cannot always be hindered in making its decisions by the prospect of applications for damages whenever it has occasion to adopt legislative measures in the public interest which may adversely affect the interests of individuals.

6 It follows from these considerations that individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void. In a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

7 This is not so in the case of a measure of economic policy such as that in the present case, in view of its special features. In this connexion it is necessary to observe first that this measure affected very wide categories of traders, in other words all buyers of compound feeding-stuffs containing protein, so that its effects on individual undertakings were considerably lessened. Moreover, the effects of the regulation on the price of feeding-stuffs as a factor in the production costs of those buyers were only limited since that price rose by little more than 2 %. This price increase was particularly small in comparison with the price increases resulting, during the period of application of the regulation, from the variations in the world market prices of feeding-stuffs containing protein, which were three or four times higher than the increase resulting from the obligation to purchase skimmed-milk powder introduced by the regulation. The effects of the regulation on the profit-earning capacity of the undertakings did not ultimately exceed the bounds of the economic risks inherent in the activities of the agricultural sectors concerned.

8 In these circumstances the fact that the regulation is null and void is insufficient for the Community to incur liability under the second paragraph of Article 215 of the Treaty. The application must therefore be dismissed as unfounded.

Costs

9 Under Article 69 (2) of the Rules of Procedure the unsuccessful party must be ordered to bear the costs. Since the applicants have failed in their applications they must be ordered to pay the costs.

On those grounds

THE COURT

hereby:

1. **Dismisses the applications.**

2. Orders the applicants to pay the costs.

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 25 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 7 JUNE 1977
(see [1977] ECR p 1223)

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 1 MARCH 1978 [1]

Mr President,
Members of the Court,

1. This opinion refers, as the Court is aware, to five applications lodged against the Council and the Commission under the second paragraph of Article 215 of the EEC Treaty by the undertakings Bayerische HNL, Bernd Adleff, F. X. Zollner, Christof Schwab and Johann Seidl. The applicants are claiming compensation for the damage which they state they have suffered through the effects of Council Regulation No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding-stuffs.

One very important preliminary point must be considered as established, in other words that the above-mentioned regulation is null and void. The Court declared it null and void in the judgments of 5 July 1977 in Case 114/76 *Bela-Mühle* v *Grows-Farm*, Case 116/76 *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* and Joined Cases 119 and 120/76 *Ölmühle Hamburg and Becher* v *Hauptzollamt Hamburg and Hauptzollamt Bremen-Nord* ([1977] ECR 1211 *et seq.*) which

1 — Translated from the Italian.