

with that of stabilizing markets, which the Commission sought to achieve when it laid down the rules for implementing measures for reducing stocks of skimmed-milk powder, is only partially attained, it is not possible to conclude that the legislation enacted by the Commission was unlawful *vis-à-vis* Article 39 of the Treaty since the legality of a measure can be adversely affected only if the measure is manifestly unsuitable for achieving the aim pursued.

3. As a specific expression of the general principle of equality, the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) of the EEC Treaty does not prevent comparable situations from being treated differently if such difference in treatment is objectively justified.

Consequently, the fact that subsidies are granted in respect of skimmed-milk powder, which plays a part in supporting the common organization of the market in milk and milk products, whilst they are not provided for in respect of whey, which is only a waste product of cheese-making which must be eliminated, may not be regarded as discrimination.

4. An action for damages brought under Article 215 of the Treaty for unlawful legislative action cannot succeed unless the damage alleged by the applicant exceeds the limits of the economic risks inherent in operating in the sector concerned. That principle would have to be applied *a fortiori* if the concept of liability without fault were accepted in Community law.

In Case 59/83

SA BIOVILAC NV, having its registered office in Leuze, Belgium, represented by Hans G. Kemmler, Barbara Rapp-Jung and Alexander Böhlke, Rechtsanwälte, Frankfurt am Main, with Chambers at 223-225 Rue de la Loi, Brussels, and with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34B Rue Philippe-II,

applicant,

v

EUROPEAN ECONOMIC COMMUNITY, represented by the Commission, itself represented by Jörn Sack, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto and Manfred Beschel, also members of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for an award of damages made under the second paragraph of Article 215 of the EEC Treaty,

THE COURT

composed of: Lord Mackenzie Stuart, President, G. Bosco, O. Due and C. Kakouris (Presidents of Chambers), A. O'Keeffe, T. Koopmans, U. Everling, K. Bahlmann and Y. Galmot, Judges,

Advocate General: Sir Gordon Slynn

Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the proceedings and the conclusions, submissions and arguments of the parties may be summarized as follows:

processed, namely butter and skimmed-milk powder.

I — Facts

1. Relevant legal provisions

The common organization of the market in milk and milk products, one of the aims of which is to ensure a fair income for Community producers, provides to that end for the fixing of a single target price for milk, which is guaranteed on the domestic market mainly through the national intervention agencies' buying in the principal products into which milk is

The excessive level of stocks of skimmed-milk powder held by the intervention agencies in 1982 led the Commission to bring back into force through the adoption of Regulation (EEC) No 1753/82 of 1 July 1982 (Official Journal 1982, L 193, p. 6) various "special measures" within the meaning of Article 7 (2) of Regulation (EEC) No 804/68 of the Council (Official Journal, English Special Edition 1968 (i), p. 176) which had previously been adopted to deal with an identical situation where stocks were high and market capacity low, namely Commission Regulation (EEC) No 368/77 of 23 February 1977 on the sale by tender of skimmed-milk powder for use in feed for pigs and poultry (Official Journal 1977, L 52, p. 19) and Commission Regulation (EEC) No 443/77 of 2

March 1977 on the sale at a fixed price of skimmed-milk powder for use in feed for pigs and poultry (Official Journal 1977, L 58, p. 16).

Having found that the formulae for denaturing skimmed-milk powder listed in the Annex to Regulation No 368/77 allowed that product to be used in piglet feed, the Commission, which wanted to reduce the selling price of skimmed-milk powder sold by the intervention agencies under Regulations Nos 368/77 and 443/77 and prevent skimmed-milk powder sold under those regulations from being substituted for skimmed-milk powder sold at a higher price under Regulation (EEC) No 1725/79 (Official Journal 1979, L 199, p. 1), adopted Regulation (EEC) No 2923/82 of 29 October 1982 (Official Journal 1982, L 304, p. 64) by which it adjusted the denaturing formulae laid down in Regulations Nos 368/77 and 443/77 by replacing them with new formulae for denaturing skimmed-milk powder which were intended to prevent that product from being used for feeding piglets.

2. *The facts*

In 1974 the applicant, SA Biovilac NV a Belgian undertaking, began to develop high-quality basic animal feedingstuffs which were particularly suited for producing compound feedingstuffs for poultry and piglets. Since 1978 it has marketed Kulactic and since 1980 Bioblanca; these are two products made from whey which compete with skimmed-milk powder as basic feedingstuffs for piglets and poultry.

It attributes the appreciable reduction in sales of its products since November 1982 and the drastic reduction in its sales since 1 March 1983 to Commission

Regulations Nos 368/77 and 443/77, as amended by Regulations Nos 1753/82 and 2923/82, on the ground that those regulations introduced sales of skimmed-milk powder at reduced prices by the intervention agencies and that the denaturing formulae for the skimmed-milk powder sold in that way did not prevent that product from being used in piglets and poultry-feed.

II — Written procedure

On 11 April 1983 the applicant brought an action under the second paragraph of Article 215 of the EEC Treaty against the EEC, represented by the Commission, for compensation for the damage which it allegedly suffered as a result of the enactment and implementation of Commission Regulations Nos 368/77 and 443/77, as amended by Regulations Nos 1753/82 and 2923/82.

The written procedure followed the normal course.

At the Commission's request the case was assigned to the full Court in accordance with Article 95 (2) of the Rules of Procedure.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court requested the parties to reply in writing to a number of questions before the hearing and to produce certain documents. The parties were also requested to concentrate their submissions at the hearing on specific points and to appear before the Court with their experts.

III — Conclusions of the parties

The *applicant* claims that the Court should:

1. Order the Commission to make good the loss which it "has suffered and will suffer as a result of the adoption and implementation of Commission Regulation (EEC) No 368/77 of 23 February 1977 and No 443/77 of 2 March 1977, as amended by Regulation No 1753/82 of 1 July 1982, in particular as a result of the sale of skimmed-milk powder at cut-rate prices, because the products it manufactures (staple animal food based on whey) have been rendered unsaleable and it will be forced out of business if those measures continue in operation";
2. Order the Commission to pay the costs.

The *Commission* contends that the Court should:

1. Dismiss the action as inadmissible or at any rate as unfounded;
2. Order the applicant to pay the costs.

IV — Submissions and arguments of the parties

A — In its *application* the applicant states that compound feedingstuffs for piglets and poultry can be manufactured from many different partially interchangeable basic feedingstuffs and that their composition depends on the prices at which the manufacturers are able to buy the individual staple foods required to make them.

During the final quarter of 1982 and the first quarter of 1983 the price of those products was approximately BFR 1 200 per 100 kg, or 27.92 ECU per 100 kg. However, between July 1982 and February 1983 the price of skimmed-milk powder sold by the intervention agencies under Regulations Nos 368/77 and 443/77 fell from 43 ECU per 100 kg in July to 39.5 ECU in October, 21 ECU in November and December, 20 ECU in January and then to 19 ECU in February. Sales by the intervention agencies increased correspondingly. Whereas in December 1982 sales amounted to 3 570 tonnes in January and February 1983 they had risen to 16 500 and 19 412 tonnes. However, in 1982 sales of skimmed-milk powder for compound feed for piglets subsidized under Commission Regulation No 1725/79 (Official Journal 1979, L 199, p. 1) fell by 15% in the Federal Republic of Germany as a result of the intervention agencies' sales of skimmed-milk powder at reduced prices.

In the applicant's view, the denaturing formulae inserted into Regulations Nos 368/77 and 443/77 by Regulation No 2923/82 which were intended to prevent skimmed milk sold under those regulations from being substituted for skimmed milk being sold at higher price under Commission Regulation No 1725/79, does not prevent the skimmed-milk powder sold by the intervention agencies from being used in feed for piglets. The basic animal feed obtained by the application of the denaturing formulae needs only to be extended by adding certain substances in order to make compound feedingstuffs suitable for piglets. In this regard the applicant points out that skimmed-milk powder denatured in accordance with Formula IK laid down in Regulation No 2923/82 has been on the Belgian market since 8 November 1982 and is offered at a price

of BFR 1 200 per 112.50 kg, or 23.71925 ECU per 100 kg, which is considerably lower than the price of 27.92 ECU per 100 kg for its products.

The damage

In the applicant's view, the measures adopted by the Commission were and are responsible for the damage it has suffered and will suffer in the future. With regard to the damage it has already suffered, it states that, since the commencement in July 1982 of the intervention agencies' sales of skimmed-milk powder as part of the special measures, most supply contracts with its purchasers, which were concluded for periods between two and six months, have been cancelled, curtailed or simply not renewed. The damage it will suffer in the future consists of a further decline in its sales, the collapse of its business and its inability to fulfil its contracts to buy whey from its suppliers, the manufacturers of milk products.

Claim for damages in respect of an unlawful act

The applicant contends that the measures adopted by the Commission are unlawful because they infringe (i) Article 39 of the EEC Treaty, (ii) the prohibition of discrimination laid down in the second paragraph of Article 40 (3) of the EEC Treaty and (iii) the right to carry on an established business and the right to the protection of property.

1. Breach of Article 39 (1) (c) of the EEC Treaty

According to the applicant, the measures are unlawful because they are inappropriate for achieving the aim of stabilizing markets referred to in Article 39 of the

Treaty and mentioned in the fourth recital of the preamble to Regulation No 804/68 and are therefore also unnecessary for achieving that purpose. The denaturing formulae laid down by Regulation No 2923/84 do not prevent the skimmed milk sold under Regulations Nos 368/77 and 443/77 from being substituted for the skimmed milk sold at a higher price under Regulation No 1725/79. The market in skimmed-milk powder for feeding to calves, piglets and poultry, subsidized under Regulation No 1725/79, has been affected by the sales of powdered milk pursuant to the special measures.

2. Breach of the second paragraph of Article 40 (3) of the EEC Treaty

According to the applicant, the measures adopted by the Commission infringe the prohibition of discrimination by making it impossible for it to keep its products competitive with skimmed-milk powder.

3. Infringement of the right to carry on an established business and of the right to the protection of property

The applicant points out that in its judgment of 13 December 1979 in Case 44/79, *Hauer v Land Rheinland-Pfalz*, [1979] ECR 3727 the Court recognized that the right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States and argues that the right to carry on an established business, which is recognized in particular in German law, also forms part of the *corpus* of fundamental rights existing in Community law. The measures adopted by the Commission are akin to an expropriation of property since they deprive the applicant's property and business of all commercial value.

Claim for damages in respect of a lawful act

The applicant contends that, even if the measures adopted by the Commission are not unlawful, the Community must nevertheless make good the damage suffered by an individual in consequence of general lawful rules if he is particularly affected by them, namely if he is affected in a different way and far more seriously than the Community at large. In this regard it refers to the German law concept of "Sonderopfer" [special sacrifice] and the French law concept of "rupture de l'égalité devant les charges publiques" [unequal discharge of public burdens].

B — In its *defence* Commission makes submissions on the following questions.

*Admissibility of the action**Preventive action for damages**Action in respect of an unlawful act*

The Commission takes the view that the action brought by the applicant is a preventive action for damages limited to obtaining a declaration that the Community is liable to pay damages.

Whilst acknowledging that in its judgment of 2 June 1976 in Joined Cases 56 to 60/74, *Kampffmeyer v Commission and Council*, [1976] ECR 711 and of 2 March 1977 in Case 44/79, *Milch-, Fett- und Eier-Kontor GmbH v Council and Commission*, [1977] ECR 393 the Court admitted preventive actions provided that the damage was imminent and foreseeable with sufficient certainty, the Commission considers that a

preventive action is not admissible in this case because the applicant has not provided sufficient evidence that at the time when the action was brought damage due to specific measures adopted by the Community was foreseeable with sufficient certainty. At the time when the applicant put its products on the market the intervention agencies were already selling skimmed-milk powder for animal feed at prices even lower than the current prices and there was no denaturing method for preventing the product from being fed to piglets. Those circumstances did not prevent the applicant from increasing its sales. In the Commission's view, it is not clear how the resumption of sales of skimmed-milk powder by the intervention agencies should infallibly have caused the applicant damage within a few months.

Action in respect of a lawful act

In the Commission's view, a preventive action for damages in respect of lawful legislative action is inadmissible in any case. On this question the Commission contends in particular that determining whether and to what extent compensation is to be awarded on account of a lawful act depends very much on the nature and extent of the damage suffered. The person concerned should therefore wait until the nature and extent of the damage are clearly established before bringing his action.

Action against national measures

Relying in particular on the Court's judgment of 12 December 1979 (in Case 12/79, *Wagner v Commission*, [1979] ECR 3657, of 27 March 1980 in Case 133/79, *Sucrimex v Commission*, [1980] ECR 1299 and of 10 June 1982 in Case

217/81, *Interagra v Commission*, [1982] ECR 2233, in which the Court dismissed as inadmissible actions brought against Community institutions and directed against measures taken by national agencies in implementation of Community law, the Commission contends that this action is inadmissible because the applicant is primarily contesting the measures adopted by the intervention agencies, namely their sales of stored skimmed-milk powder at fixed prices. Certain aspects of this case suggest that the objection of inadmissibility should be dismissed; however, it was raised merely in order to clarify certain points on the question of admissibility.

Substance

Claim for damages in respect of an unlawful act

The Commission argues that, according to a consistent line of decided cases (judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL v Council and Commission*, [1978] ECR 1209 and of 5 December 1979 in Joined Cases 116 and 124/77, *Amylum v Council and Commission*, [1979] ECR 3497), a right to compensation for damage caused by Community legislative action involving choices of economic policy arises only if the institutions have committed a sufficiently serious breach of a superior rule of law for the protection of the individual and thus manifestly and gravely disregarded the limits on the exercise of their powers, provided that the applicant proves that there is a causal link between the infringement and the damage actually suffered.

The Commission takes the view that in effecting special sales of skimmed-milk powder from intervention stocks and in granting special aids for that product for feeding to pigs and poultry it acted within the limits of the powers granted to it by the Council under Article 155 of the EEC Treaty. The second subparagraph of Article 7 (2) of Regulation No 804/68 of the Council provides that special measures may be taken in order to dispose of skimmed-milk powder which cannot be marketed on normal terms during a milk year. In accordance with Article 7 (4) of that regulation, the Council, by Regulation No 1285/70 (Official Journal, English Special Edition 1970 (II), p. 407), made it possible for skimmed-milk powder to be sold at reduced prices as pig and poultry-feed. The Commission adopted Regulations Nos 368/77 and 443/77 on that basis.

The decision on the fixing of prices, in which the Commission has a wide discretion, depends on a number of factors: the price of the products competing with skimmed-milk powder, the level of stocks and storage costs, future trends in supply and demand, the costs arising from special operations and, finally, alternative ways of dealing with the problem of surpluses. The disturbingly high level of stocks, the impossibility of increasing exports owing to the keen competition from the other milk-product exporting States (United States of America, New Zealand, Australia), the Council's inaction with regard to the Commission's proposals to reduce the surpluses and the particularly low prices of vegetable feedingstuffs competing with skimmed-milk powder which were imported into the Community (the price of soya imported from the United States of America was between 17 and 18 ECU per tonne)

justified the fixing of the price of skimmed-milk powder for feeding to pigs and poultry at approximately 20 ECU per tonne. The Commission therefore exercised its discretion properly and within the political and legal limits set by the Council.

As far as the way in which the sales were effected and the aids granted is concerned, the Commission states that, after learning that heavily-subsidized milk powder under Regulation No 1725/79 was being used to feed piglets, it did what it could to prevent it from being used for that purpose in future. Furthermore, it adopted that legislation in the financial interests of the Community and not out of a duty to certain producers not to subsidize piglet-feed more than was necessary. The difficulty in adopting such a measure is that it is necessary to prevent the product in question from being used for feeding to piglets whilst ensuring that it remains suitable for feeding to pigs. It is not easy to make a clear distinction between pigs and piglets on the basis of their age and weight. Therefore, the denaturing measures adopted could not have been designed to prevent for certain milk powder disposed of pursuant to special measures from being used, directly or in mixtures with other products, to feed large piglets or even young pigs. The main products used as a denaturing agent are mustard and cellulose. Adding mustard to milk powder gives it a slightly pungent smell which invariably results in a considerable reduction in food intake and therefore in a much slower rate of growth in piglets of up to 7 kg in weight and in the case of piglets weighing more than about 10 to 12 kg in a loss of appetite which involves certain risks for the breeder. Adding cellulose causes diarrhoea in young piglets, which involves considerable risks for their health and growth. As with the addition of mustard, the larger the animal the

lower is the risk but relatively old piglets are still at risk, even when pure skimmed-milk powder is mixed with the product denatured in that way.

Infringement of Article 39 of the EEC Treaty

In the Commission's view, it follows from its arguments that the contested measures are consistent with the aims of Article 39 of the EEC Treaty. Besides, the applicant may not rely on those general aims as rules of law affording it protection.

Infringement of Article 40 (3) of the EEC Treaty

The Commission contends that the applicant has not been treated any less favourably than other comparable producers of piglet and poultry-feed.

Causal link

Referring to its submissions on the admissibility of a preventive action for damages in respect of an unlawful act, the Commission submits that the applicant has failed to establish a causal link between the measures adopted and the damage which it allegedly suffered. It has not adequately explained how the measures are supposed to have brought its business to a standstill now — in contrast to the position in 1978.

Damage

In the Commission's view, the applicant has expressed only fears and vague assertions about the damage which it has allegedly suffered. However, a mere presumption of damage cannot make an action for damages brought against the Community institutions succeed. The applicant ought to have proved that it has actually suffered damage.

Claim for damages in respect of a lawful act

Although the Commission accepts that the Court has not yet decided whether and in what circumstances the institutions may incur liability for lawful acts, it takes the view that in this case there is no obligation to pay compensation.

The applicant's reference to fundamental rights to establish such liability is inappropriate. This case does not involve expropriation of property or a restriction on the use of property. A change in the basic legal and economic conditions does not amount to an infringement of the applicant's right to property.

The fact that the applicant ought to have expected the special sales at reduced prices to be "brought back into force" at any time in view of the situation on the milk-powder market excludes any question of compensation. When the applicant extended its business, the provisions authorizing such sales were suspended only temporarily. Referring to the Court's judgment of 4 February 1975 in Case 169/73, *Compagnie Continentale France v Council* [1975] ECR 117,

it argues that a businessman who consciously takes a risk cannot claim compensation for interference with his trade or his property. The factual and legal situation existing at the time when a business is commenced and the foreseeable developments of that situation are part of the normal risks that any trader runs and afford no grounds for invoking the German law concept of "Sonderopfer" or the French law concept of "rupture de l'égalité devant les charges publiques".

C — In its *reply* the applicant makes *inter alia* the following submissions:

Admissibility of the action

Preventive action for damages

The applicant explains that at the time when it lodged its application it did not have precise details of the extent of the damage suffered which could be expressed in monetary terms. It could only prove that, one after the other, its major customers, with reference to the cut-price sales of skimmed-milk powder, reduced the quantities they purchased, demanded a price reduction or entirely ceased to purchase the applicant's products. In its application it estimated its loss of sales, on 30 June 1983, at probably 540 tonnes a month. Taking into account the price of its products, the Commission could imagine the damage it suffered. The applicant was unable to quantify that loss in precise monetary terms when it brought its action because it did not have any details of costs based on its accounts for 1982 which had not been drawn up by then. The Commission is therefore wrong to describe its action as a preventive action for damages in

respect of an unlawful act or as a preventive action for compensation in respect of a lawful act.

Action against national measures

The applicant states that it considered the possibility of bringing an action against the national authorities but in the circumstances of the case decided that such a procedure would have been too long for it to survive. Moreover, it seemed impossible to choose the Member State in which to institute proceedings.

Substance

Claim for damages in respect of an unlawful act

The applicant emphasizes that it has no objection to Regulations Nos 804/68 and 1285/70 on the basis of which the Commission adopted Regulations Nos 368/77, 443/77 and 1844/77; its complaint is that the Commission acted unlawfully in implementing those regulations.

Breach of Article 39 (1) (c) of the EEC Treaty and of fundamental rights.

The applicant takes the view that the Commission ought at least to have attempted to comply with the injunction "to stabilize markets" contained in Article 39 (1) (c) of the Treaty. The measures adopted by the Commission and the explanations given by it only suggest an almost fanatical effort to deal with one aspect of the organization of the market in milk, namely the reduction of surpluses at any price.

The market in piglet-feed has been fundamentally destabilized by the implementation of Regulations Nos 1725/79 and 2923/82. The price of skimmed-milk powder for feeding to piglets varies between 18.50 ECU per 100 kg and approximately 84.23 ECU per 100 kg, depending on whether it is sold under subsidy under Regulations Nos 368/77 and 443/77 or whether it is sold under subsidy under Regulation No 1725/79. The Commission itself admits that it has not succeeded in preventing skimmed-milk powder sold pursuant to the special measures from being used as piglet-feed, although Regulation No 2923/82 states that the substituting of skimmed-milk powder denatured in accordance with its provisions for skimmed milk sold under Regulation No 1725/79 "should not be permitted". The Commission justified that fact by pointing out that the "aim" of the new denaturing methods was not infallibly to prevent denatured skimmed-milk powder from being used for feeding to "large piglets" weighing between 10 and 12 kg or even "young pigs" weighing less than 30 kg and that when it referred to piglets or piglet-feed in its policy for regulating the market it meant only small piglets weighing less than 7 kg. That argument is purely defensive and does not correspond to the reality of pig-breeding and of the pig-trade since it is clear from a number of publications that the term "piglet" means young pigs weighing up to 30 kg and not, as the Commission claims in this case, animals aged between five to six weeks weighing up to 7 kg or animals weighing up to approximately 10 to 12 kg.

Finally, with regard to the Commission's contention that it has not proved that a legal rule protecting it has been infringed, the applicant refers to the submissions it made in its application concerning the infringement of the

fundamental right to carry on an established business and of the right to the protection of property; it has nothing to add to those submissions.

Breach of Article 40 (3) of the EEC Treaty

The applicant states that its products compete with skimmed-milk powder on the market in piglet-feed. Its competitors are not merely the intervention agencies, which sell skimmed-milk powder at the price fixed by the Commission, but all persons and undertakings which receive, directly or indirectly, high aids for skimmed-milk powder which they use to manufacture piglet-feed. Those aids reduce the market price of skimmed-milk powder to a level which substantially reduces sales of its products or makes them impossible. The applicant considers that result a clear breach of Article 40 (3) of the Treaty.

Causal link

The Commission's assertion that the selling prices of skimmed-milk powder charged by the intervention agencies between 1977 and 1979 were already lower than the selling prices of its own products is incorrect. The lowest Commission price during that period (at the end of 1977) was 11.5 ECU per 100 kg or BFR 567.50 per 100 kg. The lowest price at which it sold Kulactic was BFR 650 per 100 kg in the second half of 1978. At that time the price of skimmed-milk powder sold by the intervention agencies was between BFR 666 and 790 per 100 kg.

Since it is established that the applicant's products and skimmed-milk powder were in competition and that there was a

price difference between them which was detrimental to the applicant, it is clear that the special measures adopted by the Commission were responsible for ousting its products from the market in compound piglet-feed.

In order to prove the existence of a causal link the applicant produces letters which it sent to its customers confirming in writing the conversations it had with them. In the course of those conversations the customers informed the applicant of their intention to reduce the amount of products purchased from it or cease buying its products altogether; they pointed out that it was possible to obtain skimmed-milk powder from the intervention agencies at a lower price. Should the Commission dispute the accuracy or completeness of those documents the applicant requests the Court to order the persons responsible in the undertakings concerned to give evidence on oath.

Damage

The applicant gives details of the damage which it suffered from October 1982 to 30 June 1983 and quantifies it at BFR 7 101 377. It estimates that the damage it has suffered or will suffer as from 1 July 1983, in so far as it is foreseeable and calculable, is BFR 1 847 467 a month, which corresponds to a monthly loss of 500 tonnes. It also indicates the method by which it quantified its loss.

Future damage, which cannot yet be precisely calculated, will arise mainly from its closing-down and the dismissal of its workforce. It provisionally estimates the compensation due to it in the event of its business closing down to be at least BFR 200 million.

Claim for damages in respect of a lawful act

The applicant states that it does not in any way owe its business to the legislative and economic framework established by the Community. The Commission cannot criticize it for having sought, in 1974, possible ways of upgrading whey from which it manufactures its products and which can be obtained in the Community at a moderate price.

It could not have anticipated that, in disregard of all the other aims laid down in Article 39 (1) of the Treaty, milk policy would be directed in the long term solely towards ensuring a fair standard of living for farmers by means of political prices for agricultural products. It is out of the question that it ought to have expected the Commission to adopt measures to reduce skimmed-milk powder surpluses by "every" means, including those which were to oust its products from the market in feedingstuffs. There was even less reason for it to expect measures which would oust its products from the market in feed for piglets since, as the Commission has itself admitted, those measures were not meant to affect that market at all.

D — In its *rejoinder* the Commission makes, *inter alia*, the following points.

*Admissibility of the action**Action against national measures*

The Commission points out that, according to the criteria laid down by the Court in its decisions, the action

must be regarded as inadmissible because the applicant is primarily contesting measures adopted by the intervention agencies (sales of skimmed-milk powder at fixed prices), even though those measures are based on Community law. However, as it has already stated, certain equitable grounds might nevertheless suggest that the action should be admitted.

Preventive action for damages

The applicant gave details of the nature and extent of the damage which it has allegedly suffered and supported its claim with figures for the first time in its reply. Although Article 42 (1) of the Rules of Procedure allows further evidence to be produced at that stage, the party producing it must give reasons for the delay in its presentation. The Commission considers that the applicant has not given any good reason why it produced the evidence only in its reply. It is clear from its statements that it was already in possession of all the evidence when it brought its action. The fact that the accounts for 1982 had not been finalized at the beginning of April 1983 is its own fault and that excuse makes it clear it only wished to gain time. However, that is not a good reason for not complying with the rules of procedure which are intended not only to facilitate the work of the Court but also to enable the other party to defend himself in an appropriate manner. The delay in producing that evidence must make it inadmissible. The applicant cannot rely on the facts and figures which it adduced at a later stage.

It follows that the claim for compensation in respect of a lawful act is clearly inadmissible. The claim for damages in respect of an unlawful act must also be inadmissible because

otherwise many applicants would deliberately refrain from producing their main evidence until the reply stage in order to restrict the other party's opportunity to defend itself.

Substance

The Commission emphasizes in particular that the purpose of sales of skimmed-milk powder at a reduced price is gradually to eliminate from the market vegetable protein-bearing commodities, such as soya for animal feed. The political responsibility for the high surpluses lies primarily with the Council since it often increased prices above the level proposed by the Commission and introduced moderating mechanisms only with great reluctance. Since the common organization of the market made the Commission responsible for the disposal of stocks, it could not escape that responsibility and therefore had to use all the means which the Council put at its disposal.

As far as the denaturing of skimmed-milk powder sold by the intervention agencies is concerned, the Commission's view is that it is quite impossible to denature powdered milk in such a manner that it cannot be eaten by piglets weighing between 15 and 30 kg but can still be used for feeding pigs weighing more than 30 kg. The colouring of the powdered milk suggested by the applicant would be totally ineffective unless it was accompanied by regular checks on the breeder's premises because the addition of a colouring agent does not render the powder inedible. In view of the great number of pig breeders, such checks would be impossible. In any case, it cannot be disputed that the denaturing methods laid down are effective in the case of piglets aged between one and seven weeks weighing between 12 and 15 kg. The Commission suggests that expert

evidence be heard by the Court on this point.

Causal link

The Commission accepts that it was possible that between 1977 and 1979 the applicant's prices were never higher than those of the intervention agencies; nevertheless, its prices were at any rate very close to the intervention agencies' since in the second quarter of 1978 there was a difference of only a few Belgian centimes.

It points out that the applicant's prices increased, particularly between 1978 and 1982, from BFR 650 per 100 kg (at the end of 1978) to BFR 1 200 per 100 kg (at the end of 1982), although the average rate of inflation in Belgium at that time was only 10%. If the applicant had kept price increases within that limit, the relationship between its sale prices and those of the intervention agencies would be the same as in 1978 and 1979 when the applicant's business was particularly prosperous. The change in the competitive position and the fact that skimmed-milks powder is now cheaper, than the applicant's products are not due to a change in the Commission's selling policy after 1977 to 1979 but to a substantial increase in the applicant's selling prices.

In this connection the Commission also points out that the applicant has produced only letters which it sent to customers and not letters sent by customers. The hearing of witnesses suggested by the applicant should make in clear whether and for which reasons the special sales actually affected the applicant so much more severely than in previous years.

Damage

In case the Court should admit the evidence produced by the applicant in

its reply regarding the damage it has suffered despite the delay in its production, the Commission considers that it must raise a number of objections of detail and an objection of principle.

As regards the objections of detail, it objects to the applicant's method of calculating its production costs for 1 kg of dry matter. The production costs are kept artificially low because the applicant does not take into account general operating costs, finance costs, royalties and so on. The applicant also made a mistake in stating that Kulactic consists of 9% water, 33% whey and 67% bran, amounting in total to 109%; that error distorts its estimated loss. After correcting that error the Commission calculates that the theoretical loss arising from the loss of sales to the customer Heus amounts to BFR 1 233 000 and not BFR 1 242 000 as calculated by the applicant. Subject to further reservations, the Commission finally states that the applicant's statements about future damage are too vague for it to be able to reply to them at this stage of the procedure.

As regards the objection of principle, the Commission argues with reference to the Court's judgment of 4 October 1979 in Joined Cases 64 and 113/76, 239/78, 27, 28 and 45/79, *Dumortier v Council* [1979] ECR 3091, at p. 3177, that the principles common to the laws of the Member States to which the second paragraph of Article 215 of the EEC Treaty refers cannot be relied upon to found an obligation to make good every harmful consequence, however remote, of unlawful provisions. The difficulties experienced by the applicant must be regarded as remote consequences. Even assuming that the Commission acted unlawfully, the applicant cannot assert

such a broad right to damages. It certainly cannot require a specific profit margin to be guaranteed and the consequences of a close-down of its business must be regarded as very remote. The most which the applicant could claim is very limited compensation in respect of sales at particularly low prices.

Claim for damages in respect of an unlawful act

The Commission argues that, since the means of eliminating milk surpluses put at its disposal by the Council are limited, it could only try to dispose of the surpluses on the world market or find ways of disposing of powdered milk on the internal market which are usually excluded in the case of that product because of the Community price-support system. Since the world market no longer had hardly any absorption capacity, the Commission could only use the internal market. The market in pig and poultry-feed had considerable absorption capacity whereas the capacity of the market in piglet-feed was much more limited. Owing to the keen competition from vegetable protein-bearing products based on soya, the only possibility remaining was to sell powdered milk at very low prices as an additive to pig and poultry-feed otherwise the product would not have been sold at all and the consequent loss for the Community would have been much higher (increased storage costs and deterioration of the product). Since there was little chance of disposing of the product on the market in piglet-feed and in view of the high prices on that market, the Commission could not introduce a control system so strict as to prevent the disposal of the

product on the much larger market in pig and poultry-feed.

Infringement of Article 39 (1) of the EEC Treaty

In view of its submissions the Commission considers that there has been no breach of Article 39 of the EEC Treaty or of Article 7 (2) of Regulation No 804/68 since it adopted the only means available to it to stabilize the markets and took into account all relevant interests. In any case, the aforementioned provisions do not constitute rules for the protection of individuals.

Infringement of the right to property and of the right to pursue a business activity

The Commission considers it questionable whether the protection of the right to exercise a business activity afforded by Community law under the second paragraph of Article 215 of the EEC Treaty is as wide as under German law to which the applicant refers. In any event, it did not deprive the applicant of any property or restrict the use of its property in any way or impose the slightest restriction on the pursuit of its business activity.

Breach of Article 40 (3) of the EEC Treaty

The applicant has not shown how it has been arbitrarily treated less favourably

than other producers and traders in a comparable situation. The Commission's measures are not arbitrary and affect all those producing or dealing in substitutes for powdered milk in the same way.

Claim for compensation in respect of a lawful act

The Commission submits that for the Community to be liable for the consequences of a lawful act — provided that such liability is covered by Article 215 of the EEC Treaty — there must not only be a serious interference with the property of the person concerned but the interference must also occur in circumstances which are not within in the general conditions laid down by the legal system for the exercise of economic activity. In this case there was no interference with the applicant's property since it ought to have anticipated special sales at particularly low prices.

V — Oral procedure

The parties presented oral argument at the sitting on 7 June 1984.

The Advocate General delivered his opinion at the sitting on 18 September 1984.

Decision

- 1 By application lodged at the Court Registry on 11 April 1983 SA Biovilac NV, which since 1978 has manufactured and marketed Kulactic and since 1980 Bioblanca, two basic feedingstuffs for piglets and poultry made from

they, brought an action under the second paragraph of Article 215 of the EEC Treaty for compensation for the damage which it allegedly suffered as a result of the enactment and implementation of certain Commission regulations.

- 2 The applicant contends that the alleged damage — an appreciable reduction in the sales of its products since November 1982 and a drastic reduction in those sales since 1 March 1983 — was caused by Regulation (EEC) No 368/77 of 23 February 1977 on the sale by tender of skimmed-milk powder for use in feed for pigs and poultry (Official Journal 1977, L 52, p. 19) and by Regulation (EEC) No 443/77 of 2 March 1977 on the sale at a fixed price of skimmed-milk powder for use in feed for pigs and poultry (Official Journal 1977, L 58, p. 16), as amended by Regulation No 1753/82 of 1 July 1982 (Official Journal 1982, L 193, p. 6) and by Regulation No 2923/82 of 29 October 1982 (Official Journal 1982, L 304, p. 64). Regulation No 1753/82 brought back into force Regulations Nos 368/77 and 443/77 on the sale at a reduced price by the intervention agencies of skimmed-milk powder for feeding to pigs and poultry. Regulation No 2923/82 inserted into those two regulations new denaturing formulae for skimmed-milk powder sold at reduced prices. According to the applicant, those formulae do not prevent skimmed-milk powder sold by the intervention agencies from being used as basic feed for piglets, although that is contrary to their intended purpose.
- 3 The applicant's action is primarily based on the alleged illegality of the measures adopted by the Commission. Only in the alternative, in case those measures should be regarded as lawful, does it contend that the Community is still liable because the general scheme introduced by the Commission imposed a "special sacrifice" on the applicant.

Admissibility

- 4 The Commission contests the admissibility of the action on several grounds.

Failure to have recourse to national remedies

- 5 In the Commission's view, the applicant ought to have brought its action for damages in the national courts since it is directed above all against measures

which the national authorities adopted in implementation of Community law, namely the sales of skimmed-milk powder at reduced prices by the intervention agencies.

- 6 It must be observed with regard to that objection that in its application the applicant does not challenge the measures adopted by the national authorities to implement Community law but the Commission's measures themselves since it is clear from its arguments that it complains that by enacting Regulation No 1753/82 the Commission brought back into force Regulations Nos 368/77 and 443/77 and secondly that in enacting Regulation No 2923/82 it failed to insert into those regulations denaturing formulae which would have effectively prevented the skimmed-milk powder sold by the intervention agencies from being substituted for powder sold under Commission Regulation No 1725/79 of 26 July 1979 (Official Journal 1979, L 109, p. 1) for use as feed for piglets. According to the applicant, the establishment of that scheme by the Commission caused the damage for which it claims compensation.

- 7 It follows from the above observations that the Court has jurisdiction in this case and that it must therefore examine the question whether the enactment of those regulations may give rise to liability on the part of the Community by virtue of its legislative action. The objection of inadmissibility based upon the failure to have recourse to national remedies must therefore be rejected.

The objection that the action is preventive

- 8 The second ground on which the Commission contests the admissibility of the action is that it is preventive. It contends that, in so far as the action is based on the alleged illegality of the regulations adopted by the Commission, the applicant has not provided sufficient evidence that at the time when proceedings were instituted damage due to certain measures adopted by the Community was foreseeable with sufficient certainty. As regards the contention that the Community is liable even in the absence of any illegality, it argues that the very nature of such an action requires that the nature and extent of the damage should be clearly established at the time when it is brought.

- 9 In this regard it must be borne in mind that the Court has repeatedly held that Article 215 of the Treaty does not prevent an application from being made to the Court for a declaration that the Community is liable for imminent damage which is foreseeable with sufficient certainty, even if the damage cannot yet be precisely assessed. In that regard, it must be noted that the applicant stated in its application, without being contradicted, that skimmed-milk powder denatured in accordance with Formula IK laid down in Regulation No 2923/82 had been on sale on the Belgian market as basic feed for piglets since November 1982. In producing a table comparing the prices of its products with the prices of the skimmed-milk powder sold by the intervention agencies the applicant has therefore sufficiently demonstrated that the alleged damage is imminent and foreseeable. The objection of inadmissibility based on the preventive nature of the action must therefore be rejected.

Liability arising from the alleged illegality of certain regulations

- 10 As the Court confirmed once again in its judgment of 17 December 1981 (in Joined Cases 197 to 200, 243, 245 and 247/80, *Ludwigshafener Walzmühle v Council and Commission* [1981] ECR 3211, at p. 3246), in order for the Community to incur non-contractual liability for an unlawful act a number of conditions must be met as regards the unlawfulness of the conduct alleged against the institutions, the existence of damage and the existence of a causal link between that conduct and the alleged damage; if the legislative act in question involves choices of economic policy, liability is not incurred unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. In this regard the Court has stated, in particular in its judgment of 25 May 1978 (in Joined Cases 83 and 94/76, 4, 15 and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others v Council and Commission*, [1978] ECR 1209, at p. 1224, that it is necessary to establish, having regard to the relevant principles of the legal systems of the Member States, that the institution in question has manifestly and gravely disregarded the limits on the exercise of its powers.
- 11 To support its contention that the measures adopted by the Commission are unlawful, the applicant puts forward four submissions: first, that the aim "to stabilize markets" referred to in Article 39 (1) (c) of the EEC Treaty and

defined more specifically in Article 7 (2) of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176) was disregarded; secondly, that the prohibition of discrimination laid down in Article 40 (3) of the Treaty was contravened; thirdly, that the right to property and the right to carry on an established business was infringed and fourthly that the principle of the protection of legitimate expectation was disregarded. The applicant contends that all those rules are superior rules of law which the Commission must observe when enacting regulations.

- 12 With regard to the first submission, the applicant states that the bringing back into force of Regulations Nos 368/77 and 443/77 by Regulation No 1753/82 and the insertion in those regulations by Regulation No 2923/82 of denaturing formulae which were unsuitable for preventing skimmed-milk powder sold under Regulations Nos 368/77 and 443/77 from being substituted for powder sold under Regulation No 1725/79 led to a destabilization of the market in skimmed-milk powder for use as feed for piglets contrary to the aim referred to in Article 39 of the Treaty and defined more specifically in the first subparagraph of Article 7 (2) of Regulation No 804/68.
- 13 The Commission responds by contending that, in view of the large surpluses of skimmed-milk powder and the limited means put at its disposal by the Council for reducing the large stocks held by the intervention agencies, it took the only course open to it by bringing back into force Regulations Nos 368/77 and 443/77 on the sale at a reduced price of skimmed-milk powder for use as pig and poultry-feed and that its action was *intra vires* since the second subparagraph of Article 7 (2) of Regulation No 804/68 empowers it to adopt special measures to dispose of skimmed-milk powder which cannot be marketed on normal terms during a milk year. The particularly low price of products competing with skimmed-milk powder on the market in pig and poultry-feed, especially the price of soya imported from the United States, which was approximately 17 to 18 ECU per tonne, justified the fixing of the price of skimmed-milk powder for feeding to pigs and poultry at approximately 20 ECU per tonne.

- 14 After learning some time after the bringing back into force of Regulations Nos 368/77 and 443/77 that, owing to the denaturing formulae laid down in those regulations, skimmed-milk powder sold under them was being increasingly used as a substitute for skimmed-milk powder subsidized under Regulation No 1725/79, it adopted Regulation No 2923/82 by which new denaturing formulae were inserted into Regulations Nos 368/77 and 443/77 with the intention of preventing such skimmed-milk from being used in feed for piglets.
- 15 The Commission points out that it is difficult, if not impossible, to find a denaturing method which is harmless to animals weighing more than 25 kg whilst making the skimmed milk totally unsuitable for animals weighing less than 25 kg. It does not dispute that the method suggested by the applicant, namely the incorporation of a colouring agent in the skimmed-milk powder sold by the intervention agencies, could have been used instead of the denaturing methods. However, since the effectiveness of such a measure depended on the establishment of a system of checking pig-breeding farms, it was ultimately less suitable than the denaturing method finally adopted, given the particularly high number of pig-breeding farms in the Community (approximately 2 000 000) and the high costs which such a measure would involve. Besides, the provisions cited by the applicant do not constitute rules of law for the protection of the individual.
- 16 The submission that the aim referred to in Article 39 (1) (c) and described more particularly in the first subparagraph of Article 7 (2) of Regulation No 804/68 was disregarded cannot be upheld. In this regard it need only be observed first of all that, as the Court has stated on numerous occasions, the institutions must reconcile the various aims laid down in Article 39, which does not allow any one of those aims to be pursued in isolation in such a way as to make the attainment of other aims impossible. Regulation No 1753/82 was adopted pursuant to the general policy applied to milk products. One of the main aims of that policy is to ensure that Community milk producers in accordance with Article 39 (1) (b) of the EEC Treaty receive a reasonable income through the fixing of a target price for milk which is guaranteed by intervention buying of the principal products into which milk is processed, namely butter and skimmed-milk powder; in that

regard the regulation constitutes a supplementary measure for attaining that aim.

- 17 Furthermore, the introduction of denaturing methods which — as is shown by the first recital in the preamble to Regulation No 2923/82 — were intended to prevent skimmed milk sold under Regulations Nos 368/77 and 443/77 from being substituted for skimmed milk sold at a higher price under Regulation No 1725/79 is sufficient proof that the Commission made an attempt when implementing the measures for reducing stocks of skimmed-milk powder to reconcile the aim of ensuring a fair standard of living for the agricultural community with the aim of stabilizing markets. The fact that the technical methods of denaturing chosen to achieve that aim subsequently proved to be partially ineffective does not alter the appraisal of the legality of the contested legislation *vis-à-vis* Article 39 of the Treaty since the legality of a measure can be adversely affected only if the measure is manifestly unsuitable for achieving the aim pursued by the competent Community institution.
- 18 With regard to the submission alleging an infringement of the second subparagraph of Article 40 (3) of the Treaty, according to which the common organization of the markets must exclude any discrimination between producers or consumers within the Community, the applicant points out that products manufactured from whey and skimmed-milk powder are both covered by the common organization of the market and contends that the latter product has received greater preferential treatment through numerous direct and indirect subsidies than products made from whey.
- 19 That is not an argument capable of casting doubt on the legality of the Commission measures at issue. In a consistent line of decisions the Court has held that, as a specific expression of the general principle of equality, the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) of the EEC Treaty does not prevent comparable situations from being treated differently if such difference in treatment is objectively justified. The granting of direct or indirect subsidies in respect of skimmed-milk powder is objectively justified owing to the very nature of the product

and the market-supporting role it consequently plays in the common organization of the market in milk and milk products, whilst whey does not have those characteristics. The latter product is a waste produce obtained in the making of cheese and normally must be eliminated by the cheese manufacturers concerned.

- 20 The different treatment of those two products is therefore based on objective differences arising from the economic circumstances underlying the common organization of the market in milk and milk products and cannot therefore be regarded as discriminatory.
- 21 As its third submission the applicant contends that the regulations in question have infringed its right to property and its right to carry on an established business. The latter right, which is recognized in particular by German law, is, like the right to property of which it is a corollary, one of the fundamental rights guaranteed by the Community legal order. In their substance or scope those two rights form absolute limits on the action of Community institutions. The measures adopted by the Commission amount to unlawful expropriation because they reduce the profitability of its business to such an extent as to place its very existence in jeopardy.
- 22 That argument cannot be accepted. The measures adopted by the Commission do not deprive the applicant of its property or of the freedom to use it and therefore do not encroach on the substance of those rights. Even though those measures may, as the applicant maintains, have a detrimental effect on sales of its products, that negative effect cannot be regarded as an infringement of the substance of those rights, particularly where, as in this case, the detrimental effect is merely an indirect consequence of a policy with which aims of general public interest are pursued which vary greatly, depending on the economic factors affecting market trends and on the general direction of the common agricultural policy.

- 23 In this regard it must be emphasized, as the Court has already stated in particular in its judgment of 27 September 1979 in Case 230/78, *SpA Eridania — Zuccherifici Nazionali and Another v Minister for Agriculture and Forestry and Others*, [1979] ECR 2749, that an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time.
- 24 The applicant's fourth submission, which is that the measures adopted by the Commission constituted a breach of the principle of the protection of legitimate expectation, was put forward by the applicant for the first time at the hearing and therefore constitutes a fresh issue within the meaning of Article 42 (2) of the Rules of Procedure. That submission cannot therefore be considered.
- 25 It follows from the foregoing considerations that the applicant has neither established a serious breach of a superior rule of law for the protection of the individual nor shown that the regulations at issue are in any respect unlawful.
- 26 The claim that the Community is liable for an unlawful act must therefore be dismissed.

Liability in the absence of illegality

- 27 To support its alternative claim the applicant relies on the German law concept of "Sonderopfer" [special sacrifice] and the French law concept of "rupture de l'égalité devant les charges publiques" [unequal discharge of public burdens]; it contends that, even in the absence of any illegality, the Community is nevertheless liable, under the second paragraph of Article 215 of the EEC Treaty, to make good any loss of property which an individual suffers in consequence of general measures which are lawful in themselves if he is particularly affected and harmed by them, namely if he is affected in a different way and much more seriously than all other traders and producers.
- 28 In this regard it need only be observed that the Court has held in a consistent line of decisions that an action for damages brought under Article 215 of the Treaty for unlawful legislative action cannot succeed unless the damage alleged by the applicant exceeds the limits of the economic risks inherent in

operating in the sector concerned. That principle would have to be applied *a fortiori* if the concept of liability without fault were accepted in Community law. In this case those limits were not exceeded since the applicant ought to have anticipated when marketing its products in 1978 and 1980 that Regulations Nos 368/77 and 443/77, which were suspended only temporarily and which originally did not contain any mechanism for preventing skimmed-milk powder sold under them from being used for feeding piglets, which is not the case now, would be brought back into force if the circumstances which existed at the time of their adoption were later to re-occur. When it was established in 1974 the applicant also ought to have anticipated, or at any rate could have anticipated, that special measures would be adopted under the second subparagraph of Article 7 (2) of Regulation No 804/68 in order to dispose of skimmed-milk powder which could not be marketed on normal terms during a milk year.

- 29 The foreseeability of the risks inherent in the market conditions at the time when the applicant began to manufacture and market those products excludes the possibility of any recompense for the loss of competitiveness which it has suffered. Those risks form part of the economic risks inherent in the activities of an industrial and commercial undertaking in this sector, as does the increase in energy costs which, on the applicant's evidence, is one of the main causes of the considerable increase in the price of its products in the space of four years.
- 30 It follows from the foregoing considerations that the alternative claim must also be dismissed.

Costs

- 31 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs.
- 32 As the applicant has failed in its submissions, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. Dismisses the action;
2. Orders the applicant to pay the costs.

Mackenzie Stuart	Bosco	Due	Kakouris	
O'Keeffe	Koopmans	Everling	Bahlmann	Galmot

Delevered in open court in Luxembourg on 6 December 1984.

For the Registrar
D. Louterman
Administrator

A. J. Mackenzie Stuart
President

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 18 SEPTEMBER 1984

My Lords,

In the present proceedings the Applicant, Biovilac seeks recompense from the Commission under Article 215 (2) of the EEC Treaty for damage which it has

allegedly suffered or will suffer as a result of sales of skimmed-milk powder from Community intervention stocks. It claims in the alternative damages flowing from an unlawful act by the Commission, and compensation to which