In Case 217/81

COMPAGNIE INTERAGRA SA, whose registered office is at 152 Avenue de Malakoff, Paris 16, represented by its Managing Director, Gustave Grandin, assisted by X. de Roux and C. H. Léger, Advocates at the Cour de Paris, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by F. Lamoureux, a member of its Legal Department acting as Agent, with an address for service in Luxembourg at the office of O. Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

1. History of the dispute

By Regulation (EEC) No 2943/80 of 13 November 1980 fixing the export refunds on milk and milk products (Official Journal 1980, L 305, p. 27) the Commission fixed in advance the refunds on exports of butter to the Soviet Union to be carried out after 1 January 1981 at an amount varying between 113.41 and 197.00 European currency units (hereinafter referred to as "ECU") per 100 kilograms depending on fat content by weight.

On the same day on which that regulation was adopted the Soviet agency V. O. Prodintorg of Moscow invited Interagra SA to participate in an international invitation to tender for the delivery of 100 000 tonnes of butter and 15 000 tonnes of butter-oil between January 1981 and February 1982. The tenders had to be submitted to Prodintorg by no later than 25 November 1980 and were binding on the tenderers until 5 December 1980.

On 17 November 1980 Interagra answered the invitation to tender by submitting a tender for 25 000 tonnes of butter in reliance on the refund fixed in advance by Commission Regulation No 2943/80. On the same day Interagra submitted an application to the Fonds d'Orientation et de Régularisation des Marchés Agricoles [Agricultural Markets Guidance and Stabilization Fund, hereinafter referred to as "the French Fund"] for an advance-fixing certificate for 25 000 tonnes of butter and indicated that its application was to be considered in connection with Prodintorg's invitation to tender.

On 19 November 1980 Interagra agreed to Prodintorg's request to extend the validity of its tender to 20 December 1980.

On 20 November 1980 Commission Regulation (EEC) No 2993/80 of 19 November 1980 temporarily suspending advance fixing of the export refund for butter and butter-oil (Official Journal 1980, L 310, p. 18) entered into force. That regulation suspended advance fixing of export refunds until 27 November 1980 which date was extended to 11 December 1980 by Commission Regulation (EEC) No 3070/80 of 28 November 1980 (Official Journal 1980, L 322, p. 27). On 12 December 1980 the Commission adopted the first of a series of regulations (Regulation (EEC) No 3218/80, Official Journal 1980, L 334, p. 18) fixing the export refunds on milk and milk products. Those regulations ceased to fix any refunds on exports of butter to the Soviet Union.

When adopting Regulation No 2993/80 suspending advance fixing of refunds on exports of butter and butter-oil the Commission sent to the national intervention agencies a telegram stating that by virtue of Article 3 (3) of Regulation No 2044/75 applications for

export certificates submitted after 17 November 1980 were devoid of purpose and should be refused. After receiving a request for confirmation made by the French Fund on 21 November 1980 the Commission confirmed its interpretation in a telex message of 27 November.

On 28 November 1980 the French Fund informed Interagra that because of the Commission's decision to suspend advance fixing of refunds from 20 to 27 November applications for certificates submitted after 17 November 1980 were devoid of purpose.

The extension of that decision to 12 December 1980 and the fact that the subsequent regulations had ceased to fix refunds on exports of butter to the Soviet Union meant that Interagra could not obtain any refund in connection with the tender which it had submitted to Prodintorg on 17 November 1980.

On 10 December 1980 Prodintorg accepted Interagra's tender for 25 000 tonnes. The Soviet agency would not accept that the fact that it had become impossible for Interagra to obtain the export refunds on which it counted constituted a case of *force majeure* capable of releasing Interagra from its obligations and on 7 January 1981 it served formal notice on Interagra requiring it to discharge its obligation to supply 25 000 tonnes of butter. By letter of 17 March 1981 Prodintorg informed Interagra that failing performance by Interagra it had been compelled to obtain 25 000 tonnes of butter elsewhere at a higher price and would seek damages from Interagra for the loss which it had suffered.

Interagra believes that in French administrative law and Soviet law there is no doubt that it was bound to Prodintorg as soon as it submitted its tender in response to the international call for tenders and that it is therefore under an obligation to compensate Prodintorg for the damage suffered by that agency because of its non-performance.

Interagra considers that the Commission is liable for the damage which it has incurred as a result of its obligation to indemnify Prodintorg and for the non-material damage and damage to its commercial reputation arising from its non-performance of the contract.

II — Written procedure

By application received at the Court Registry on 20 July 1981 Interagra brought an action for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty against the Commission of the European Communities.

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.

By order of 20 January 1982 the Court decided to assign the case to the Third Chamber pursuant to Article 95 (1) and (2) of the Rules of Procedure.

III — Conclusions of the parties

The *applicant* claims that the Court should:

Declare and adjudge that the applicant was wrongly refused the refund provided

for by Regulation No 2943/80 of 13 November 1980 to which it was entitled;

Declare and adjudge that the damage which it suffered as a result amounts in total to FF 61 956 250;

Declare and adjudge that the Commission is liable in the matter because the French Fund was only an intermediary and simply acted on the basis of the regulation and on the instructions of the Commission;

Declare and adjudge that Regulation No 2993/80 adopted by the Commission on 19 November 1980 offends against the principle of legitimate expectation.

The *Commission* contends that the Court should:

Dismiss the application as inadmissible or alternatively as unfounded;

Order the applicant to pay the costs.

IV — Submissions and arguments of the parties in the written procedure

A — Admissibility

The applicant takes the view that although it is true that the French Fund notified it of the refusal to grant it export refunds it is the Commission's attitude, as expressed in both Regulation No 2993/80 and the instructions given to the national agencies, towards the refusal of applications for certificates which is the cause of the damage which it has suffered. The action for damages is therefore admissible in so far as it has been brought directly against the Commission.

The Commission contends that the decision to refuse the applications for export certificates was taken by the French intervention agency, namely the French Fund, in the exercise of its power to implement, on its own responsibility, the Community rules on agriculture. In a consistent line of decisions the Court of Justice has held that it is for those concerned to contest decisions of intervention agencies adopted in implementation of the Community rules before their national courts and, if necessary, for the court seised of the matter to refer to the Court of Justice for a preliminary ruling questions relating to the interpretation or validity of those rules. The applicant may not circumvent the allocation of jurisdiction between the Court of Justice and national courts by bringing before the Court of Justice an action for damages which is really based on the alleged illegality of a measure adopted by a national administration which could have been challenged by an action for annulment before the national court having jurisdiction in the matter. In support of its contention the Commission refers to passages in the Court's judgment of 5 December 1979 in Joined Cases 116 and 124/77 *Amylum* [1979] ECR 3497 at p. 3560 and of 12 December 1979 in Case 12/79 *Wagner* [1979] ECR 3657 at p. 3671.

As regards the telex messages which the Commission sent to the French Fund on 16 and 27 November 1980, the Commission considers that they have no legislative force. They emanated from the officers of the Commission and cannot render the Commission liable as an institution. They state and communicate information and by themselves are in no way binding on intervention agencies. The two telex messages are similar in nature to those which were at issue in Case 133/79 *Sucrimex* [1980] ECR 1299 and which the Court held in its judgment of 27

March 1980 not to be capable of incurring the liability of the Community.

In its reply the applicant states that concurrently with the proceedings before the Court it has brought an action before the Tribunal Administratif [Administrative Court], Paris, on the ground that the French Fund had acted *ultra vires*, for the annulment of the French Fund's decision refusing its application for a certificate in breach of Regulation No 2044/75. As for the application to the Court of Justice, its purpose is not to have the Court examine the validity of decisions adopted by the national authority responsible for implementing certain measures relating to agricultural policy but it directly raises the issue of the Commission's liability and the validity of the measures which were adopted by the French Fund and which were directly determined by the Commission's conduct. Therefore the Court's decision in the *Wagner* case is not applicable. Nor do the principles enunciated in the *Amylum* judgment stand in the way of admissibility of the application because the applicant is contesting the Commission's conduct which caused it injury and not Regulation No 2993/80 or any legislative measure which it considers unlawful. That conduct included genuine instructions issued to the French Fund by the Commission. The first part of the French Fund's telex message of 21 November 1980 to the Directorate-General for Agriculture shows that the French Fund thought that the applicant's rights could not be affected by the suspension of advance fixing by Regulation No 2993/80. The Commission took the contrary view in its reply by way of telex message of 27 November and the French Fund then informed the applicant on 28 November that it could not grant its application for a certificate. It was not a case of the French Fund's changing its mind but simply of its carrying out the instructions of the Commission. Besides, the French Fund considers itself to be bound by the Commission's interpretation of Community regulations if only because the financial risks which it would run under the rules of the European Agricultural Guidance and Guarantee Fund (hereinafter referred to as "the EAGGF") if it did not apply the regulations correctly. The French Fund admitted this openly in its rejoinder submitted to the Tribunal Administratif, Paris, during the proceedings brought by the applicant to have the Fund's decision declared *ultra vires*.

The applicant further contends that the telex message which the Director-General for Agriculture sent to the French Fund on 27 November was quite plain in its terms. It left no scope for discretion and did not state that the opinion which it gave was for guidance only. That telex message was therefore the direct and immediate cause of the rejection of Interagra's application for an export certificate.

In its rejoinder the Commission maintains its objections to the admissibility of the action. It contends that the real purpose behind the action is to have the Court examine the validity of a decision adopted by a national intervention agency in implementation of the common agricultural policy. It denies that decision, which was one taken by a national agency, was the result of instructions given by the Commission to the French Fund. The telex message sent by the French Fund on 27 November 1980 merely mentioned the applicant's

situation which led the French Fund to request from the Commission in that telex message an interpretation of the relevant rules of Community law which it had applied since 1977. It is therefore incorrect to say that the Commission caused the French Fund to change its view. As to the argument that national authorities have no discretion when applying Community regulations because of the financial risks involved in applying Community provisions incorrectly, the Commission contends that that argument was not accepted in the ***Suprimex*** case and in any case it is incorrect to say that national agencies are paralysed by the fear that the EAGGF might refuse to defray expenditure arising from an application of Community law which is at variance with the Commission's views.

B — The substance of the case

1. Interpretation of Regulation (EEC) No 2044/75 of the Commission of 25 July 1975 (Official Journal 1975, L 213, p. 15)

Interagra takes the view that Article 3 (3) of Regulation No 2044/75, which provides that in the case of butter the export certificate is to be issued on the fifth working day following that on which the application is lodged unless special measures are taken in the intervening period, does not apply to cases in which the butter is to be exported in connection with an invitation to tender opened in an importing non-member country. That follows from Article 6 of Regulation No 2044/75 which provides that in such cases the export certificate "shall be valid from its day of issue within the meaning of Article 9 (1) of Regulation (EEC) No 193/75". That provision stipulates that "for the purpose of determining their period of validity licences or certificates shall be considered to have been issued on the day on which the application for them was lodged, that day being included in the calculation of such period of validity". The special rules thus prescribed for invitations to tender are justified by the special features of invitations to tender which require the tenderer to act quickly and make the terms of the tender which he submits in response to the invitation binding upon him. The applicant claims that the instructions given by the Commission to the French Fund on the basis of which the latter declared the applications for export certificates to be devoid of purpose placed a new and unfounded interpretation on the Community regulations with the aim of applying Article 3 (3) of Regulation No 2044/75 to all applications for certificates, including those submitted in connection with invitations to tender opened in an importing non-member country.

The applicant stresses the fact that the interpretation which the Commission endeavoured to impose on the French Fund has since been achieved by means of the amendment of Regulation No 2044/75 by Commission Regulation (EEC) No 3137/80 of 4 December 1980 (Official Journal 1980, L 329, p. 20). However, that amendment, made after the date on which the application for a cerificate was lodged, cannot affect adversely the rights which the applicant enjoys under the rules in force on the day on which it lodged its application.

The applicant also contends that Article 6 of Regulation No 2044/75 cannot be understood as determining only the date from which an issued certificate is to have validity, leaving the date of issue to be determined in accordance with Article 3 (3) of that regulation. Article 19 of

Regulation No 193/75, which lays down the conditions for the issue of certificates applied for in connection with an invitation to tender opened in a non-member country, provides that certificates are to be issued only after applicants have been awarded a contract. This makes the application of Article 3 (3) of Regulation No 2044/75, which provides that certificates are to be issued on the fifth working day following that on which applications are lodged, impossible.

The Commission considers that the argument put forward by the applicant against the Commission's interpretation of Regulation No 2044/75 is based on a confusion of the date of issue of the certificate with the duration of its validity. Article 6 of Regulation No 2044/75 is concerned only with determining the duration of the validity of the certificate and cannot prevent applications for certificates from being refused under Article 3 (3) if the Commission suspends the advance fixing of refunds in the period of five days following the day on which they are lodged. As regards Regulation No 3137/80, the Commission contends that its purpose is to clarify the scope of the seventeenth amendment made to Regulation No 2044/75 by Commission Regulation No 3105/80 (Official Journal 1980, L 312, p. 24), which reduces the duration of validity of certificates issued in connection with invitations to tender. Moreover Regulation No 3137/80 may not be constituted as extending the waiting period laid down in Article 3 (3) of Regulation No 2044/75 to applications for certificates submitted in connection with invitations to tender because that period was applied to such applications from the time when the system of monitoring the advance fixing of refunds was introduced by Regulation No 445/77 of 2 March 1977 (Official Journal 1977, L 58, p. 21). Although applications for certificates submitted in connection with invitations to tender differ from other applications, that difference arises after the expiry of the waiting period of five days and resides in the fact that, pending the outcome of the invitation to tender, a suspension of advance fixing taking effect after the five-day period has elapsed can no longer affect such applications, even if they are still in the course of being processed when suspension takes effect and the certificate has still not been physically issued.

2. Breach of the principle of legitimate expectation

The applicant claims that by abruptly suspending the fixing of refunds on exports of butter to the Soviet Union Commission Regulation No 2993/80 disregarded the legitimate expectation which traders were entitled to have that such refunds would be granted and on the basis of which they had submitted firm tenders to the Soviet agency Prodintorg. The applicant acknowledges that the Commission enjoys a wide discretion in such matters but in its view that does not entitle the Commission to ignore the legitimate interests of traders who have entered into commitments in the light of a well-considered and plainly expressed policy of the Commission. In that regard, the applicant reminds the Court that during the greater part of 1980 the Commission pursued a policy of restricting butter exports to the Soviet Union, which had already drawn criticism from the European Parliament, that on 23 October 1980 it restored the rate of refund to 160 ECU per 100 kg for all destinations, including the Soviet

Union, that that decision was suspended on 11 November 1980 mainly because of the volume of applications for advance-fixing certificates and that, finally, it was re-introduced on 14 November 1980 but with a reduced refund of 150 ECU per 100 kg. From those facts the applicant concludes that on 14 November 1980 the Commission was well aware of the market situation and of the possibility, indeed even the probability, that it would receive applications relating to a substantial volume of exports to the Soviet Union and that the reaction of the European Parliament would be unfavourable. Accordingly Regulation No 2993/80 cannot be attributed to a sudden change in the market due to an abnormally high influx of applications for certificates, especially as the applications for advance-fixing certificates related to quantities to be delivered in 1981, a year in which it was clearly impossible to foretell, at that time, whether the normal volume of trade would be exceeded. According to the applicant, the origin of Regulation No 2993/70 is to be found in a motion for an emergency debate tabled in the European Parliament on 18 November 1980 by 30 or so of its members. The Commission changed its policy to take account of that development, first by suspending advance fixing of refunds in Regulation No 2993/80, then by discontinuing the grant of refunds on exports of butter to the Soviet Union.

The applicant further contends that even if the market situation did justify the adoption of measures by the Commission, the latter ought to have sought to introduce measures aimed at limiting the quantities exported under advance-fixing arrangements or at reducing the amount of the refund, which would have been less damaging and perhaps tolerable for the traders concerned.

In reply to the applicant's contention that it offended against the principle of legitimate expectation the Commission argues first that the applicant had no vested right in the export refund prevailing on the day of its application. Such a right does not arise until the fifth working day following that on which the application was lodged, as is stated in Article 3 (3) of Regulation No 2044/75, as there are no special rules governing applications for certificates submitted in connection with invitations to tender opened in a non-member country. The Commission also believes that the suspension measure was quite foreseeable. It never made any secret of its intention to monitor exports as closely as possible in order not to allow traders to obtain unjustified advantages at the expense of the Community budget. In view of the substantial profits anticipated by traders from Prodintorg's invitation to tender announced on 13 November 1980 and relating to substantial quantities it was therefore reasonably foreseeable that speculative operations would be mounted and that a measure would consequently be adopted to suspend the advance fixing of refunds, especially as the situation had been the same under Regulation No 2697/80, which had fixed refunds valid from 1 January 1981 and had had to be suspended from 12 to 14 November 1980 (Regulation No 2913/80, Official Journal 1980, L 302, p. 17).

In any event the Commission considers that an overriding public interest justified the adoption of the suspension measure. There had been an enormous number of applications for certificates for butter

exports, and this posed a serious threat to the equilibrium of the market. Between 17 and 19 November 1980 applications had reached a figure of 352 555 tonnes, a figure which, according to the Commission, showed that the refunds, although reduced, were still too high and that if such large quantities were exported the equilibrium of the market might be imperilled. Moreover subsequent developments on the wor market showed how right the Commi on had been to be prudent because in 1981 butter stocks fell so low that if it had been necessary in the first few months of 1981 to meet export contracts for a quantity of 100 000 tonnes a temporary deficit would have occurred in the Community in the spring and prevented it from maintaining its relations with its long-standing customers. The Commission therefore exercised its discretion at the right time. It was not therefore guilty of misconduct, manifest error or any unlawful act capable of incurring the liability of the Community.

Finally the Commission contends that there is no causal link between the damage alleged and the action of the Community. The cause of the damage lies in the fact that Interagra did not wait for the five-day period laid down in Article 3 (3) of Regulation No 2044/75 to expire before irrevocably undertaking to supply 25 000 tonnes of butter, even though it could have replied to the invitation to tender after that period had expired.

In its reply the applicant, in the belief that for the reasons set out under B.1. above Article 6 and not Article 3 (3) of Regulation No 2044/75 applies in its case, submits that it acquired an incontestable right to the export certificates fixing the refunds in advance once it proved that it had been awarded a contract. As regards the question whether the measure was foreseeable the applicant stresses that, although there had already been three periods in 1980 in which advance fixing had been suspended (from 12 January to 1 February, from 13 to 15 May and from 12 to 14 November), they were separated by intervals of several months and it was hardly foreseeable, therefore, that only five days after altering the rate of refund and re-adjusting it to the market the Commission would again suspend the advance fixing of refunds, particularly as speculative operations are not possible where an invitation to tender is concerned because each participant irrevocably fixes the price and quantity proposed in his tender whilst the buyer fixes in advance the total quantity of butter which he wishes to buy.

As to the existence of an overriding public interest, the applicant contends that on 17, 18 and 19 November total real demand for butter rose to 193 000 tonnes of which 127 000 tonnes were ascribable to invitations to tender. Since, moreover, sales concluded pursuant to invitations to tender do not mean that butter will leave the Community immediately and that the deliveries to Prodintorg, for example, would have been spread over a period from January 1981 to February 1982, the Commission's contention that large quantities of butter would leave the Community in the first few months of 1981 is unfounded. Furthermore, so far as butter stocks are concerned, the

applicant believes that the figure of 320 000 tonnes given by the Commission should be compared with the minimum acceptable, which is 120 000 tonnes or the equivalent of one month's consumption. Stocks below that figure had not, moreover, prevented the Commission, in 1973, from considering the sale of 200 000 tonnes of butter to the Soviet Union. What is more, the Commission could not have been taken by surprise by Prodintorg's invitation to tender in respect of 100 000 tonnes of butter because the Soviet Union had already imported similar quantities in the previous years, namely 135 000 tonnes in 1979 and 150 000 tonnes in 1980. Besides, the Soviet Union is a long-standing customer of the Community and it ill becomes the Commission to contend as justification for suspending refunds on exports to that country that it was necessary to maintain its relations with such customers. In conclusion the applicant contends that Regulation No 2993/80 was adopted under pressure from the European Parliament for reasons which had nothing technical about them.

In its rejoinder the Commission contends, as regards the question whether the suspension measure was foreseeable, first that it is not true that speculative action is not possible where invitations to tender are concerned because there is nothing to prevent the agency of a non-member country from changing the total quantity originally specified in such a way that a quantity larger than that announced in the invitation to tender leaves the Community, and secondly that even on the view that no speculation is possible where invitations to tender are concerned, nevertheless the applications for certificates not related to invitations to tender which were submitted between 17 and 19 November were for a considerable quantity, namely 73 534 tonnes, and demonstrate that the rate of refund was too high.

As regards the existence of an overriding public interest, the Commission disputes that the deliveries to Prodintorg were spread over a period from January 1981 to February 1982. The contracts concluded by Prodintorg, particularly that with Interagra, show that most of the deliveries were to be made from January to May 1981. The Commission also considers that total real demand for butter for export, which had risen to at least 198 534 tonnes in November 1980 and not 193 000 tonnes as asserted by the applicant, was likely to cause a serious imbalance on the market whilst butter stocks, which were already running low, would fall to 45 000 tonnes in March 1981. The situation was not comparable with that in 1973 because in November 1980 stocks were in any event lower than in May 1973. As for the Soviet Union being a "long-standing customer", the Commission points out that although the Soviet Union bought a large quantity of butter in 1973 it did not import any or hardly any butter in 1971, 1972, 1974, 1975 or 1976 whilst exports of butter from the Community to non-member countries have consistently and considerably increased since 1973.

The Commission therefore maintains that if it had not suspended the advance fixing of refunds there would have been a real risk that the Community's available stocks, which were declining, would be insufficient to meet its commitments, both internal and external,

which were increasing. It also notes that the applicant has not replied to its argument to the effect that the suspension of the advance fixing of refunds was not the direct cause of the damage alleged.

3. Damages

Interagra claims that it has suffered damage of three different kinds:

Amount due to Prodintorg by way of compensation for the damage suffered by it owing to the non-performance of the contract;

Non-material damage;

Commercial loss equivalent to the profit anticipated from the transaction.

That damage is real and not uncertain and arose when, once the refunds were actually refused and the applicant found that it was impossible to perform the contract without incurring considerable loss, the issue of the applicant's liability under the contract was raised. The damage is unavoidable and cannot be mitigated because the applicant has already reduced it by a substantial extent by incurring liability for non-performance instead of performing the contract without refunds. There is no way by which it can escape its contractual liability.

The Commission contests that the damage is certain on the ground that the contract between Prodintorg and Interagra made provision for arbitration, to which apparently recourse has not been had. It would also like to see the general conditions of the invitation to tender announced by Prodintorg on 13 November.

It denies, furthermore, that the damage is special to the applicant. Many traders were affected by the refusal of application for certificates and the only "special" circumstance which the applicant can invoke is its own fault in irrevocably undertaking to deliver the butter to Prodintorg when a suspensive measure was reasonably foreseeable.

The Commission also contests the applicant's method of quantifying the damage. An expert's report would be needed to determine the exact price at which Prodintorg bought supplies on the world market. For the rest, there are no grounds for claiming compensation for non-material damage because the Community's action has not injured the applicant's reputation or standing. Finally, the Commission considers that where transactions of this kind are concerned the Community is not required to make good commercial loss because "the purpose of Community regulations ... is not to eliminate the risks to traders which are inherent in any commercial activity".

In its reply the applicant contends that it decided not to have recourse to arbitration in order to keep the dispute within reasonable limits and thus avoid aggravating the damage. It also admits that the damage which it suffered is not special, inasmuch as many traders were affected by the refusal of applications for certificates lodged in connection with invitations to tender. However, that admission does not prevent it from claiming compensation for its own direct loss, which was not due to its own fault as the period of five working days which

it did not observe does not exist except as part of the Commission's wrong interpretation of Regulation No 2044/75.

As regards the quantum of damages and in particular the price at which Prodintorg finally procured supplies of butter, the applicant takes the view that the Commission has no grounds for questioning that figure, which is far from excessive, because it is lower than the world price determined by taking the equivalent value in dollars of the sale price proposed by the applicant to Prodintorg and increasing it by the amount of the refunds suspended by the Commission. As regards the existence of non-material damage the applicant contends that the fact that it found it impossible to honour the irrevocable commitments into which it had entered was bound to harm its reputation. Finally, although the applicant fully agrees that "the purpose of the Community regulations ... is not to eliminate the risks to traders which are inherent in any commercial activity", that does not mean that the Community is not under the duty to make good damage attributable to the Commission where it has acted wrongfully.

In its rejoinder the Commission maintains that the damage is neither certain nor special. As regards the assessment of the damage, it contests the applicant's methods of assessment and points out, by way of example, that the method of calculating the world price is not very clear. In its opinion the movement of prices within the Community between December 1980 and March 1981, the date on which Prodintorg obtained the butter, and changes in the value of the dollar and in the rate of refund during the same period should be taken into account.

V — Oral procedure

The parties submitted oral argument and replied to questions put by the Court (Third Chamber) at the sitting on 4 March 1982.

The Advocate General delivered his opinion at the sitting on 13 May 1982.

Decision

1 By application lodged at the Court Registry on 20 July 1981 the undertaking Compagnie Interagra SA brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation in the sum of FF 61 956 250 for the damage which, it says, it suffered as the result of the adoption of Commission Regulation (EEC) No 2993/80 of 19 November 1980 temporarily suspending advance fixing of the export refund for butter and butter-oil (Official Journal 1980, L 310, p. 18) by virtue of which the applicant was refused a refund, to which it believed that it was entitled, in

respect of a contract concluded pursuant to an invitation to tender for the delivery of butter to the Soviet Union and as the result of instructions given by the Commission regarding the implementation of that regulation.

2 In response to an invitation to tender issued by the Soviet agency V. O. Prodintorg, Moscow, (hereinafter referred to as "Prodintorg") on 17 November 1980 the applicant submitted a tender to that agency for 25 000 tonnes of butter in reliance on the rate of refund fixed by Commission Regulation (EEC) No 2943/80 of 13 November 1980 (Official Journal 1980, L 305, p. 27). The tender was valid until 20 December 1980. On the very day on which it submitted its tender the applicant lodged an application with the French intervention agency, the Fonds d'Orientation et de Régularisation des Marchés Agricoles [Agricultural Markets Guidance and Stabilization Fund, hereinafter referred to as "the French Fund"] for an advance-fixing certificate for 25 000 tonnes of butter.

3 On 20 November 1980 Commission Regulation (EEC) No 2993/80 of 19 November 1980 entered into force (Official Journal 1980, L 310, p. 18). It suspended the advance fixing of refunds on exports of butter until 27 November 1980. That suspension was subsequently extended to 11 December 1980 by Commission Regulation (EEC) No 3070/80 (Official Journal 1980, L 322, p. 27) and the subsequent Commission regulations fixing export refunds on milk and milk products ceased to fix any refunds on exports of butter to the Soviet Union.

4 On 28 November 1980 the French Fund informed the applicant that since the Commission of the European Communities had suspended advance fixing from 20 to 27 November 1980 applications for certificates submitted after 17 November 1980 were devoid of purpose by virtue of Article 3 (3) of Regulation (EEC) No 2044/75 of 25 July 1975 on special detailed rules for the application of the system of import and export licences and the advance fixing of refunds in respect of milk and milk products (Official Journal 1979, L 213, p. 15). The French Fund confirmed its decision by letter of 24 December 1980 in which it referred to the "EEC's interpretation" of Regulation (EEC) No 2044/75.

5 During the written procedure the Commission referred to two communications which its Directorate-General for Agriculture sent to the French Fund when the advance fixing of the refunds in question was suspended. The

first was a telex message dated 19 November 1980 which according to the Commission, contained a standard formula indicating the date from which applications for certificates lodged after the suspension of advance fixing had to be refused by virtue of Article 3 (3) of Regulation (EEC) No 2044/75 and the second was a telex message of 27 November in response to an express request from the French Fund, confirming that for applications for certificates lodged in connection with invitations to tender there was no exception to the rule contained in Article 3 (3) of Regulation (EEC) No 2044/75. According to the Commission the two telex messages were purely informative and merely indicated the legal position under the regulations in force.

6 After it had accepted the applicant's tender on 10 December 1980 Prodintorg served formal notice on the applicant on 9 January 1981 requiring it to perform its obligation to supply the products in question. By this application the applicant seeks compensation from the Commission for the damage which it has allegedly suffered as the result of the application of instructions given by the Commission and of the Community rules. The damage is alleged to consist of the loss incurred by Prodintorg which the applicant must make good, and the non-material damage and loss of profit incurred by the applicant itself.

Admissibility

7 The Commission contests the admissibility of the application. It contends, in this respect, that the two telex messages which it sent to the French Fund have no legislative force but merely constitute statements and communications of information which cannot by themselves bind national bodies because those bodies apply Community law on their own responsibility. According to the Commission, it follows that the decision to refuse the applications for export certificates was adopted by the French intervention agency and it is for those concerned to contest such a decision before the national courts which if necessary may refer questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty.

8 In its judgment of 27 March 1980 in Case 133/79 *Sucrimex* [1980] ECR 1299 the Court had the occasion to record that the application of Community provisions on export refunds is a matter for the national bodies

appointed for this purpose and the Commission has no power to take decisions on their interpretation but may only express its opinion which is not binding upon the national authorities. It follows that the telex messages at issue are part of the internal cooperation between the Commission and the national bodies responsible for applying the Community rules in this field and as a general rule that cooperation cannot make the Community liable to individuals.

9 The decision to refuse the applications for export certificates, which is said to be the cause of the damage alleged by the applicant, is therefore to be seen as having been adopted by the French intervention agency. As the Court stated in its judgment of 12 December 1979 in Case 12/79 *Wagner* [1979] ECR 3657, the purpose of the action for damages provided for in Articles 178 and 215 of the Treaty is not to enable the Court to examine the validity of decisions taken by national agencies responsible for the implementation of certain measures within the framework of the common agricultural policy or to assess the financial consequences resulting from any invalidity of such decisions.

10 On the contrary, a review of administrative acts of Member States in applying Community law is primarily a matter for national courts without prejudice to their power to refer questions for a preliminary ruling to the Court under Article 177 of the EEC Treaty. In the circumstances the remedy to be envisaged in the present case is an action before the national courts, to which the applicant has in fact already applied.

11 The application must therefore be dismissed as inadmissible.

Costs

12 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleading. As the applicant has failed in its action it must be ordered to pay the costs.

On those grounds,

THE COURT (Third Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs.**

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 10 June 1982.

J. A. Pompe
Deputy Registrar

A. Touffait
President of the Third Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 13 MAY 1982 [1]

Mr President,
Members of the Court,

1. Introduction

My opinion in this case, Interagra, can be relatively short. I shall not examine, except in the most cursory fashion, Interagra's arguments on the substance of the case. Although it was my opinion in Case 45/81 *Moksel*, which is comparable in subject-matter, that the action in that case is admissible, I consider that this action is manifestly inadmissible. To demonstrate this I shall first summarize the facts and the submissions supporting the claim for

1 — Translated from the Dutch.