authorities to enable the national bodies to effect payment of the sums which resulted from the adjustment of the amount of the refunds, the entry, into force of the said Regulations rendered such an act indispensable.

In Case 143/73

Reference to the Court of Justice under Article 177 of the EEC Treaty by the Tribunal administratif of Paris for a preliminary ruling in the action pending before that court between

SOCIÉTÉ DES PRODUITS ALIMENTAIRES ET DIÉTÉTIQUES (SOPAD), S.A., of Courbevoie (France),

and

FONDS D'ORIENTATION ET DE RÉGULARISATION DES MARCHÉS AGRICOLES (FORMA), of Paris and FONDS D'INTERVENTION ET DE RÉGULARISATION DU MARCHÉ DU SUCRE (FIRS), of Paris,

on the interpretation of Regulations No 1098/68 of the Commission of 27 July 1968, establishing detailed rules for the application of export refunds on milk and milk products (OJ L 184 of 29 July 1968), No 951/71 of the Commission of 7 May 1971 amending Regulation No 1098/68 (OJ No 103 of 8 May 1971) and No 1048/71 of the Council of 25 May 1971 amending Regulation No 766/68 laying down general rules for granting export refunds on sugar on the subject of adjustment of the refund (OJ L 114 of 26 May 1971),

THE COURT

composed of: M. Sørensen, acting President, R. Monaco, J. Mertens de Wilmars, P. Pescatore, H. Kutscher, C. Ó Dálaigh (Rapporteur) and A. J. Mackenzie Stuart, Judges,

Advocate-General: J. P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Issues of fact and of law

The facts of the case, the subject matter of the applications and the views of the parties may be summarized as follows:

I — Facts and procedure

1. Regulation No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds was made more specific for the purpose of its application by Regulation No 1098/68 of the Commission of 27 July 1968. The last-mentioned Regulation, in line with Regulation No 766/68 of the Council of 18 June 1968, laying down general rules for granting export refunds on sugar and providing for a strict adaptation of export refunds fixed in advance in the event of a change in the price of sugar, stipulates in its Article 2 (3), second paragraph, that where the refund is fixed in advance, the basic amount . . . shall be that applicable on the day when the application for an export licence was lodged, adjusted, as necessary, for any alteration in the intervention price for white sugar'.

This applies to certain special products, made up of milk and sugar, including those the subject matter of the present proceedings.

Regulation No 951/71 of the Commission of 7 May 1971 amended Regulation No 1098/68, by providing that an automatic adjustment is not necessary in all cases, and henceforth only takes place where — the sugar prices having been modified between the day when the application for an export licence was lodged and the day on which the goods are exported — an adjustment was under the provisions of Article 12 of Regulation No 766/68 provided for the main 'sugar' sector. This modification of Article 2 (3), second paragraph, of Regulation No 1098/68 therefore makes the adjustment of the 'sugar' element contained in composite products depend on what happens to the refund fixed for white sugar.

By its Regulation No 1048/71 of 25 May 1971, it was precisely Article 12 of Regulation No 766/68 which the Council modified, so that it henceforth read: 'if during the period between the date of lodging the application for an export licence together with an application for fixing the refund in advance . . . and the date of exportation, an alteration occurs in the price of sugar or molasses, fixed under Regulation No 1009/67 of the Council, the amount of the refund *may* be adjusted'. The adjustment is therefore no longer automatic.

2. Relying on the increase in the intervention price for white sugar that occurred on 1 July 1971, SOPAD (Société des produits alimentaires et diététiques) the plaintiff in the main action, pursuant to the system for 'automatic adjustment' provided for by Regulation No 1098/68, applied for an adjustment — in the sense of an increase — of the refund for the sugar content of the product for which it had obtained an export licence. This licence was on 29 October 1970 granted by FORMA (Fonds d'orientation et de régularisation des marchés agricoles) — one of the defendants in the main action — covering 10 million kg of milk and cream, preserved or concentrated, other than in powder, containing added sugar, and of a fat content of 9 % for export to Algeria before 28 February 1972. The export licence laid down that the refund

was fixed in advance at FF 61·10 per 100 kg of the finished product and FF 64·93 per 100 kg of the sugar contained in this product.

Following upon the request on the part of the plaintiff in the main action, FORMA and FIRS (Fonds d'intervention et de régularisation du marché du sucre) the second defendant in the main action rejected the application, on the basis that they had no power to grant it, and of the change in the Community system that had meanwhile taken place.

3. The plaintiff in the main action appealed to the Tribunal administratif of Paris which decided to stay its decision and to refer the following preliminary questions to the Court:

'1. Whether, having regard to the date (29 October 1970) when the export licence was granted to the plaintiff company, with the prefixing of a refund rate, the variations of this rate, for any alteration in the intervention price of white sugar, remained subject to the scheme established by Community Regulation No 1098/68 of 27 July 1968, or whether on the contrary, the possible variations in the refund rates had to be applied by reference to the new rules resulting from Community Regulations No 951/71 and No 1048/71 of 7 May and 25 May 1971.

2. Whether, whatever the scheme applicable, an act by the Community authorities was indispensable to enable FIRS and FORMA to proceed with the payment of sums resulting from the adjustments.'

4. The order of the Tribunal administratif of Paris was registered at the Court on 20 June 1973.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, the plaintiff in the main action and the Commission of the European Communities presented their written observations.

The Court, upon hearing the report of the Judge-Rapporteur and the opinion of the Advocate-General, decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted under Article 20 of the Statute

1. *As regards the first question submitted by the Tribunal administratif of Paris*

(a) *The plaintiff in the main action* considers that in the event, the text basically applicable is Regulation No 1098/68 of 27 July 1968, under the provisions of which there was signed with (signé avec) FORMA the export certificate of 29 October 1970.

(1) To maintain the contrary would amount to a violation of an incontestable principle of law, that of the non-retrospective nature of laws and regulations. The automatic nature of the system of adjustment provided by Regulation No 1098/68 in the event of an increase in the intervention price for white sugar, cannot be contested. The very text of this Regulation, that of Regulation No 951/71 modifying the same and that of the Commission's letter of 21 October 1971 addressed to the 'Chambre syndicale nationale des fabricants de lait concentré et poudre de lait infantile et alimentaire' stating that 'Regulation No 1098/68 has been modified in the sense that the automatic nature of the adjustment has been abolished . . .' proves this abundantly.

Regulations No 951/71 and No 1048/71, that replaced the automatic correction of the refund by an optional correction are under no circumstances applicable to either the export licence of 29 October 1970 or to the contract entered into with the Algerian Government: this licence and the contract signed under the provisions of Regulation No 1098/68 must until their expiry continue to be governed by the provisions of this Regulation which provides for an automatic readjustment, by reason of the

general and unchanging legal principle that the consequences of contracts in force at the date of a legislative change continue to be determined by the law in force at the time when they came into existence. This principle of non-retrospective effect, laid down by Article 2 of the French Code Civil, which arises from the necessity of ensuring the certainty of contracting parties has been developed in a consistent fashion by French civil and administrative case law, according to which any later development under a contract must remained governed by the law in force at the time when it was entered into.

(2) To apply Regulations No 1048/71 and No 951/71 would mean imposing upon the plaintiff in the main action the burden of unjustified commercial damage since as from 1 July 1971, in order to comply with its contracts, it has had to purchase sugar at the new price whilst subsequently receiving the refunds at the old rate. It is in order to avoid such awkward features that Regulation No 1098/68 provided for the automatic readjustment of the refund. In order to maintain the high quality of concentrated milk which it sold, the plaintiff in the main action is faced with the necessity of purchasing sugar likewise of high quality, which is not commonly found either on the market or with the intervention agencies and any possibility of falling back upon intervention sugar has been closed to it. Besides, being only a user of sugar for the purpose of including this in a milk product, and not a producer, it has placed orders in accordance with its short-term needs and has not had either the material or the financial possibilities of maintaining such sugar stocks as to enable it to face over a certain period of time a change in sugar prices without thereby suffering detriment. In the event there was no particular reason for it to store sugar, since it thought on good grounds that even in the event of an increase in the price of sugar, it would be covered against this bearing in mind the automatic nature of the readjustment provided for by Regulation No 1098/68. Finally, since it had only a very restricted working stock of sweetened concentrated milk, it would have been quite unable to rely upon this stock in order to supply the Algerian Government at the old price, since its contract continued from 1 July 1971 to February 1972. Refusing the readjustment therefore amounts to a disregard of an acquired right resulting from the export licence of 29 October 1970 which provided the guarantee of an automatic adjustment in the event of an increase in the sugar price, a guarantee without which the plaintiff in the main action would probably not have accepted the transaction, since its only protection lay precisely in advance fixing, coupled with automatic readjustment. To refuse the plaintiff in the main action the benefit of this acquired right which it would have been justified in relying upon as from 1 July 1971, would amount also to a violation of the principle having as its purpose the protection of legitimate confidence. This principle has repeatedly been endorsed by the Court.

Besides, in Judgment 1/73, Westzucker GmbH v Einfuhr- und Vorratsstelle für Zucker (1973) E.C.R. 723, the Court found that the discontinuance of the automatic adjustment of refunds upon exportation of sugar, introduced by Regulation No 1048/71, applied to advance fixing certificates signed before the entry into force of this Regulation 'to the extent that the exportations in question had not yet taken place and ... an adjustment of the intervention price had not been made'. But in the present case there has indeed been an adjustment of the intervention price.

To apply the 1971 Regulations is therefore unjustified and the reply to the question referred ought to be that the export licence of 29 October 1970 must continue to be governed by Regulation No 1098/68 under the provisions of which it was issued.

(b) The *Commission* emphasizes at the outset (as indeed does the plaintiff in the

main action) that until the coming into force of Regulation No 951/71 the principle of automatic operation undoubtedly applies to the adjustment of the refund in respect of the 'sugar' element.

The Commission further notes that as appears from the 4th recital to Regulation No 951/71, the alteration that was effected had as its object the elimination of this automatic character and its replacement by a more elastic system.

According to the judgment of this Court in Case 1/73 aforementioned, 'the laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law.

Consequently the amendment to Article 12 of Regulation No 766/68 applies not only to advance fixing certificates issued after its entry into force, but also to those certificates issued before such date to the extent that exportation had not yet taken place and an adjustment of the intervention price had not been made.'

These dicta must also apply to the amendment of Article 2 (3), second paragraph of Regulation No 1098/68.

Besides, the Commission argues that one cannot treat this as a case of infringement of the protection of legitimate confidence of the parties involved.

The dictum in Judgment 1/73, according to which 'it seems difficult to consider the amendment of a provision, which was capable, because of its inflexibility, of causing losses or gains for those concerned, as adversely affecting any established position which they hold', also fully applies to a case such as the present one.

In the case of an export licence of so long a period of validity, that is to say 16 months, it would be very difficult to prohibit the Community legislator from amending the law governing such licences.

Precisely because of this length of validity, it could happen that the firm would postpone the export of the product until after the date of the increase in the price of sugar and that it would then be obliged to obtain supplies at the increased price for sugar, a fact which would have made an adjustment of the refund seem justifiable.

But this argument is not convincing:

— The plaintiff in the main action could not rely upon the original system (to the defective nature of which the Court has drawn attention in Case 1/73) remaining unchanged during the whole period of the licence;

— The change in the legal situation occurred as from 7 May 1971 and the increase in the white sugar price only on 1 July 1971. A manufacturer of goods for export, such as the plaintiff, could at the point of time have restocked with sugar at the 'old' price, since stocks were available at the French intervention agencies.

Nor can the *individual* situation of the applicant lead to a finding of an infringement of a protected legal position. The French enterprises that, just like the applicant, had received export licences for the products in question, had bought sugar for the purpose of export on the basis of a tender, at the intervention price before its increase, and had released it on the national market, had been obliged to utilize other sugar in order to manufacture products destined for export to Algeria. Not having acquired this sugar before 1 July 1971, the enterprises concerned concluded that they had suffered a 'loss'. In fact, as was pointed out by the Commission's services, it was the enterprises concerned that had placed themselves in this situation and they could not under any circumstances obtain therefrom the right to an increase in the refund; on the contrary they ought themselves to bear the entire commercial risk of such an operation. There can therefore be no question of an infringement of the principle of protection of legitimate confidence.

The Commission draws attention to the fact that under the practice in France, the exporter must in his application for the licence declare: 'I undertake if necessary to bear the cost involved in an adjustment of the refund, such as results from the application of Article 12 of Regulation No 766/68' and that this declaration applies solely to the possibility of a reduction in the refund.

To sum up, the Commission is of the opinion that the new Community Regulation that came into force on 27 May 1971 applies also to export licences with the rate of refund fixed in advance, that were issued before that date, when the export had not yet taken place.

2. *As regards the second question by the Tribunal administratif of Paris*

(a) *The plaintiff in the main action* considers that FORMA and FIRS could have paid the readjusted figures without any formal act on the part of the Community authorities, since the different Regulations bearing upon this question nowhere mention the necessity for such an act. Quite to the contrary, Regulation No 1098/68 which is applicable in the present case, provides for the automatic nature of the adjustment, which by definition, means that no particular provision is necessary in order to bring it about.

Besides, the Commission in Case 1/73 recognized that the automatic application could be ensured by the competent national organs without prior intervention on the part of the Commission.

It would therefore be right to reply in the negative to the question put by the Tribunal administratif of Paris.

(b) The *Commission* notes that, contrary to the system previously in force, the new Regulation makes the adjustment of refunds dependent upon a decision to be taken under Article 12 of Regulation No 766/68, as amended.

This decision is discretionary, as the Commission underlined in its observations in Case 1/73, and must be adopted uniformly throughout the Community; it must therefore originate with the Community authorities and more particularly with the Commission.

The Commission concludes that, bearing in mind the reply given to Question No 1, Question No 2 referred by the Tribunal administratif of Paris does not arise.

3. As a subsidiary point, the Commission notes that the questions referred only relate to the interpretation of the Regulations, but that in reality from some points of view it is in fact their validity that is in question. The first question is concerned with ascertaining whether the alteration in Community law extends to export licences and to the refunds fixed in advance in those licences, and the Commission considers that the Court ought, in order to avoid a further reference in this case, to take into account the problem of the proper legal scope of these provisions taken together, as was done in Case 1/73.

The oral proceedings took place on 6 November 1973.

The plaintiff in the main action was represented by Maîtres Xavier de Roux and Dominique Voillemot, advocates at the Cour de Paris, FORMA, the first defendant in the main action by Maître P. Villey-Desmeserets, advocate at the Cour de Paris and the Commission of the European Communities by its Legal Advisers P. Gilsdorf and B. Paulin, acting as agents.

The Advocate-General delivered his opinion at the hearing on 22 November 1973.

Grounds of judgment

1 By order dated 5 June 1973 received at the Court Registry on 20 June 1973, the Tribunal administratif of Paris referred to the Court of Justice under Article

177 of the Treaty for a preliminary ruling two questions relating to the interpretation of Regulations No 1098/68 of the Commission of 27 July 1968 (OJ L 184 of 29 July 1968) 'on detailed rules for the application of export refunds on milk and milk products', No 951/71 of the Commission of 7 May 1971 (OJ L 103 of 8 May 1971) amending the aforementioned Regulation and No 1048/71 of the Council of 25 May 1971 (OJ L 114 of 26 May 1971) amending Regulation No 766/68 laying down general rules for granting export refunds on sugar as regards the adjustment of the refund;

2 It appears from the order of reference that the plaintiff in the main action — consequent upon the increase in the intervention price for white sugar which took effect on 1 July 1971 under the provisions of Regulation No 1061/71 of the Council of 25 May 1971 (OJ L 115 of 27 May 1971) — applied for the refund fixed in advance for sugar contained in milk and cream to be increased as was expressly provided for by the export licence which the plaintiff had obtained on 29 October 1970 for the export of these products to Algeria before 28 February 1972;

3 The Regulations establishing the common organization of the market for the sector of milk and milk products provide for the grant of export refunds for these products in order to cover the difference between the world market price and the Community price and for the fixing in advance, for a definite period, of the refund to be paid;

4 In its original version, Article 2 (3), second paragraph, of Regulation No 1098/68 provided that in the event of an alteration in the intervention price for white sugar, the amount fixed in advance would be adjusted in accordance with this alteration;

5 Regulation No 951/71, which came into force on 8 May 1971, altered this provision to read: 'when ... the prices for sugar ... are altered during the period between the day when the application for an export licence was lodged and the day on which the goods are exported, the amount of the refund shall be adjusted if an adjustment is provided for pursuant to Article 12 of Regulation (EEC) No 766/68' for the sugar sector;

6 It was precisely the strict adaptation of the export refund fixed in advance in the sugar sector that was removed by Regulation No 1048/71, which came into force on 27 May 1971, which in the preamble expressed the view that this provision had proved too rigid, and altered the text of the said Article 12 to read: 'if during the (said) period ... an alteration occurs in the price of sugar or molasses, ... the amount of the refund may be adjusted.';

7 The first question asks whether, having regard to the date (29 October 1970) on which permission to export was granted with advance fixing of the rate of refund, the variations of this rate, in accordance with an alteration of the intervention price of white sugar, remained subject to the system established by Regulation No 1098/68, or whether, on the contrary, the new provisions resulting from Regulations No 951/71 and No 1048/71 had to be applied;

8 Under a generally recognized principle, the laws amending a legislative provision apply, unless otherwise provided, to future consequences of situations which arose under the former law;

9 It follows that the modification of Article 2 (3), second paragraph, of Regulation No 1098/68 applies not only to advance fixing certificates issued after its entry into force, but also to those issued before such date, to the extent that the intended exportation had not yet taken place;

10 The second question asks whether, whatever the scheme applicable, a formal act on the part of the Community authorities is indispensable for the organizations competent in the matter to proceed with the payment of sums resulting from the adjustments;

11 Prior to the modification that occurred in 1971, the adjustment in the refund was automatic and could be applied by the competent national organizations without the need for a formal act by the Community authorities;

12 In the framework of the new Regulations it seems on the contrary that in order to ensure the necessary uniformity of measures taken within the Community, the adjustment of the refund must result from a formal act on the part of the Community;

Costs

13 The costs incurred by the Commission, which has submitted observations to the Court, are not recoverable, and as these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

Upon reading the pleadings;
Upon hearing the report of the Judge-Rapporteur;

Upon hearing the oral observations of the plaintiff in the main action, the first defendant in the main action and the Commission of the European Communities;
Upon hearing the opinion of the Advocate-General;
Having regard to the Treaty establishing the European Economic Community, especially Article 177;
Having regard to Regulations No 1098/68 of the Commission of 27 July 1968, No 951/71 of the Commission of 7 May 1971 and No 1048/71 of the Council of 25 May 1971;
Having regard to the Protocol on the Statute of the Court of Justice of the European Economic Community, especially Article 20;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

in answer to the questions referred to it by the Tribunal administratif of Paris by order of that court dated 5 June 1973 hereby rules:

1. **The amendment of Article 2 (3), second paragraph, of Regulation No 1098/68 of the Commission of 27 July 1968, by the combined effect of Regulations No 951/71 of the Commission of 7 May 1971 and No 1048/71 of the Council of 25 May 1971 applies not only to advance fixing certificates issued after the entry into force of the last-mentioned Regulation, but also to those issued before that date, to the extent that the intended exportation had not yet taken place;**

2. **Whilst the system existing prior to Regulations No 951/71 and No 1048/71 did not require a formal act on the part of the Community authorities to enable the national bodies to effect payment of the sums which resulted from the adjustment of the amount of the refunds, the entry into force of the said Regulations rendered such an act indispensable.**

Sørensen Monaco Mertens de Wilmars

Pescatore Kutscher Ó Dálaigh Mackenzie Stuart

Delivered in open court in Luxembourg on 5 December 1973.

A. Van Houtte
Registrar

M. Sørensen
for the President