2. Orders the applicants to pay the costs.

Touffait Pescatore Due

Delivered in open court in Luxembourg on 27 March 1980.

For the Registrar

I. A. Pompe

Deputy Registrar

A. Touffait

President of the Second Chamber

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 6 MARCH 1980 [1]

Mr. President,
Members of the Court,

After participating in an invitation to tender made pursuant to Commission Regulation (EEC) No 1634/77 on a standing invitation to tender in order to determine export refunds for white sugar (Official Journal L 181 of 21 July 1977, p. 35), the Westzucker undertaking, one of the applicants in the proceedings to which my opinion is today devoted, obtained licences on 14 May 1979 from the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], which I shall subsequently refer to as "the Federal Office", for the export of sugar with advance fixing of the refund valid until 31 May 1979. It bought 2 600 tonnes of French sugar to be delivered in May/June 1979 from the Sucrimex undertaking, the other plaintiff in these proceedings and, as provided by Article 3 of Regulation (EEC) No 193/75 of the Commission laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 25 of 31 January 1975, p. 10), assigned the export rights attaching to the licence which it had been granted so that Sucrimex might export these amounts of sugar on behalf of Westzucker. Customs export clearance was to take place on 17 May 1979 at Dunkirk. Since Sucrimex did not receive the licence extracts until 16 May 1979 and was afraid that if they were posted they would not arrive at the forwarding agent's at Dunkirk in good time, it sent these documents to Dunkirk with a transport firm. On 17 May 1979 it was advised that the documents had not arrived in Dunkirk and could not be located there. It informed Westzucker about this on 22 May 1979. Westzucker advised the Federal Office of the facts

1 — Translated from the German.

and requested the issue of new, identical licences and the extension of their validity. The Federal Office could not agree to an extension of the period of validity since this would have had to be noted on the original documents; however, it issued new, identical licences bearing the date 28 May 1979. On 30 and 31 May 1979 2 600 tonnes of sugar were exported by Sucrimex on the basis of these documents which, contrary to Article 17 (7) of Regulation No 193/75, did not bear the word "Duplicate" and which in accordance with the instructions of the Federal Office had to be used by 31 May 1979.

Sucrimex obviously also informed the Fonds d'Intervention et de Régularisation du Marché du Sucre ("F.I.R.S") [Sugar Market Intervention and Stabilization Fund], which I shall subsequently call "the Fund", the French intervention agency, of these facts only to learn as had been indicated following discussions about the problem of lost licences which took place in 1978 in Brussels at the request of the French delegation, that there was no satisfactory solution to the problem of the payment of the refunds fixed in advance in such licences. Thereupon the Association des Organisations Professionnelles du Commerce des Sucres pour les Pays de la Communauté Economique Européenne ("A.S.S.U.C.") [Association of Sugar Trade Organizations for the Countries of the European Economic Community] put the problem before the Commission in a telex message of 23 May 1979. It pointed out that Article 17 (7) of Regulation No 193/75 appeared unsatisfactory in providing:

"Where a licence or certificate or extract therefrom is lost, issuing agencies may, exceptionally, supply the party concerned with a duplicate thereof, drawn up and endorsed in the same way as the original document and clearly market with the word 'Duplicate' on each copy.

Duplicates may not be submitted for the purposes of carrying out import or export operations."

The Commission was therefore asked to look into the problem and, pending the elaboration of a suitable solution which would require a certain amount of time, to empower the national intervention agencies to make an arrangement whereby suitable guarantees might be required from licence-holders.

The Director General for Agriculture at the Commission answered this telex massage by one of 6 June 1979 in which he basically confirmed an answer already given by telephone on 23 May 1979 by officers of the Commission. He explained that the problem which had arisen had already been examined in 1970; thereafter the rules in Regulation No 193/75 were adopted, according to which a duplicate licence could be used only for the release of the security provided. But because there was at that time no satisfactory solution, the Commission stated that it would go into the question again with the national experts.

This happened at a session of the Management Committee for Sugar on 13 June 1979. After that meeting the French Sugar Fund was informed by a telex message of 3 July 1979 signed by the Director General for Agriculture that the second licences issued by the Federal Office were in fact only duplicates although the appropriate words were missing and that Sucrimex had been in no doubt about this. According to Article 17 (7) of Regulation No 193/75 such documents could not be used for export and consequently only the normal

refund, and not the refund fixed in advance therein, could be paid.

The Fund accordingly turned down the applications which Sucrimex had made on 6 and 7 June 1979 for a refund, in accordance with the export licences, of the amount fixed in advance (FF 3 927 124.65). Sucrimex was informed in a letter sent to it on 5 July 1979 to which was attached the Commission's telex message of 3 July 1979 that Sucrimex could however apply for the refund applicable on the day when the customs export formalities were completed. Subsequently, this refund, which, as the applicant has shown, was FF 921 339.04 less than that fixed in advance in the licence, was in fact paid.

Sucrimex then once again approached the Director General for Agriculture at the Commission, sending a telex message on 17 July 1979. It contended that after the loss of the export licences an identical second set of licences had been issued by the German intervention agency which, according to instructions of the Federal Office, had to be used by 31 May 1979. That had been done in good faith and therefore the genuineness of those documents could not subsequently be denied after the exports had been completed. Sucrimex was therefore entitled to the refund fixed in advance and the Fund should accordingly be instructed to pay the amount of this refund. Thereupon Sucrimex was simply informed by a telex message from the Director General for Agriculture of 9 August 1979 that, as the law stood, it was not possible to grant its application.

Both firms then appealed to the Court of Justice on 13 August 1979. They seek a declaration annulling the Commission decision of 3 July 1979 and, in the alternative, an order that the Commission pay damages amounting to FF 921 339.04 together with legal interest thereon.

For reasons which I shall now examine, the Commission takes the view that the application is wholly inadmissible. It has therefore made an application under Article 91 (1) of the Rules of Procedure seeking an appropriate decision of the Court of Justice.

Before I go into this application I wish to mention that after the Commission had raised its objection the plaintiffs also brought an action in the French administrative court against the negative decision of the Fund. It is also worth noting that, as was borne out in the oral proceedings, the Commission's repeated attempts to secure an amendment to Regulation No 193/75 in regard to the problem of the loss of licences failed clearly as a result of resistance by the Member States, which pointed out the technical problems involved in the checks which would be required.

My views on the questions which have arisen at the present stage of the action are as follows:

1. *Admissibility of the application for the annulment of the decision contained in the telex message of 3 July 1979 of the Director General for Agriculture*

The Commission, mainly on the basis of the *content* of the telex message, states that the application is inadmissible. The message was intended to draw attention to the provisions of Article 17 (7) of Regulation No 193/75, and therefore to inform the national intervention agency, which had to apply the rules, about the legal position. Such a statement has no

legal effect and constitutes nothing more than confirmation of an existing measure. At most it may be regarded in the sense of Mr Advocate General Mayras's opinion in Case 132/77 (*Société pour l'Exportation des Sucres S.A.* v *Commission*, judgment of 10 May 1978 [1978] ECR 1073), as an internal office directive which cannot be contested, particularly since no provision is made in any of the relevant texts for any special procedure whereby the Commission may deal with such cases. Furthermore, the Commission claims, the telex message was signed only by the Director General for Agriculture and since he cannot bind the Commission in the area concerned, this statement cannot therefore be attributed to the Commission.

On the other hand, the applicants point out that the telex message of 3 July 1979 does not merely draw attention to existing Community regulations. It is, on the contrary, intended to have legal effect. On the one hand it does in fact direct that the applicants are to be deprived of entitlement to the refund fixed in advance arising out of the second set of licences issued by Federal Office and, on the other hand, apart from this failure to observe Regulation No 193/75, it lays down that the applicants may claim only the normal refund — a legal effect which the French intervention agency could not have deducted by itself since it is not disclosed by any Community provision. Moreover it can hardly be denied that statements of its officers bind the Commission. Since in this regard it is not the form which is important, as is apparent from case-law (Case 22/70, *Commission* v *Council*, judgment of 31 March 1971 [1971] ECR 263), it has to be accepted that a decision of the Commission may also be found in a telex message signed by a Director General.

As far as this point of contention is concerned, I must say immediately that am in full agreement with the view taken by the Commission.

It is not what was requested of the Commission in the Association's telex message of 23 May 1979 which matters here. Since we are not dealing with proceedings pursuant to *Article 175* of the EEC Treaty, it is more important to establish whether the statement in question can by its *content* constitute a decision capable of producing legal consequences and whether the authority which made it had the necessary powers to do so. The answer to both questions is "No".

It may be seen from the telex message of 3 July 1979 from the Director General for Agriculture that the applicant's case was examined by the officers of the Commission. They found that the second set of licences issued to the applicants by the Federal Office were in fact to be treated as duplicates under Regulation No 193/75 and that the applicants must have known this. Accordingly, it was not possible under Article 17 (7) of the regulation to use them for export transactions; consequently only payment of the normal refund could be considered and not that of the refund fixed in advance in the licences. Because the law on refunds does not make particular provision for the Commission to deal with and determine special cases, the telex message in fact represents nothing more than information on the interpretation and application of the existing rules which, in regard to the payment of the normal refund in such a case, may be derived from certain principles elaborated in case-law (Case 106/75, *Merkur-Außenhandel GmbH* v

Hauptzollamt Hamburg-Jonas, judgment of 8 April 1976, [1976] ECR 531). It cannot have any real binding character because in Community law the *national* intervention agencies are competent to apply the relevant rules upon their own responsibility. The statement consequently had no *legal consequences in regard to the intervention agencies*, even in regard to the financing of such payments from the Community budget, which at that time did not yet have to be decided. It was actually quite conceivable that the intervention agency would not abide by it, or that if it did adopt the legal opinion therein and this was challenged in national proceedings, then, following a preliminary ruling under Article 177 of the EEC Treaty a different view might be taken of it either because the relevant provisions were interpreted differently or because doubts were cast on their legal validity since they do not contain an appropriate solution for a special case of this kind.

Furthermore, the statement came only from the Director General for Agriculture and made it clear that it was intended only to pass on the view of the officers of the Commission ("the Commission's officers feel ...", "the officers of the Commission conclude ..."). Such views may be attributed to the Commission and regarded as acts of the Commission capable of being contested in certain circumstances only if powers have been delegated to the Director General for Agriculture by a Community instrument. This is not however the case in regard to export refunds.

Hence, in so far as the application seeks the setting aside of the telex message of 3 July 1979, it can only be treated as inadmissible on the ground that there is no act susceptible of challenge. Whether the legal view expressed in the telex message and adopted by the French intervention agency is tenable or not cannot therefore be resolved unless and until proceedings under Article 177 of the EEC Treaty are started at the instigation of the French administrative court to which the applicants have also applied.

2. *The alternative claim for damages*

The grounds given by the applicants for their alternative claim for an order that the Commission pay the amount equivalent to the difference between the refund fixed in advance in the licences and the normal refund applying on the day of export are that they were entitled to the refund fixed in advance — which the Fund was also prepared to pay — and, because of the decision contained in the telex message of 3 July 1979 they received only the normal refund, thereby suffering a loss on account of the Commission's directions. The Commission's conduct was also at fault: on the one hand it contested the value of the second set of licences issued by the Federal Office — it declared to be non-existent documents which had been duly issued and were to be used by 31 May 1979 in accordance with the instructions of the Federal Office — a breach of the principles of legal certainty and of the protection of legitimate expectation; and on the other hand it directed payment of the normal refund although there is no provision for this anywhere. The Commission is also to be criticized for its delay in acting since, although it had known about the loss of the licences

since 23 May 1979, it did not make any statement on the matter until the beginning of June and only adopted a clear position on 3 July 1979 instead of communicating to the Institute in good time, that is before the export took place, in the form of a direction its view that second sets of licences could not be used for export operations.

The Commission thinks that the same objections to the admissibility of the application for annulment also apply to this alternative claim. The telex message of 3 July 1979 contained only information and because it was not accompanied by any legal consequence does not therefore constitute an act which can found a claim for damages. Moreover, it should not be overlooked that the plaintiffs are concerned only with their claim for refunds fixed in advance and therefore with what they regard as the correct application of Regulation No 193/75. As has been repeatedly stressed in case-law, the appropriate course for this is an action in a French court against the decision of the French intervention agency not to grant the refund fixed in advance. The Commission states that there is, incidentally, no justification at all for the criticism that the Commission acted too late since the applicant Sucrimex was first informed on 23 May 1979 by telephone of what the Commission thought the existing legal position was.

As regards the *admissibility* of the claim for compensation, one might indeed be inclined to focus all one's attention on whether the requirements for such a claim — wrongful conduct by a Community institution and damage arising therefrom — were *conclusively shown*. Using this restricted test the admissibility of the application could scarcely be denied in this case for the applicants have contended and specifically demonstrated how conduct of the officers of the Commission, which in the light of Community law is to be described as wrongful, led the French intervention agency to perform an act causing loss to the applicants.

Of course one must not forget that an examination of the main claim has already shown that the act alleged to have caused damage is not a binding statement of the Commission accompanied by legal consequences but a view adopted by one of its departments on a particular case involving the application of Community law, which the French intervention agency, given the responsibility of applying Community law in this sector, could not determine. In the light of this conclusion, which is now apparent from the examination regarding admissibility, there may indeed be grounds for doubting whether such a statement is in any way to be considered as a relevant cause of damage. Nevertheless, as I have said, the interested parties are free to bring an action in the national court against such an application of Community law, which the intervention agency adopted and which the interested parties regard as wrong, and thereby to secure, by means of the procedure under Article 177 of the EEC Treaty if necessary, the correct application of Community law which will assist them to win the whole of their claim and thus to avert the loss which they fear.

Of further importance are conclusions which may be drawn from relevant judgments delivered not too long ago.

For example, Case 132/77, which I should like to mention first, involved the application of Regulation No 1608/74

(Official Journal L 170 of 27 June 1974, p. 38) which provides for the exemption from monetary compensation by the authorities of Member States of certain contracts. In the case concerned exemption had been refused and this had been approved by the officers of the Commission. However, both the application for annulment and the alternative claim for compensation were dismissed as inadmissible by the Court of Justice. The decisive finding was that, because national agencies were given the responsibility to determine claims and the refusal was part of a national decision, there was actually no conduct of the Commission which fulfilled the requirements of Article 215 of the EEC Treaty. A similar decision was reached in a similar type of case, (Joined Cases 12, 18 and 21/77, *Debayser and Others* v *Commission*, judgment of 2 March 1978 [1978] ECR 553), in which again a national agency had refused to apply the discretion clause in Regulation No 1608/74 and the answer was given by a high Commission official, after the Commission had been approached to have, amongst other things, the relevant regulation amended, that the national authority had applied the relevant regulation correctly. The Court of Justice held that in the applications for damages lodged against the Commission the applicants were seeking sums corresponding to the increase in the compensatory amounts which had been refused. Thus it was clear that the action was in fact essentailly directed against measures which national authorities had taken in their sphere of responsibility. Consequently, because the requirements of Articles 178 and 215 of the EEC Treaty were not fulfilled, the application for damages on the basis of official liability had to be declared inadmissible. Finally, it was held in the judgment in Case 12/79 (*Wagner* v *Commission*, judgment of 12 December 1979), which concerned a claim for damages for the refusal by a national intervention agency to cancel an export licence, that it was for the national courts to decide on the lawfulness of such a decision by an intervention agency. In the proceedings before the Court of Justice compensation was claimed on the ground that the applicant had not succeeded in rendering the decision of refusal ineffective, but because, on the other hand, it is not the purpose of an action for damages to examine the validity of decisions by national authorities and secure a judgment on the financial effects of the invalidity of such decisions, the action for damages against the Commission had to be declared inadmissible.

In the light of these authorities and since the purpose of this action is clearly to secure the refund fixed in advance which is a decision to be taken by the national intervention agency and subsequently the national courts, there is no choice but to declare this action for damages too as inadmissible and to refer the applicants for their claims to the domestic legal proceedings upon which they have in the meantime also embarked.

3. Accordingly, I propose that, as the Commission requests, the application which has been lodged should be declared wholly inadmissible and that the applicants should be required to bear the costs.