In Case 12/79

HANS-OTTO WAGNER GMBH AGRARHANDEL KG, Bad Homburg, represented by Modest, Heemann, Gündisch, Rauschning, Landry, Festge, Horst Heemann, Wegemer, Petersen and Bauer, of the Hamburg Bar, with an address for service in Luxembourg at the office of Mrs Jeanne Jansen-Housse, Huissier, 23 Rue Aldringen,

applicant,

v

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

defendant,

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

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, Judges,

Advocate General: J.-P. Warner
Registrar: J. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

(a) The regulations applicable

(aa) The system applying to the export of sugar

Article 12 of Regulation No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar (Official Journal No L 359, p. 1, repealing Regulation No 1009/67/EEC of the Council of 18 December 1967, Official Journal, English Special Edition 1967, p. 304), makes all imports into or exports out of the Community of the products in question conditional upon the submission of an import or export licence. The issue of a licence is conditional on the lodging of a deposit guaranteeing that importation or exportation will be effected during the period of validity of the licence and the deposit is forfeited in whole or in part if the transaction is not effected, or is only partially effected, within that period.

Common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products were laid down by Regulation (EEC) No 193/75 of the Commission of 17 January 1975 (Official Journal No L 25, p. 10). Special conditions for the sugar sector were provided for in Regulation (EEC) No 2048/75 of the Commission of 25 July 1975 (Official Journal No L 213, p. 31).

Article 19 of Regulation No 3330/74 allows for the difference in prices on the world market and within the Community to be covered by an export refund. Article 4 of Regulation (EEC) No 766/68 of the Council of 18 June 1968 laying down general rules for granting export refunds on sugar (Official Journal, English Special Edition 1968 (I) p. 155) provides that the refunds may be fixed by tender. By Regulation (EEC) No 2101/75 of 11 August 1975 (Official Journal No L 214, p. 5) the Commission made provision for a standing invitation to tender, which was to remain open until a date to be determined subsequently, to determine an export levy and/or export refund on white sugar, and, during the period of validity of the standing invitation, for weekly partial invitations to tender. Tenders were made in accordance with the provisions of Regulation No 766/68 of the Council and of Regulation No 2101/75 of the Commission.

Article 12(b) of the aforementioned Regulation No 2101/75 provides that the successful tenderer must, within ten days following the day of expiry of the period for the submission of tenders, apply for an export licence. The making of a

tender is subject *inter alia* to the lodging of a special security. The tender may not be withdrawn and the security is forfeited if the tender is accepted and the successful tenderer does not apply for a licence within the period stipulated (cf. Articles 5 and 6 of Regulation No 2101/75).

(bb) The system applicable to changes in the exchange rate

Article 4(1) of Regulation (EEC) No 1134/68 of the Council of 30 July 1968 (Official Journal, English Special Edition 1968 (II), p. 396) provides:

"In the case of an alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account, the Member State concerned, using the new parity relationship and without prejudice to the application of Article 1(2), shall adjust the following amounts, given in units of account, if they appear in national currency in the documents or certificates issued in pursuance of the Common Agricultural Policy or the special trade systems for goods processed from agricultural products:

(a) amounts which have been fixed in advance for a transaction or part of a transaction still to be carried out after alteration of that parity relationship;

(b) amounts appearing in agreements concluded between a private individual and an intervention agency for a transaction or part of a transaction still to be carried out after the alteration of the parity relationship.

However, any person who has obtained advance fixing of such amounts for a specific transaction may, by written application which must reach the competent authority within 30 days of the entry into force of the measures fixing the altered amounts, obtain cancellation of the advance fixing and of the relevant document or certificate."

On the basis of Article 3 of Regulation No 129 of the Council on the value of the unit of account and the exchange rates to be applied for the purposes of the Common Agricultural Policy (Official Journal, English Special Edition 1959-1962, p. 274), which allows derogations from the principle of the use of parities for converting one currency into another, the Council, on 27 February 1975, adopted Regulation No 475/75 on the exchange rates to be applied in agriculture. Article 6 of that regulation provided that the provisions of Regulation No 1134/68 in respect of an alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account should apply (see above).

On 15 March 1976 the Council adopted Regulation No 557/76 (Official Journal No L 67, p. 1) repealing Regulation No 475/75 and fixing new exchange rates to be applied in agriculture. Article 5(1) of this regulation also provided that the provisions of Regulation No 1134/68 should apply but paragraph (2) introduced the following restriction:

"However, Article 4(1), second subparagraph, of Regulation (EEC) No 1134/68 shall apply only if the application of the new representative rates is disadvantageous for the party concerned".

Detailed rules for the application of Regulation No 557/76 were laid down by Commission Regulation (EEC) No 571/76 of 15 March 1976 (Official Journal No L 68, p. 1). Article 1(1) thereof provides:

"With respect to products for which a monetary compensatory amount is fixed, cancellation of the advance fixing and the relevant document or certificate as provided in the last subparagraph of Article 4(1) of Regulation (EEC) No 1134/68 may be applied only:

— In the case of import licences issued in Ireland and Italy,

— In the case of export licences issued in Germany, Belgium, Luxembourg and the Netherlands."

Article 2(1) provides that the provisions of the last subparagraph of Article 4(1) of Regulation No 1134/68 shall apply to products and Member States concerned with effect from the dates set out in Article 2(2) of Regulation No 557/76 (as regards sugar: the beginning of the 1976/1977 marketing year, that is to say, 1 July 1976). The said provisions apply only to advance fixing and to the relevant documents or certificates issued before 15 March 1976 (Article 2(2) of Regulation No 571/76).

On the ground that if the right of cancellation "were widely exercised, it could in certain cases seriously hinder good Community administration of a given agricultural market" and that "provision should therefore be made for it to be replaced by the right to compensation for the disadvantage suffered", the Council adopted on 22 June 1976 Regulation No 1451/76 (Official Journal No L 163, p. 5). That regulation added the following subparagraph to Article 5(2) of Regulation No 557/76 (see above):

"Provision may be made for this disadvantage to be compensated for by a suitable measure. In such a case, the provisions referred to in the first subparagraph shall not apply."

Finally, on 30 June 1976 the Commission adopted Regulation (EEC) No 1579/76 (Official Journal No L 172, p. 59), which provides:

"Article 1

(1) The compensation referred to in the second subparagraph of Article 5(2) of Regulation (EEC) No 557/76 shall be granted for those quantities of white sugar for which customs export formalities are completed on or after 1 July 1976 in connexion with partial awards under Regulation (EEC) No 2101/75 and for which an export licence was issued before 15 March 1976. For the Member States concerned this compensation shall be as shown in the annex.

(2) In respect of the export licences referred to in paragraph (1), the right to cancel under the last subparagraph of Article 4(1) of Regulation (EEC) No 1134/68 may not be exercised.

Article 2

This regulation shall enter into force on 1 July 1976."

(b) The matter in dispute

In accordance with Regulation No 2101/75 the Bundesanstalt für Landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], hereinafter referred to as "the Federal Office", which was formerly the Einfuhr- und Vorratsstelle für Zucker und Rohtabak, delivered to Hans-Otto Wagner Agrarhandel KG (hereinafter referred to as "Wagner") a statement of award of tender on the basis of the twentieth partial invitation to tender under the standing invitation to tender for export.

Following the statement of award Wagner received from the Federal Office on 18 March 1976 an export licence for 500 tonnes of sugar.

After the publication of Council Regulation No 1451/76 Wagner sent a telex message on 29 June 1976 to the Federal Office protesting at the fact that the regulation allowed the abolition of the right to cancel in the event of an alteration in the exchange rates applicable in the agricultural sector.

On 30 June 1976 the Commission adopted Regulation No 1579/76 relating to the appropriate compensation. The date provided for the entry into force of the regulation was 1 July 1976. However, publication of the relevant Official Journal was delayed for one day because of a strike. As a result Regulation No 1579/76 could not have effect until 2 July 1976 (judgment of 31 March 1977 in Case 88/76 *Société pour l'Exportation des Sucres S.A.* v *Commission* [1977] ECR 709).

By letter dated 1 July 1976, received at the Federal Office on the same day, Wagner asked for cancellation of the export licence and release of the security of DM 107 362 which it had lodged.

By decision dated 5 July 1976 the Federal Office, referring to Regulation No 1579/76, rejected the application. The Federal Office had already notified the decision to Wagner by telephone on 2 July 1976.

Wagner thereupon used the export licence, but states that the transaction caused it considerable losses.

Wagner took the view that Regulation No 1579/76 could not apply to applications for cancellation of licences lodged on 1 July 1976 and after correspondence with the Commission brought the present action for damages.

(c) Procedure

The application dated 22 January 1979 was registered on 24 January 1979.

On 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. Nevertheless, the Court asked the parties to reply in writing to certain questions. Further, the parties were requested to confine their arguments to the question of liability.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— Order the defendant to pay the applicant the sum of DM 63 845.62, together with interest at 6.75% from the date of service of the application;

— Order the defendant to pay the costs.

The *defendant* contends that the Court should:

— Dismiss the application as inadmissible;

— Alternatively, dismiss the application as unfounded;

— Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Admissibility of the application

The *applicant* claims that it did not take proceedings against the decision by the Federal Office dated 5 July 1976 for it

would have had to expect lengthy administrative proceedings including an application for a preliminary ruling to the Court of Justice. In the meantime the export licence would have been regarded as valid. In order to mitigate the damage the applicant had accordingly been forced to use the licence to avoid forfeiting its security and in order to claim in any event the export subsidies, including the compensatory amounts. Otherwise it would have had to run the risk of bringing further administrative proceedings against the decision forfeiting its security of DM 107 362 for not using the licence.

The *defendant* considers that the application is inadmissible.

The applicant ought to have brought proceedings against the decision by the Federal Office dated 5 July 1976 before the national authorities and courts.

It is clear that when on 1 July 1976 the applicant lodged its application for cancellation of the licence it did not yet know that the publication of the Official Journal in Luxembourg had been delayed by one day. That fact was revealed during the course of the proceedings. Either the Federal Office would then simply have granted the application or else the application would have led to a request for a preliminary ruling under Article 177 of the EEC Treaty; at the latest when the Court of Justice had given judgment the question would have been settled as in Case 88/76 [1] and the applicant would have obtained full satisfaction, that is to say it would have not had to use its export licence and its security would have been released.

1 — Case 88/76 *Société pour l'Exportation des Sucres S. A.* v *Commission* [1977] ECR 709.

The defendant refers to the case-law of the Court (Joined Cases 67 to 85/75 *Lesieur Cotelle and Others* v *Commission* [1976] ECR 391; Case 46/75 *IBC* v *Commission* [1976] ECR 65; Joined Cases 12, 18 and 21/77 *Debayser and Others* v *Commission* [1978] ECR 553 and in particular pages 567 to 569).

It is not possible to maintain the point of view taken by the applicant, namely that it could not be required to make use of the national remedies.

The applicant had two choices. On the one hand at the risk of forfeiting its security it could have brought an action against the decision by the Federal Office. On the other hand it could have used the licence, together with the various advantages, that is to say it would have received the general monetary compensation and the special compensation for the disadvantage it had suffered.

The applicant preferred the latter alternative. It was perfectly at liberty to take such a decision, but it had then to abide by it and suffer the consequences. The applicant could not claim to hold the Commission liable for a disadvantage amounting to damage for the fact that it had not brought an action before the national courts which had jurisdiction.

Further, it is the general administrative practice of the Federal Office that pending proceedings there is no forfeiture of the security. To this extent therefore the applicant ran no risk.

In its reply the *applicant* claims that the present application seeks compensation for the damage caused by the defendant to the applicant. The applicant is convinced that the damage was caused by wrongful conduct on the part of the defendant. Accordingly the application is admissible (Case 43/72 *Merkur-Außenhandels-GmbH* v *Commission* [1973] ECR 1055 at p. 1069; Case 126/76 *Firma Gebrüder Dietz* v *Commission* [1977] ECR 2431 at p. 2441).

The judgement given by the Court in Case 132/77 *Société pour l'Exportation des Sucres v Commission* [1978] ECR 1061, in which the applicant had not succeeded in showing that a decision taken by the competent national administrative authorities had been influenced by conduct on the part of the Commission, is not authority to the contrary effect.

It is not possible to require the applicant to bring proceedings before the national courts.

The applicant did not learn of the late publication of Regulation No 1579/76 until after the time-limit had expired for appealing against the decision of the Federal Office dated 5 July 1976.

For this reason the applicant could not at the time actually assess the chances of success of a claim and weigh up the risks resulting from not using the licence save on the basis of its objections in substance to the lawfulness of Regulation No 1579/76. At the time the applicant was not able simply to content itself in this respect with bringing a claim against the decision of the Federal Office dated 5 July 1976; it would have had further to resolve to allow the period of validity of the licence to expire without using it. If it had appealed against the decision of the Federal Office dated 5 July 1976 but then had used the licence it would have suffered the very damage which it is claiming in this action. On the one hand the applicant had therefore to take account of the risk of losing as security an amount representing more than one sixth of its capital and on the other it could assess its chances of avoiding such loss of the security resulting from not using the licence only on the basis of its objections of substance to the lawfulness of Regulation No 1579/76.

The applicant denies that it is the general practice of the Federal Office not to forfeit securities pending proceedings against decisions refusing applications to cancel.

Finally, the applicant has received no advantage in relation to other exporters. It has simply suffered losses for which it seeks compensation. The advantages from cancelling the licence would have been greater. Instead of losses as a result of using the licence the applicant would have made a profit in the event of cancellation of the licence.

In its rejoinder the *defendant* observes that the decisive factor is whether the application is directed against *measures* adopted by national authorities on the basis of provisions of Community law.

The case-law of the Court is guided by the legitimate aim of drawing a systematic and clear dividing line between the various legal remedies (Court of Justice and national courts) and preventing overlapping of these legal remedies in spite of substantially similar aims; in this connexion priority is given to pursuing legal remedies before the national courts in so far as these are or were available.

In this case the applicant has brought proceedings for damages because it neglected to challenge the decision of the Federal Office dated 5 July 1976. If the applicant had done so the decision would have been annulled or withdrawn. By leaving that decision to apply in its case the applicant definitively undertook to export 500 tonnes of sugar to non-member countries with the refund fixed in advance (plus the compensation for disadvantage). However, according to the applicant itself the alleged damage results from the fact that in view of this position the applicant was obliged to buy and sell sugar on terms unfavourable to it. As a result the first cause of the damage is the export licence issued by the national authority, namely the Federal Office, in conjunction with the decision refusing to cancel that licence. By bringing an action under Article 215 of the EEC Treaty the applicant is seeking subsequently to escape the consequences of the national measures and thus to avoid the conditions laid down by the national law for making an application for annulment (*inter alia* time-limits). The application is therefore basically directed against the said measures.

The defendant maintains that the applicant ought to have brought the matter before the national courts. The very fact that to begin with the applicant knew nothing of the delay in the publication of the Official Journal shows the artificial nature of this application based on this factor which could not have had the slightest influence on the commercial measures which the applicant took.

In fact, the applicant would receive an advantage *vis-à-vis* other exporters if it were successful in the present action. At the time an exporter who decided to bring an action against the national refusal ran the risk of forfeiting his security. The applicant did not wish to run that risk. If it were lawful to compensate it for the disadvantage resulting from the decision by means of the compensation provided for by Regulation No 1579/76, it would not be possible to say, and in particular from the perspective at the time, that it was incurring a risk. It would thus have been put in a better position than that of exporters who had decided to bring an action before the national courts.

Substance

The *applicant* claims that in adopting Regulation No 1579/76, which was at the origin of the rejection by the Federal Office of the request for cancellation lodged by the applicant on 1 July 1976, the defendant was the cause of the damage which the applicant suffered.

Further, since the *defendant* knew at the latest on 2 July 1976 that Regulation No 1579/76 had not been published either on 30 June 1976 or on 1 July 1976, it ought to have explained to the competent national authorities that the regulation could not apply to requests for cancellation of 1 July 1976.

In its defence *the defendant* alleges that there was no wrongful conduct on its part on which the non-contractual liability of the Community could be based.

First of all it observes that the applicant bases its complaint of wrongful conduct on the part of the Commission only on the delay in publication of Regulation

No 1579/76. It is therefore not claiming that there is anything wrong with the substance of the regulation as it did in 1976 *vis-à-vis* the Federal Office.

The defendant admits that *in the beginning* the refusal by the Federal Office may have seemed insufficiently justified in law in view of the fact that the regulation in question could not apply to the request lodged by the applicant on 1 July 1976 for cancellation of the licence. However, since the applicant subsequently submitted to the refusal and made commercial arrangements which seemed to it good having regard to that refusal, it can no longer rely on that specific error. Otherwise its conduct could be classed as *venire contra factum proprium.*

The delay in publication of the Official Journal in question is obviously a case of *force majeure* and there is no wrongful conduct on the part of the Office for Official Publications and therefore of the Commission.

Further, it is completely without foundation to think that the Commission could have informed the competent national authorities on 2 July 1976 that Regulation No 1579/76 was temporarily inapplicable. The defendant did not learn until 14 September 1976 of the delay in publication, that is to say the date when the application in Case 88/76 was lodged.

Assuming that there was wrongful conduct on the part of the Commission, it is not sufficient to give rise to non-contractual liability on the part of the Community within the meaning of Article 215 of the Treaty. The misconduct relied on in the present case relating to the publication of the Official Journal is to be regarded as a formal defect. Whatever may be the legal consequences of such defects, they cannot give rise to liability for a wrongful act or omission.

In the defendant's view it is further necessary that the damage claimed should be the direct consequence of the specific conduct alleged against the Commission. The damage should have arisen precisely because Regulation No 1579/76 was applied to the applicant already with effect from 1 July 1976. That was not so in the present case.

Further, the applicant could have prevented the damage it alleges by challenging the refusal of the Federal Office.

In its reply the *applicant* maintains that there was wrongful conduct on the part of the defendant.

Further, it considers that the substance of Regulation No 1579/76 is unlawful in that it infringes and abolishes rights legitimately acquired. In this respect it refers to the applicant's statement in Case 88/76 *Société pour l'Exportation des Sucres S. A.* v *Commission* [1977] ECR 709.

It alleges that the decision of the Federal Office of 5 July 1976 was not only temporarily unlawful but was based on provisions which were absolutely inapplicable because they had not yet entered into force. There is scarcely any more serious legal defect,

The wrongful conduct on the part of the defendant lies in the fact that it did not immediately state that the regulation could not apply to requests to cancel lodged on 1 July 1976.

It is therefore irrelevant that the late publication of the Official Journal was due to *force majeure.* Further, the defendant cannot base a case of *force majeure* on the strike of its own staff.

The defendant or in any event certain staff of the Office for Official Publications knew on 2 July 1976 of the late publication of Regulation No 1579/76. If that information was not passed within the defendant's organization to the proper officers that was due to the negligence on the part of that organization.

As regards the causal link between the wrongful act or omission on the part of the defendant and the damage suffered by the applicant, the latter observes that if the defendant had clearly indicated at the proper time that Regulation No 1579/76 had not yet entered into force on 1 July 1976, the applicant would in any event have been in a position to challenge the decision of the Federal Office.

Both according to the *equivalence theory* and the *theory of adequate causality* the causal connexion between the defendant's misconduct and the damage caused to the applicant cannot be denied.

The applicant considers that at the time, having regard to the circumstances, it discharged its duty to mitigate the damage.

In its rejoinder the *defendant* points out first of all that under Article 42 of the Rules of Procedure a fresh issue is inadmissible. The applicant has never alleged even indirectly in its application that the content of Regulation No 1579/76 is unlawful. It is only in the reply that it claims that the regulation is unlawful.

As regards the substance of the case the defendant alleges that the late publication involves no misconduct by the Commission giving rise to non-contractual liability on the part of the Community. There is no *wrongful* breach by the Commission of its duty.

If it is thought that the wrongful conduct of the Commission lies in the fact that it neglected to warn the Federal Office, the question arises whether the decision by the Federal Office is unlawful. In this respect the defendant maintains the point of view put forward in its defence.

The Commission did not fail to perform any duty towards the applicant by not informing the Federal Office of the delay in publication. Generally speaking the very existence of such a duty must be denied. A special duty to give notice might on the other hand arise from the specific requirements of legal certainty or the protection of legitimate expectation in relation to individuals. Such a duty would, however, be simply ancillary for it would arise only from the fact of late publication. In the present case this duty could only mean protecting exporters from the damage which they suffered because of the delay in publication, in other words because they relied on the continued possibility of cancelling on 1 July 1976. However, the applicant has said nothing in this respect.

If it is assumed that the wrongful conduct of the Commission consisted in the delay in publishing Regulation No 1579/76, then there is no causal link between the fact and the damage alleged. If the regulation had been published, as expected, by 1 July 1976 at the latest, the applicant would have been in exactly the same position as now.

Even on the basis of the alleged negligence by the Commission in not informing the Federal Office, there is no

sufficient causal link between this and the damage. The purpose of a special duty to inform could only be to protect exporters against damage which would be a consequence of the delay in publishing Regulation No 1579/76. There was no such damage and as a result there is no specific causal link between the failure to perform the legal duty in question and the damage alleged.

In answer to a question put by the Court the *applicant* confirms that is has received the compensation provided for by Regulation No 1579/76.

The compensation for the disadvantage nevertheless did not make good the damage which the refusal of its request to cancel caused the applicant to suffer. The compensation was equal only to the difference between the monetary compensatory amount applicable from 1 July 1976 and that which would have been applicable if the new conversion rates had not been used from 1 July 1976.

IV — Oral procedure

The parties presented oral argument at the sitting on 3 October 1979.

The Advocate General delivered his opinion at the sitting on 14 November 1979.

Decision

1 The applicant is claiming that the European Economic Community, represented by the Commission, should under the second paragraph of Article 215 of the Treaty be ordered to compensate it for the loss resulting to it from the rejection of its request for cancellation of the export licence for 500 tonnes of white sugar issued to it following a partial invitation to tender as part of the standing invitation to tender for export provided for by Regulation No 2101/75 of the Commission of 11 August 1975 on a standing invitation to tender in order to determine a levy and/or refund on exports of white sugar (Official Journal No L 214, p. 5).

2 The following facts are established: the statement of award was delivered to the applicant on 11 March 1976. The export licence relating thereto was issued on 18 March 1976. In the meantime, namely on 15 March 1976, the exchange rates for transactions concerned with the Common Agricultural Policy were altered by Council Regulation No 557/76 of 15 March 1976 on the exchange rates to be applied in agriculture (Official Journal No L 67, p. 1). On 1 July 1976 the applicant applied to the appropriate German intervention agency, the Bundesanstalt für Landwirtschaftliche Marktordnung (hereinafter referred to as "the Federal Office") to request can-

cellation of the export licence and release of the security which it had lodged. This request was refused by the Federal Office by a decision of 5 July 1976.

3 It should be recalled that Regulation No 1134/68 of the Council of 30 July 1968 laying down rules for the implementation of Regulation No 653/68 on conditions for alterations to the value of the unit of account used for the Common Agricultural Policy (Official Journal, English Special Edition 1968 (II), p. 396), for the purpose of preventing an alteration in the exchange rates from causing damage to the undertakings concerned, provided by Article 4 thereof that any person who had obtained advance fixing of such amounts for specific transactions might, by written application which had to reach the competent authority within a specified period of the entry into force of the measures fixing the altered amounts, obtain cancellation of the advance fixing and of the relevant document or certificate. When the exchange rates were altered in March 1976, Article 5 of the aforementioned Regulation No 557/76 added that that power to request cancellation should apply "only if the application of the new representative rates is disadvantageous for the party concerned". Commission Regulation No 571/76 of 15 March 1976 laying down detailed rules for the application of Regulation No 557/76 (Official Journal No L 68, p. 1) stated that in the sugar sector the right to request cancellation should apply only to advance fixing and to the relevant documents or certificates issued before 15 March 1976 and that the right could be exercised only as from 1 July 1976, the date the new marketing year commenced. From the same date the new representative rates were to apply in the sugar sector. The defendant does not deny that the applicant would have been able to exercise its right to request cancellation if no amendment of the provisions relating thereto had been made.

4 On 22 June 1976 the Council adopted Regulation No 1451/76 amending Regulation No 557/76 (Official Journal No L 163, p. 5). According to the recitals in the preamble thereto the aim of the regulation was to prevent a wide exercise of the right to cancel from hindering good Community administration of a given agricultural market. To this end it provides that the "disadvantage" resulting from an alteration in the exchange rate may be compensated for by a suitable measure and that in such a case the right to request cancellation may no longer be exercised. Following that regulation flat rate compensation was fixed for white sugar by Commission Regulation No 1579/76 of 30 June 1976 laying down special detailed rules of application for sugar under Regulation No 557/76 on the exchange rates to

be applied in agriculture (Official Journal, No L 172, p. 59). Article 1 (2) of that regulation provides that export licences for which compensation may be granted cannot be cancelled under the rules previously applicable.

5 The aforementioned Regulation No 1579/76 provides that it shall enter into force on 1 July 1976. It was published in an Official Journal dated 1 July 1976 but because of a strike that issue was not in fact published and distributed until the next day.

6 In its judgment of 31 March 1977 in Case 88/76 *Société pour l'Exportation des Sucres* v *Commission* [1977] ECR 709 the Court held that notwithstanding the fact that the regulation provides for its entry into force on 1 July 1976 it could properly be applied only on the following day and that consequently it could not be applied to applications for cancellation of licences lodged on 1 July 1976.

7 The applicant infers from that judgment that the Federal Office wrongly relied on Regulation No 1579/76 to refuse cancellation since the request for cancellation was lodged on 1 July 1976. It alleges that the conduct of the Commission was responsible for that refusal, on the one hand because the Commission is responsible for the functioning of the Office for Official Publications of the Communities and on the other because it failed to warn the Federal Office of the postponement of the date of entry into force of Regulation No 1579/76 caused by the delay in publication of the regulation. The alleged unlawful refusal to cancel caused the applicant considerable losses.

8 In its reply the applicant claims that the refusal to cancel is also unlawful because the provisions of Regulation No 1579/76 are contrary to the law and thus unlawful. However, since this is a fresh issue within the meaning of Article 42 (2) of the Rules of Procedure it has been put forward too late and the Court cannot take it into account.

Admissibility

9 The Commission alleges that the action is inadmissible. It stresses that the decision to refuse to cancel was taken by a German agency and was therefore capable of challenge by action before a German court. Since the

decision of the Federal Office was not challenged by the applicant, it is not for the Community to make good any damage caused by that decision.

10 The action for damages provided for in Articles 178 and 215 of the Treaty was included as an independent form of action, with a particular purpose to fulfil within the system of legal remedies, and subject to conditions on its use arising out of its specific nature. Its purpose 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.

11 The applicant has brought its action against the Community on the basis of non-contractual liability, alleging that the contested refusal by the Federal Office is entirely the result of the Commission's conduct. In the applicant's view the damage suffered arises from that conduct, since the national authorities had no choice other than to apply the Community provisions and to follow in this respect the directions given to them by the Commission.

12 It follows from the judgment of the Court of 31 March 1977 in the aforementioned Case 88/76 that Regulation No 1579/76 could not lawfully be applied to a request for cancellation lodged on 1 July 1976. However, it was for the national courts to give a ruling on the legality of the refusal by the Federal Office in pursuance of Community law within the forms laid down by national law, following recourse, where necessary, to Article 177 of the Treaty.

13 The action by the applicant is seeking in fact compensation for the damage resulting from the fact that the applicant did not succeed in rendering the refusal by the Federal Office ineffective. Whatever the reasons which have led the applicant not to bring an action against that decision before the national courts having jurisdiction, the Court cannot allow an action for damages such as that in the present case against the Community without disregarding the whole system of legal recourse conceived *inter alia* to

protect the undertakings concerned against a wrongful application of the measures adopted within the framework of the Common Agricultural Policy.

14 It follows that the Court must reject as irrelevant the applicant's argument that the bringing of an action against the refusal would have led to the export licence's not being used and the loss of the security pending the subsequent outcome of the action and that this result would be such a financial risk that an average-sized undertaking such as the applicant's could not reasonably bear it. In choosing to avoid such a risk the applicant has also deprived itself of the opportunity then open to it of correcting the illegality of which it complains.

15 It follows from the aforementioned considerations that the action is inadmissible.

Costs

16 Pursuant to Article 69(2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in its claim, it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**
2. **Orders the applicant to pay the costs.**

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 12 December 1979.

A. Van Houtte — Registrar

H. Kutscher — President