OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 7 OCTOBER 1982 [1]

Mr President,
Members of the Court,

1. Introduction

These joined cases once more confront the Court with the complicated juridical reality of the agro-monetary policy of the Community institutions. The flood of rules and regulations which caused the plaintiffs in these cases to refer to them, quite rightly, as a "labyrinth" at the hearing makes it necessary for me to begin my Opinion by setting them out.

2. The system of monetary compensatory amounts and the representative rates

The cause of this dispute can be traced back to 4 June 1973, the date of the entry into force of Regulation (EEC) No 1112/73 of 30 April 1973 (Official Journal 1973, L 114, p. 4) amending for the third time Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special Edition 1971 (I), p. 257) on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States. That amendment of the basic regulation, which although amended twelve times so far has regrettably not been published in codified form, became necessary because in the first half of 1973 all the currencies of the Member States were floating against the United States dollar. The abandonment of linkage to the dollar meant that the relationship between the currencies of the Member States and the unit of account (u.a.) used at that time for the purposes of the common agricultural policy became in fact entirely independent. After the abandonment of linkage the necessity for monetary compensatory amounts ceased to reside in the fact that the actual currency exchange rates no longer corresponded with the official IMF parities and later with the central rates as against the United States dollar (fixed under the Smithsonian Agreement) on the basis of which units of account were converted into national currency. With the abandonment of linkage to the dollar the justification for continuing to apply the old rates based on the dollar value of gold disappeared for all practical purposes. The argument that for a variety of reasons Member States did not wish to adjust representative rates in the agricultural sector to actual currency parities gained ground. With the disappearance of the last remnants of linkage to the dollar and the old Bretton Woods system of stable exchange rates, representative or "green" exchange rates lead a life entirely of their own, as is shown amongst other things by the marathon meetings which the Council holds each year on agricultural prices. The representative rates have evolved into instruments of economic conjunctural policy and of the common agricultural policy.

1 — Translated from the Dutch

This is shown in particular by the fact that they are split up according to sector as may be seen primarily from Council Regulation No 878/77 of 26 April 1977 (Official Journal 1977, L 106, p. 27). To describe the exchange rates used in the Community agricultural sector as a system of multiple exchange rates is therefore quite justified. The use of representative rates differing according to the sector, time-period and kind of transaction forms the background to the preliminary questions submitted to the Court.

3. The consequences of altering representative rates

Whenever, as is the case with the Community's agricultural policy, individuals' rights and duties with regard to the authorities charged with implementing that policy are based on prices fixed in or by units of account, an alteration in the rate for converting units of account into national currency creates problems of legal certainty. Even under the system of fixed exchange rates provision was made for adjusting existing rights and obligations. This was done in Regulation No 1134/68 of the Council of 31 July 1968 (Official Journal, English Special Edition 1968 (II), p. 396). Article 4 of that regulation makes provision for a compulsory adjustment whilst Article 6 determines the applicable date. Article 6 reads as follows:

"For the purposes of this regulation, the time when a transaction is carried out shall be considered as being the date on which occurs the event, as defined by Community rules or, in the absence of and pending adoption of such rules, by the rules of the Member State concerned, in which the amount involved in the transaction becomes due and payable."

That provision therefore concerns the event and time to be taken into account for the purposes of conversion. In the French text the better term "fait générateur" is used for this combination of event and time.

This can be, for example, the date of importation or exportation, the day on which customs formalities are completed and so forth. The determination of the "fait générateur" is crucial when it concerns, on the one hand, legal relationships with the agricultural authorities fixed for a specific period, for example where export refunds and monetary compensatory amounts are fixed in advance, and, on the other hand, frequent adjustments in the conversion rates. The general rules contained in Regulation No 1134/68 have also been declared to be applicable to the system of representative rates used in the agricultural sector. This occurred in Regulation No 878/77 of 26 April 1977 which I mentioned earlier. In Article 4 (1) thereof, as that provision applied after amendment by Council Regulation No 976/78 (Official Journal 1978, L 125, p. 32), Regulation No 1134/68 was declared to have application whilst paragraphs (2) and (3) of that article set out below contain more specific provisions of these adjustment rules:

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

Before the date of application of the new rate it may be decided to offset this disadvantage by an

appropriate measure. In this case, advance fixing and the certificate or document attesting thereto may not be cancelled.

(3) In accordance with the procedure provided for in Article 5, derogations may be made to the provisions laid down in paragraph (1)."

Commission Regulation No 3016/78 of 20 December 1978 (Official Journal 1978, L 359, p. 11) was adopted on the basis of paragraph (3) above. In that regulation a number of derogations from the general adjustment rules contained in Regulation No 1134/68 were introduced in the sugar and isoglucose sector in the event of changes in exchange rates. The relevant recitals in the preamble to Regulation No 3016/78 read as follows:

"Whereas Article 4 (1) of Regulation (EEC) No 878/77 provides that, as regards the effect on rights and obligations existing at the moment when a representative rate is altered, the provision in respect of an alteration in the relationship between the parity of the currency of a Member State and the value of the unit of account, which are contained in Council Regulation (EEC) No 1134/68 of 30 July 1968 laying down rules for the implementation of Regulation (EEC) No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy, shall apply;

Whereas, under Article 4 (2) of Regulation (EEC) No 1134/68, sums referred to in the said article are to be paid on the basis of the conversion rate applicable at the time when the transaction or part transaction is carried out; ... under Article 6 of the same regulation the time when a transaction is carried out shall be considered as being the date on which occurs the event, as defined by Community rules or, in the absence of and pending adoption of such rules, by the rules of the Member State concerned, which gives entitlement to the amount involved in the transaction; ... however by virtue of Article 4 (3) of Regulation (EEC) No 878/77, derogations may be made from the abovementioned provisions;

Whereas, with a view to the sound management of the sugar and isoglucose markets it is appropriate to specify for each kind of transaction in these sectors, the method for fixing the conversion rate applicable; ... in certain cases it is appropriate to make derogations from the rule laid down in Article 6 of Regulation (EEC) No 1134/68;"

Details of those derogations are given in an annex to that regulation. Paragraph X thereof reads as follows:

"All import and export levies and export refunds provided for under Regulation (EEC) No 3330/74;

(a) with advance fixing of monetary compensatory amounts;

Representative rate applicable on the day referred to in Article 6 of Regulation (EEC) No 243/78, as amended by Regulation (EEC) No 1544/78.

(b) without advance fixing of monetary compensatory amounts;

Representative rate applicable on the day of completion of customs formalities for export or the day

used by the competent authority concerned to determine the rate of the import levy."

The purpose of this regulation is therefore to provide for a separate set of rules determining the "fait générateur". As the Commission explained at the hearing, the sugar sector is so far the only sector to have such a separate set of rules determining the "fait générateur".

4. The advance-fixing arrangements for refunds and monetary compensatory amounts

The foundation of the advance-fixing arrangements for export refunds on sugar is Article 12 (1) and (2) of the basic regulation, No 3330/74 of the Council of 19 December 1974 (Official Journal 1974, L 359, p. 1) on the common organization of the market in sugar. According to that provision the advance fixing is to be noted on the export licence. The general rules for granting export refunds in this sector are laid down in Regulation No 766/68 of the Council of 18 June 1968 (Official Journal, English Special Edition 1968 (I), p. 155). Article 4 of this regulation provides that the refunds may be fixed by tender. In practice this is the most frequent method of fixing refunds in this sector. Article 12 makes provision, in the event of *prices* being altered during the advance-fixing period, for the amounts fixed in advance to be adjusted. As amended by Regulation No 1048/71 of the Council of 25 May 1971 (Official Journal, English Special Edition 1966-1972, p. 54), Article 12 reads as follows:

"If between:

the date on which the application for an export licence is lodged and a request for the advance fixing of the refund is made, or

the date on which the time limit for the submission of the tenders expires, in the case of a refund fixed by tender,

and the date of exportation, there is an alteration in the prices for sugar or molasses fixed pursuant to Regulation No 1009/67/EEC, provision *may* be made for adjusting the amount of the refund." (Emphasis added.)

The advance fixing of monetary compensatory amounts is regulated in Commission Regulation No 243/78 of 1 February 1978 (Official Journal 1978, L 37, p. 5). Article 6 determines the monetary compensatory amount applicable in advance fixing:

"(1) The monetary compensatory amount in effect on the day on which the application for advance fixing of the monetary compensatory amount is lodged shall be applicable to the operations carried out during the period of validity of the certificate.

(2) However, where the levy or refund is fixed in advance under a tendering procedure, the monetary compensatory amount applicable shall be that in effect on the last day for the submission of tenders.

Paragraph (1) shall remain applicable, however, where the applicant for a certificate relating to a levy or refund fixed in advance under a tendering procedure places himself in the situation referred to in Article 4 (6)."

In this regulation, too, provision is made for an adjustment of the monetary compensatory amounts fixed in advance

if the representative rates are altered. Article 7 reads as follows:

"(1) The monetary compensatory amounts fixed in advance shall be adjusted if, during the period of validity of the certificate, a new representative rate, decided on before the application for advance fixing was lodged, comes into effect.

(2) A decision to adjust the monetary compensatory amounts fixed in advance may be taken:

Where the import or export refund is adjusted during the period of validity of the certificate following a change in prices.

Or when a new representative rate comes into force.

(3) ..."

How the compulsory adjustment provided for in paragraph (1) is to be applied is regulated in detail in Commission Regulation No 1516/78 of 30 June 1978 (Official Journal 1978, L 178, p. 63). Article 1 thereof reads:

"(1) The adjustments referred to in Article 7 (1) of Regulation (EEC) No 243/78 shall be made on the basis of the representative rate

applicable at the time of completion of the customs import or export formalities, and

fixed before the submission of the application for advance fixing of the monetary compensatory amount.

(2) ..."

I should add that monetary compensatory amounts may be fixed in advance only when refunds are fixed in advance (Article 2 of Regulation No 243/78).

5. The significance of Regulation No 3016/78

It appears from the above summary that under the general arrangements for the advance fixing of refunds (Article 12 of Regulation No 766/68, as amended by Regulation No 1048/71; Article 14 of Regulation No 766/68) and of monetary compensatory amounts (Article 7 of Regulation No 243/78 read with Article 1 of Regulation No 1516/78 the "fait générateur" is the day on which the customs formalities are completed. However, Regulation No 3016/78 derogates from that rule by providing in paragraph X (a) in the annex thereto that where monetary compensatory amounts are fixed in advance which, as I have said, is possible *only* when the export refunds are fixed as well, a different day is applicable and, in the case of a tender, this is the last day for the submission of tenders (Article 6 (2) of Regulation No 243/78). The effect of bringing forward the "fait générateur" is therefore that subsequent alterations in the intervention price, refunds or representative rates no longer affect the payment or collection of the amounts fixed in advance. Why it was decided to make that derogation is not immediately clear from the recitals in the preamble to Regulation No 3016/78 itself. Later in my Opinion I shall return to the question of the reasons for the derogation and examine them at some length.

At the hearing, the Commission's expert on these matters tried to provide insight in a detailed and learned dissertation. From what he said it may be inferred that the fixing of export refunds on the one hand and of export refunds *and*

monetary compensatory amounts on the other is based on a different line of thought which could be summarized like this.

In essence the idea behind the fixing arrangements is that at the time of fixing the applicant is known as well as all those factors which may affect his individual position and, so far as the factors capable of being fixed may alter, he wishes to have them fixed. Assuming that the purchase and selling prices of the sugar have been determined or fixed by the applicant by contract, the export refund, the representative rate and the monetary coefficient constitute variable factors, the last two of which both determine the monetary compensatory amount. If the trader now has the refund alone fixed, then his position is certain only in terms of units of account; in national currency terms it is not, for this is determined by the monetary compensatory amount. In the Commission's view, if the refund is fixed in advance, his position in national currency terms should *not* be fixed. Accordingly, in that case the "fait générateur" is deemed to be the day on which the customs formalities are completed so that alterations in the representative rate made before then may be incorporated. If the monetary compensatory amount is fixed in advance as well as the refund then on the day of fixing the applicant's position in national currency terms is voluntarily fixed and he thus deliberately excludes the effect of alterations in the representative rate on the monetary compensatory amount which he has to pay or will receive. Normally this will be to his advantage, which is of course the main idea behind the practice of advance fixing. However, in some circumstances it may work to his disadvantage. This then explains why in the latter case the date of the "fait générateur" is brought forward. My explanation is not yet complete, however, since where the refund and monetary compensatory amounts are fixed Regulation No 3016/78, by fixing the "fait générateur" as indicated, also excludes incorporation of alterations in the intervention price of sugar. From what the Commission has said it seems that a twofold assumption lies behind this. *First,* the intervention price is not necessarily the purchase price but is arrived at in negotiations between the supplier and the purchaser. Whether this reasoning is correct is a matter to which I shall return. *Secondly,* an increase in the intervention price does not also mean an abrupt increase in market prices; rather, there would be a gradual transition from the old to the new level before and after the date on which the change occurred.

6. The facts and the questions submitted

In Case 292/81 the facts are as follows. Between 2 March and 13 June 1979 the French undertaking Lion obtained by way of tender export certificates with advance fixing of refunds and monetary compensatory amounts from the Fonds d'Intervention et de Régularisation du Marché du Sucre [Fund for Intervention in and Stabilization of the Market in

Sugar, hereinafter referred to as "the Fund"]. Before that period the representative rate of the French franc had been devalued by 3.6% in Council Regulation No 976/78 of 12 May 1978 (Official Journal 1978, L 125, p. 2) followed on 25 March 1979 by a devaluation of 5.13% in Regulation No 643/79 (Official Journal 1979, L 83, p. 1). Both devaluations were to take effect on 1 July 1979. On 25 June 1979, that is after the aforesaid period had expired, the Council adopted Regulation No 1266/79 (Official Journal 1979, L 161, p. 4) in which the franc was devalued by 6.9% as from 1 July 1979. As a result the two earlier devaluations never came into effect. Also on 25 June 1979 the intervention price for sugar was raised with effect from 1 July from 40.09 European currency units (ECU) to 40.49 ECU by Regulation No 1288/79 (Official Journal 1979, L 162, p. 1). A request by Lion to the Fund for an adjustment of the amounts fixed pursuant to Regulations Nos 1134/68 and 243/78 was not granted, however.

Case 293/81 concerns the export certificates obtained by Loiret and other undertakings before 28 September 1979, again with fixing of refunds and monetary compensatory amounts. On 28 September the representative rate of the French franc was once more devalued, this time by 1.046% as from 1 October 1979 by Regulation No 2139/79 (Official Journal, L 246, p. 76). A request to the Fund for a review of the refunds fixed was also refused. In both cases the Fund referred to paragraph X (a) of the annex to Regulation No 3016/78, which I discussed earlier, by virtue of which the last day for the submission of tenders was a determinant factor, which in this case therefore ruled out account being taken of the devaluation of 6.9%, the increase in the intervention price (Case 292/81) and the devaluation of 1.049% (Case 293/81). In both cases appeals were lodged with the Tribunal Administratif [Administrative Court], Paris, against the Fund's refusals. In their last written pleadings the undertakings contended that the Fund had applied unlawful Community regulations and this prompted the national court to ask this Court the following questions:

"Is Regulation (EEC) No 3016/78 of 20 December 1978 valid with regard to the provisions contained in Article 190 of the Treaty of Rome?

Does it incorporate into the Community rules discriminatory measures such as to make them invalid?

Does it conflict with the provisions of Regulation (EEC) No 243/78 of 1 February 1978 introducing advance fixing for monetary compensatory amounts, in relation to which it is a measure of adaptation?"

The plaintiff's claims arise from contracts which they made to buy sugar. At the Court's request the plaintiffs gave a full explanation of this background to the cases. From their answers it appears that Community trade in sugar is carried on by means of standard contracts drawn up by the Association des Organisations Professionnelles du Commerce des Sucres pour les Pays de la Communauté Européenne [Association of Professional Organizations of the Sugar Trade for EEC countries, hereinafter referred to as "the Association"]. Clause 22 of those standard contracts, which are used for internal as well as for export transactions, provides as follows:

"Save for any stipulation to the contrary, the contractual price or prices shall be adjusted in order to reflect any change occurring prior to the delivery of the

sugar in the Community intervention price for the quality grade defined in Clause 5 expressed in the currency of the contract and converted at the representative rate for that currency; any change shall be for the account of the buyer."

The plaintiffs further explained that they must give this guarantee in order to be assured of constant supplies for their export transactions. According to the prevailing practice the sugar refineries are in turn obliged to allow changes in the intervention prices to be for the benefit of the beet-growers.

7. General observations in relation to the question submitted

In view of the parties' observations at the hearing I think that it may be worthwhile for me to make some general observations on the history of the contested Regulation No 3016/78.

The Commission has explained that Regulation No 3016/78 did not have to take account of changes in the price level in national currency occurring as a result of alterations in the representative rate and increases in the intervention price. With regard to the latter element it takes the view that the intervention price does not entail any obligation for individuals to use that price in their contractual relations. It substantiates this by pointing out that as a rule contract prices do not abruptly adjust to an altered intervention price but do so only gradually, especially if the alteration in the intervention price is relatively small, as in this case. The plaintiffs do not dispute the essence of that proposition.

Yet it may be asked whether the Commission's view flies in the face of economic reality. For it is a known fact that the fixing of intervention prices on a market in surplus, such as the market in sugar in this case, has a certain magnetic effect with the result that market prices do in fact move towards that price level. After all, it is always possible to offer the product (in this case sugar in categories A and B) to the intervention agency if it cannot be disposed of at an adequate price. That is not to say that for that reason alone the Commission misjudged its powers in adopting Regulation No 3016/78. For this Court takes the view that in agro-monetary matters involving the evaluation of complex economic situations courts must confine their review of the legality of the action taken to the question whether there has been a manifest error or misuse of powers or whether the authority concerned has clearly overstepped the limits of its discretion.

The plaintiffs' real complaint, however, is that in adopting Regulation No 3016/78 as described above the Commission took no account of the contractual situation forced on the plaintiffs by the clause of the Association's standard contract discussed above. As to that argument it should be observed in the *first* place that by obtaining advance fixing the plaintiffs knowingly took the risk of putting themselves in that situation. Regulation

No 3016/78 was after all published in the Official Journal on 22 December 1978 (Official Journal 1978, L 359, p. 11). That brings me to a *second* observation. The argument advanced by the plaintiffs to the effect that Regulation No 3016/78 took no account of the unequal situation brought about by that clause raises some doubt as to the conditions of competition on the relevant market. If the plaintiffs' argument is right and they had no way out of their situation then the question arises why neither they nor the Commission have suggested that the clause might infringe the relevant Community rules on competition. For the arguments put forward in this regard give the impression that the purpose and effect of the clause is amongst other things to stop the normal operation of market conditions on the formation of prices even in the case of sugar in category C (to which no intervention price applies). In other words the clause seems in fact to extend the price guarantee at the intervention price level to sugar produced by producers over and above the quota to which intervention prices apply. In view also of the clause's other effects mentioned by the plaintiffs the further question therefore arises whether when determining its policy the Commission may simply ignore this contractual undermining of the premises on which the organization of the market in sugar in general and Regulation No 3016/78 in particular are based, as it appears to have done, to judge from what its representatives said at the hearing. However, since the court which made the reference for a preliminary ruling has not raised any question on this matter and, as I have said, the plaintiffs in the main action knowingly accepted the risks inherent in the clause, I shall pass over this point.

8. Order of discussion

According to the written observations of the plaintiffs in the main action the first part of the preliminary question must primarly be understood as meaning that Article 190 of the EEC Treaty has been infringed because Regulation No 3016/78 fails to state, or states inadequately, the reasons on which it is based having regard to its consequences for the system of advance fixing provided for in Regulation No 243/78. Considering the third part of the question as well, the whole of the relationship between the two regulations is therefore subject to review by the Court. I shall therefore first discuss the relationship between Regulations Nos 243/78 and 3016/78 and then consider the second part of the question, namely whether Regulation No 3016/78 constitutes an infringement of Article 40 (3) of the EEC Treaty.

9. The relationship between Regulations Nos 243/78 and 3016/78

The first issue in these cases is, as I have stated, the question of the legality of Regulation No 3016/78 viewed in the light of Regulation No 243/78. Before examining that question two preliminary observations should be made. *First*, the wording of the third part of the national court's question shows that it clearly assumes that a hierarchical relationship exists between the two regulations. This misapprehension was confirmed by the plaintiffs in their reply to a question from the Judge-Rapporteur. The two regulations in question are, however,

regulations of the Commission. *Secondly,* it should be said that Regulation No 243/78 is founded on the basic Regulation No 974/71 of the Council concerning the system of monetary compensatory amounts. Regulation No 3016/78 came into being at a time when by virtue of Article 4 (3) of Council Regulation No 878/77 on the system of representative rates to be applied in agriculture the Commission could adopt derogating provisions in respect of the applicable rules on those representative rates and their inevitable consequences for the adjustment of fixed amounts. It is therefore clear that the operation of Regulation No 243/78 could and might be affected by regulations adopted later by the Commission in regard to the system of representative rates.

These two observations lead to the conclusion that the third part of the preliminary question must be understood as asking whether in adopting both regulations the Commission was consistent in its policy. The requirement that separate legal provisions should be consistent is after all a minimum requirement which may be placed upon the legislative action of the Community institutions in the interests of legal certainty for individuals. That the plaintiffs in the main action share this view of the question is shown by their argument set out under point IV.D. of their observations. They there argue that Regulation No 3016/78 is incompatible with the scheme, aims and effectiveness of the system of advance fixing of monetary compensatory amounts laid down in Regulation No 243/78 by ruling out adjustments, under the conditions set out in Regulation No 3016/78, of amounts once they are fixed. However, before considering that argument in detail I think that it is necessary to make a few observations on the system of monetary compensatory amounts in general and on Regulation No 243/78 in particular.

The Court has consistently held that the primary aim of the system of monetary compensatory amounts is to protect the common agricultural policy against monetary disturbances or, in other words, not to put the proper functioning of the market organizations at risk. In this regard I refer in particular to the Court's judgments in Case 74/74 [1976] ECR 797, Joined Cases 67 to 85/75 [1976] ECR 395, Case 96/77 [1978] ECR 383 and Case 84/78 [1979] ECR 1801. As appears from those decisions, that aim does not however mean that the individual trader should enjoy a guarantee against exchange-rate risks. This can be and often is the practical effect of the system of monetary compensatory amounts but, as the Court expressly said in its judgment in Joined Cases 95 to 98/74 [1975] ECR 1615, traders have no vested rights in this respect. The system of monetary compensatory amounts does not therefore afford direct protection to the individual trader but only indirect protection by ensuring that the organization of the market continues to function properly. In general the system will serve the trader's interests but it does not assure him of the most favourable conditions for conducting his transactions and in some circumstances may even cause him harm.

Regulation No 243/78 too, is a result of that line of thought. The background to that regulation, in particular the

fluctuations in the value of the French franc in 1976, and the first recital in the preamble thereto both show that the system of advance fixing of monetary compensatory amounts was created because of the effects of constant changes in the monetary compensatory amounts on trade with non-member countries. As appears from the second recital in the preamble to the regulation, the aim in view is to provide the trader with certainty about the economic conditions in which his transactions are conducted, which in the case of monetary compensatory amounts therefore means certainty about the representative rate, the actual rate and the monetary coefficient. The certainty which Regulation No 243/78 was intended to create covers only the monetary factors and *not* other factors, such as purchase and selling prices, which determine the individual trader's position. Of course, as the Commission has suggested, advance fixing is practical and makes sense only if traders are certain about those other factors, but if the parties act otherwise and as a result consciously run risks it cannot be required of the system of advance fixing that it *must* provide them with a way out of that situation.

Regulation No 3016/78 does not diminish the certainty which the system of advance fixing provided for in Regulation No 243/78 offers since once fixed the amounts stay fixed.

In the plaintiffs' case the uncertainty was not caused by non-adaptation of the fixed amounts but by their contractual situation which the aims and systems of monetary compensatory amounts and Regulations Nos 243/78 and 3016/78 do not have to take into account.

I therefore conclude that the adaptation of the system of advance fixing of monetary compensatory amounts provided for in Regulation No 243/78 by a specific set of rules determining the "fait générateur" in the sugar and isoglucose sector is not contrary to the aims and scheme of that system and accordingly the Commission cannot be accused of any inconsistency in its policy on these matters.

10. The presumed failure to state the reasons on which Regulation No 3016/78 is based

Before the question of infringement of Article 190 of the EEC Treaty is considered it should be pointed out in this regard that this question about the procedural legality of Regulation No 3016/78 mut be kept separate from the question of substantive legality which I have discussed above inasmuch as it relates to Regulation No 243/78. This limitation on the submission of a failure to state reasons adequately was made clear as long ago as the Court's judgment in Case 8/65 [1966] ECR 1. The issue in these cases is whether the given legal provisions and consequences of Regulation No 3016/78 are supported by the given recitals in the preamble thereto, in other words, whether or not there is inconsistency between the two. This effect of the provision requiring a statement of the reasons on which measures are based means that the arguments which the plaintiffs advanced, principally at the hearing, about the arbitrary nature of the regulation and the difference from Regulation No 797/80

in the following sugar-marketing year, must, being questions of substantive law, be left aside when the alleged failure to state reasons is discussed. I shall consider those questions in the following section of my Opinion.

As I have indicated, Regulation No 3016/78 contains its own set of rules determining the "fait générateur" in the sector in question which in principle affects all agro-monetary matters in this sector. It may then be said, *first*, that the legal basis of Regulation No 3016/78, namely Article 4 (3) of Regulation No 878/77, is clearly mentioned. Secondly, it is stated that derogations may be made pursuant to that regulation from the general rules of Regulation No 1134/68 on which Regulation No 243/78 is also based (second recital in the preamble). Thirdly, the reasons for those derogations are briefly stated to be for "the sound management of the sugar and isoglucose markets". From those particulars it may be concluded that the requirement that the recitals in the preamble to the regulation and the measures adopted should be consistent is satisfied. More generally speaking, the aims of the obligation to state reasons laid down in Article 190 are fulfilled as well, those aims having been described by the Court in Case 24/62 [1963] ECR 63 at p. 69 as "to give an opportunity to the parties of defending their rights, to the Court of exercising its supervisory functions and to Member States and to all interested nationals of ascertaining the circumstances in which the Commission has applied the Treaty".

The plaintiffs may well argue with some justification that the statement of reasons on which Regulation No 3016/78 is based is very brief, first because the rule in paragraph X (a) of the annex thereto is not specifically mentioned or reasons given for it in the recitals in the preamble to the regulation and secondly because its effect on the general advance-fixing arrangement for monetary compensatory amounts is not specifically indicated either.

As far as the *first* point is concerned, reference may be made to the consistent line of decisions on the stating of reasons on which regulations are based. According to the judgments in, for example, Case 5/67 [1968] ECR 83 and Case 87/78 [1978] ECR 2457, the statement of reasons may be general in nature and furthermore a specific recital of the facts, which are often very numerous and complex, or a complete evaluation of them may not be expected. As regards the *second* point it should be pointed out that the Court also accepts that the reasons on which regulations are based may be made clear from their legislative context, particularly in the agro-monetary field. According to that view, expounded in the Court's judgments in, for example, Case 92/77 [1978] ECR 497 and Case 35/80 [1981] ECR 45, not only should the wording of the statement of reasons be looked at but also the entire body of legislation contained in several related regulations. A clear reason for each separate provision need not be given in the statement of reasons on which the regulation itself is based, provided that it is apparent from the context of the relevant body of legislation which may perhaps consist of several regulations. That this is so in this case I have already shown when discussing the relationship between Regulations Nos 3016/78 and 243/78. I

therefore consider that in view of the Court's previous decisions I am bound to conclude that Regulation No 3016/78 stands up to the test of Article 190 of the EEC Treaty, although a more detailed statement of the reasons for the derogation from the usual system made in that regulation would have been desirable. If this Court had consistently held that a brief statement of reasons such as that in this case was insufficient there would perhaps be something to be said for a principle that substantial reasons for making derogations from the usual system must be given and that those reasons must also be capable of justifying the derogation made. If such a principle were accepted it would still be possible for the Commission's discretion in matters of policy to be sufficiently respected. One may indeed wonder whether it is satisfactory that the complex substantive reasons for a derogating regulation should, as in this case, come to the fore only at the last stage of the oral procedure and may not then be challenged by the other party to the dispute.

11. Infringement of Article 40 (3) of the EEC Treaty

The Tribunal Administratif has also asked the Court about the compatibility of Regulation No 3016/78 with Article 40 (3) of the EEC Treaty. In their observations the plaintiffs contend that the regulation infringes the principle of non-discrimination in two ways.

The first part of their argument consists of the assertion, which is not expanded on, at least not in their written observations, that such a specific set of rules as those contained in Regulation No 3016/78 exists only in the sugar and isoglucose sector. The Commission accepts that assertion as true with the comment that it intends to adopt such a set of specific rules in the cereals sector as well. On its own, however, this assertion of the plaintiffs does not prove anything, since it has not been demonstrated that the existence of those rules cause traders in the sector in question to be discriminated against *vis-à-vis* traders in other sectors. At the least the plaintiffs ought to have shown that compared to traders in other sectors the rules put them in an objectively unequal situation which is not justified by objectively different circumstances. The plaintiffs' reference in this regard to the judgment in Joined Cases 117/76 and 16/77 [1977] ECR 1753 cannot assist their case either. In the seventh and eighth paragraphs of that decision the Court expressly held with regard to the provision on which the plaintiffs rely that different sectors or products cannot readily be compared with one another. Moreover, that case concerned two products, quellmehl and starch, made from one basic product (maize) which for the purposes of export refunds were originally treated in the same way but later were not.

In the second part of their argument the plaintiffs allege that traders who have had monetary compensatory amounts fixed in advance are discriminated against compared with those who have not. In my view, however, no argument is needed to show that those two cases are not comparable since when monetary compensatory amounts are fixed in advance an entirely different legal relationship with the authorities concerned arises than is the case when

they are not. At the hearing the plaintiffs did not pursue this argument any further.

The plaintiffs did further substantiate their allegation of infringement of Article 40 (3) at the hearing inasmuch as they accused the Commission above all of pursuing a changeable and arbitrary policy in view of Commission Regulation No 797/80 of 31 March 1980 (Official Journal, L 87, p. 39). That regulation, which, incidentally, definitely does *not* concern monetary compensatory amounts, did make it possible for refunds fixed in advance to be adjusted, not however on account of alterations in the representative rate of a particular currency but on account of the increase in the intervention price for sugar on 1 July 1980. However, the plaintiffs have not shown that on the adoption of that later regulation the earlier Regulation No 3016/78 took on an arbitrary character. The Commission defended the adoption of the later regulation by arguing *inter alia* that the increase in the intervention price on 1 July 1980 was foreseeable at that time, in clear contrast to the previous marketing year. The plaintiffs have not challenged that argument. Although it must indeed be acknowledged that in retrospect there was some alternation in policy, the plaintiffs have also failed to show that this could not have been caused by agro-monetary circumstances or the policy pursued by the Council. According to the Court's judgment in Case 88/78 [1978] ECR 2477 frequent changes are a characteristic feature of the agro-monetary system.

In view of the foregoing considerations I therefore take the view that Regulation No 3016/78 does not constitute an infringement of Article 40 (3) of the EEC Treaty.

12. Conclusion

My opinion is therefore as follows:

Consideration of the questions submitted has disclosed no well-founded objections on the points raised therein to the validity of Commission Regulation No 3016/78. That regulation is not contrary to Article 190 of the EEC Treaty. Nor does it introduce into the common agricultural policy any discrimination which would impair its validity. Finally, the regulation is not incompatible with Commission Regulation No 243/78 of 1 February 1978 because Council Regulation No 878/77 on which that regulation is based expressly allows derogations to be made by the Commission.