2. Orders the applicant to bear the costs.

Kutscher Sørensen Bosco

Donner Mertens de Wilmars Pescatore O'Keeffe

Delivered in open court in Luxembourg on 15 December 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 6 DECEMBER 1977

My Lords,

In this action the applicant, the Firma Gebrüder Dietz of Frankfurt-am-Main, whose business includes trading in sugar, claims damages from the Commission under Article 178 and the second paragraph of Article 215 of the EEC Treaty, on the ground that the Commission was at fault in not including, in the legislation whereby monetary compensatory amounts ('mca's') were made applicable in Italy as from 3 January 1972, transitional provisions for the protection of traders who had entered before that date into contracts for the export to Italy of products affected by that legislation.

The facts of the case, as pleaded by the applicant are as follows. (I say 'as pleaded by the applicant' because the Commission does not admit them all. If Your Lordships were to decide that, on the facts as so pleaded, the Commission was in principle liable in damages to the applicant, it would be necessary to admit evidence in order to establish the actual facts in so far as they are in issue and to determine the actual amount of the Commission's liability on the basis of those facts).

On 17 December 1971 the applicant concluded a contract with one Camillo Pezzotta of Bergamo, in Italy, for the sale to the latter of 10 000 tonnes (up to 5 % more or less) of white sugar of German origin, at the price of Lit 15 250 per 100 kg net. Delivery was to be effected during the period January to June 1972. Payment was to be made in full on the first presentation of documents. The contract (a photo-copy of which is Annex 1 to the application) contained a special condition in these terms:

'This contract is based on the prices at present ruling in the EEC and the regulations issued thereon. Possible

alterations of the relevant EEC price structure may be relied on only in so far as the final price to the buyer is the same as the price in the present contract.'

Precisely what that was intended to mean is obscure. It does however at least evince that the parties to the contract were aware that EEC Regulations affecting prices for sugar were liable to alteration.

It seems that at some time after the beginning of 1972 (the precise date is not clear) the applicant registered the contract with the Einfuhr- und Vorratsstelle für Zucker.

Deliveries under the contract took place in the period January to June 1972, but they amounted to only 6 000 tonnes.

Those events occurred of course in the early days of the Community legislation relating to mca's. These had been instituted by Council Regulation (EEC) No 974/71 of 12 May 1971 (OJ L 106 of 12. 5. 1971), with which Your Lordships are only too familiar.

For the purposes of the present case I think it necessary to do no more than recall that, by Article 1 of the Regulation, a Member State which allowed the exchange rate of its currency to fluctuate by a margin wider than the one permitted by international rules was authorized to charge mca's on imports and grant them on exports, and that, by virtue of Article 2 (1) and (2), the mca's were to reflect the difference between the parity of the currency of that Member State declared to and recognized by the International Monetary Fund, on the one hand, and the mean spot market rate of that currency against the US dollar on the other hand. Article 2 (3) contained a proviso in the following terms:

'However, with regard to trade between one Member State referred to in Article 1 and another Member State referred to in that Article, the compensatory amount applicable to a specified product shall be reduced by the compensatory amount applied to that product in the latter Member State.'

The only other provision of Regulation No 974/71 that I need mention is Article 6 which provided that detailed rules for the application of the Regulation, in particular rules covering the fixing of the mca's, should be adopted in accordance with the Management Committee procedure.

Such detailed rules were adopted by Commission Regulation (EEC) No 1013/71 of 17 May 1971 (OJ L 110 of 18. 5. 1971). At that time, as was recited in the preamble to that Regulation and as Your Lordships know, Article 1 of Regulation No 974/71 applied only to the Federal Republic of Germany and to the Netherlands. The only provision of Regulation No 1013/71 to which it is necessary to advert for present purposes is Article 4, which was in these terms:

'1. The Member States referred to in Article 1 of Regulation (EEC) No 974/71 shall not apply the compensatory amounts referred to in that Article to imports effected under contracts:
   (a) concluded before 10 May 1971, and
   (b) registered before 12 May 1971 with the authorities of that Member State; or
   which can be proved by official documents to have been concluded.
2. However paragraph 1 shall apply only to the extent necessary to allow the contract to be executed under the conditions which would have existed had the monetary measures referred to in Article 1 of Regulation (EEC) No 974/71 not been taken.'

Your Lordships observe that that Article applied to imports but not to exports. The Commission explained to us that the requirement in paragraph 1 of registration or proof by official documents was considered to be necessary for

the prevention of fraud, fraud taking the form of the ante-dating of documents. The precise meaning to be attributed to paragraph 2 is a matter that is in issue in Case 94/77 *Fratelli Zerbone S.N.C.* v *Amministrazione delle Finanze dello Stato,* which we heard last week, but it need not detain us here.

Regulation No 1013/71 was followed by Commission Regulation (EEC) No 1014/71 of the same date fixing the mca's to be charged and granted by Germany and the Netherlands. Those mca's were set out in Annexes to the Regulation and those Annexes gave effect, *inter alia,* to Article 2 (3) of Regulation No 974/71 by setting out in separate columns the mca's applicable in trade between Germany and the Netherlands. The mca's so fixed were altered at intervals thereafter by subsequent Commission Regulations.

In August 1971 Belgium and Luxembourg joined Germany and the Netherlands in widening the margins of fluctuation of the exchange rates for their currencies. Consequently, on the 27th of that month, the Commission adopted Regulation (EEC) No 1871/71 which supplemented Regulation No 1013/71 by introducing into it detailed provisions applicable to Belgium and Luxembourg. In particular Article 4 (1) of Regulation No 1013/71 was amended so as to provide that Belgium and Luxembourg should not apply mca's to imports effected under contracts concluded before 23 August and registered before 24 August 1971, or which could be proved by official documents to have been so concluded.

There followed, also on 27 August, Commission Regulation (EEC) No 1872/71 fixing, again by reference to Annexes, the mca's to be charged and granted by the four Member States to which Article 1 of Regulation No 974/71 now applied. Again effect was given in those Annexes to Article 2 (3) of Regulation No 974/71. And again, of course, the mca's so fixed were altered at intervals thereafter. By virtue of Annex VII to Commission Regulation (EEC) No 2635/71 of 10 December 1971, the rate of mca applicable on 17 December 1971 (the date or alleged date of the conclusion of the contract between the applicant and Signor Pezzotta) to exports of white sugar from Germany to Italy was DM 8·85 per 100 kg.

On 16, 17 and 18 December 1971 there took place in Washington the series of meetings of the 'Group of Ten' which resulted in what is sometimes called 'the Smithsonian Agreement'. The upshot of this, so far as here material, was that the US dollar was devalued by 7·89 % and the Italian lira by 1 %, whilst the Deutschmark was revalued by 4·61 %.

Following that Agreement it was decided that France and Italy should also apply mca's. So, on 30 December 1971, the Commission adopted Regulation (EEC) No 2887/71 further amending Regulation No 1013/71 so as to introduce into it detailed provisions for the application of Regulation No 974/71 in France and Italy. In particular Article 4 of Regulation No 1013/71 was further amended so as to provide that France and Italy should not apply mca's to imports effected under contracts concluded before 19 December 1971 and registered before 28 December 1971, or which could be proved by official documents to have been so concluded.

In the *Zerbone* case the question is raised whether, having regard to the fact that, under the Smithsonian Agreement, the lira, though revalued in relation to the dollar, was not revalued in relation to its parity as declared to the International Monetary Fund, Article 1 of Regulation No 974/71 authorized the application of mca's by Italy. That question is not however raised by the pleadings in the present case, so I think that the present case must be approached on the footing that Italy could validly introduce mca's and that the Commission could validly legislate so as to enable it to do so.

The mca's to be charged and granted by Italy were initially fixed by Commission Regulation (EEC) No 17/72 of 31 December 1971. This Regulation fixed, again by reference to Annexes, the mca's to be charged and granted by all the then Member States as from 3 January 1972. As previously, the Commission gave effect in those Annexes, to Article 2 (3) of Regulation No 974/71. Thus the mca's to be paid in Germany on exports of white sugar to Italy were fixed at the figure that would have been appropriate having regard to the relationship between the Deutschmark and the US dollar reduced by the figure appropriate having regard to the relationship between the lira and the dollar. The net figure was DM 5·13 per 100 kg. The mca's fixed by Regulation No 17/72 were subsequently altered on three occasions during the period when deliveries were being effected by the applicant under its contract with Signor Pezzotta, namely by Commission Regulations (EEC) No 144/72 of 21 January 1972, No 392/72 of 24 February 1972 and No 979/72 of 12 May 1972.

In the result the applicant received less by way of mca's than it would have received had there been no deduction from the German mca's of the amounts appropriate in respect of Italian mca's. According to the applicant the total amount that it would have received had there been no such deduction was DM 649 452·50. In fact it received DM 320 052·50. It is of the loss of the difference between those two amounts that the applicant complains.

It first brought its complaint before the Finanzgericht of Hamburg, which, by a Judgment dated 9 December 1974, rejected it. It appears from that Judgment that the applicant advanced before the Finanzgericht the same contentions as it has advanced before this Court, namely that, in omitting to include in the legislation whereby mca's were rendered applicable in Italy any transitional provisions governing traders in the applicant's position, the Commission had offended against two fundamental principles, that of the protection of legitimate expectations (Vertrauensschutz) and that of equality (Gleichheitsgrundsatz). The Finanzgericht dealt very fully with those contentions in its Judgment, holding that neither of those fundamental principles could avail the applicant here.

Against the Judgment of the Finanzgericht the applicant has appealed to the Bundesfinanzhof. That appeal is still pending.

Unsure of what satisfaction it might obtain at the hands of the Bundesfinanzhof, the applicant, on 24 December 1976, commenced the present action in this Court. It points out that, had it delayed doing so much longer, the action would have become time-barred by virtue of Article 43 of the Statute of the Court.

The Commission's immediate reaction was to lodge, on 7 February 1977, an interlocutory application asking that the action be dismissed on the ground that it was inadmissible. The Commission's contention was that the action was of such a kind that the applicant must first exhaust its remedies in the national Courts before resorting to this Court.

The Court, by Order dated 30 March 1977, reserved its decision on that application for the final judgment.

Whilst, for the reasons that I shall state in a moment, the action is, in my opinion, ill-founded in substance, I do not think that it is inadmissible.

The question whether an action is inadmissible on the sort of ground relied upon by the Commission depends on the nature of the claim made in that action, i.e. on whether it is or is not a claim of a kind that this Court has jurisdiction to entertain. That question must be distinguished from the question whether the claim is well-founded in law.

Essentially the claim in the present case is a claim for damages founded on the alleged fault of the Commission in failing to include in its legislation provisions that the applicant says it should have included. There is ample authority for the proposition that such a claim is one that this Court has jurisdiction to entertain, at all events where the applicant also claims that such failure has resulted for him in financial loss. I cited some of the authorities to that effect in Case 46/75 *IBC* v *Commission* [1976] ECR 65, at pp. 86-87 and again in Cases 67 to 85/75 *Lesieur Cotelle and others* v *Commission* [1976] ECR 391 at p. 420. To the authorities to which I there referred (namely Case 43/72 *Merkur* v *Commission* [1973] ECR 1055, Case 152/73 *Holz & Willemsen* v *Council and Commission* [1974] ECR 675 and Case 74/74 *CNTA* v *Commission* [1975] ECR 533) one can now add Case 97/76 *Merkur* v *Commission* (the third *Merkur* case) [1977] ECR 1063, where no-one suggested that the action was inadmissible. Closely akin to those cases are Cases 9 & 11/71 *Compagnie d'Approvisionnement* v *Commission* [1972] ECR 391 where the Court held admissible an action against the Commission brought on the ground that it had fixed certain subsidies at too low a figure.

I ventured, in my Opinions in the *IBC* and *Lesieur Cotelle* cases, to contrast with that line of authority another line, consisting of Case 96/71 *Haegeman* v *Commission* [1972] ECR 1005, Case 99/74 *Grands Moulins des Antilles* v *Commission* [1975] ECR 1531 and the *IBC* case itself. In each of those cases it was held that the applicant's correct remedy was to sue the responsible national authority in the competent national Court and not to sue the Commission for damages in this Court. What characterizes those cases, and distinguishes them from the present kind of case, is that in each of them the applicant was claiming not damages but payment of a specific sum. In the first and third cases it was a sum that the applicant contended had been wrongfully exacted from him by the national authority concerned under Community legislation which he contended was invalid. In the second case it was a sum that the applicant claimed to be entitled to receive under the relevant Community legislation. In none of those cases was there any doubt or dispute as to the amount of the sum claimed. (To those cases one may now add Case 26/74 *Roquette* v *France* [1976] ECR 677).

It is upon the latter line of authority that the Commission here principally relies. In so doing it is in my opinion mistaken, for that line of authority has nothing to do with a case of the present kind.

To hold that it did would, in effect, involve foisting upon a national court the task of deciding how a Community Institution should have exercised a legislative discretion vested in it. In a case where it is claimed and established that a Community Institution has wrongfully omitted to legislate so as to deal with a particular situation, this Court alone can have jurisdiction to grant a remedy to the person thereby aggrieved. This case itself illustrates that very well. Suppose that the applicant here made good its contention that the Commission ought to have included transitional provisions protecting exporters in the legislation in question, the fact would remain that the Commission had a measure of discretion as to the nature and content of such transitional provisions. The Commission might have made Article 4 of Regulation No 1013/71 applicable to exporters as well as to importers, or it might have adopted any of the several other forms of transitional provision that one finds scattered about the Community agricultural legislation, or indeed it might have adopted any other sort of transitional provision. It is not for any national court to assess damages on the basis of what the Commission should

have done. Nor would it be appropriate that judgment for such damages should be entered against a national authority. The point is perhaps even more vividly illustrated by a group of cases recently heard by this Court, Cases 64 & 113/76, 117/76 & 16/77, and 124/76 & 20/77, the *'Quellmehl and Gritz* cases' (not yet reported). Some of those cases came before the Court by way of references for preliminary rulings by national Courts; others by way of actions for damages under Article 178. In the former this Court was unable to rule in such a way as to enable the national Courts to grant any effective remedy. In the latter, on the other hand, this Court can proceed to assess damages.

The Commission relies especially on the Judgment of this Court in the *Lesieur Cotelle* case. That Judgment has been vigorously criticized by learned writers on a number of grounds, including inconsistency with other authority (see in particular an article entitled 'Restitution or Damages: National Court or European Court?' by Andrew Durand in the European Law Review, Vol. 1, p. 431 at pp. 438 — 9 — an article which seems to me, if I may say so, to set out the relevant law clearly and accurately). I think however that the *Lesieur Cotelle* case can probably be explained as a case that went off on a pleading point. The applicants' claims there had been formulated in their pleadings in a somewhat obscure and unsatisfactory manner. Those claims were reformulated at the hearing, and I thought it right to deal with them on the basis of that reformulation. The Court however considered that the applicants must be held to their pleadings and, on that basis, that the claims must be treated as claims for specific sums (see paragraphs 2, 10, 13 and 16 of the Judgment). At all events, I do not think that that Judgment can be regarded as affording any sort of reliable guidance in the present case.

I do not overlook that, in the present case, the formal statement of the applicant's claim at the beginning of the application could be taken to import that here too the claim was for payment of a specific sum rather than for damages. But a reading of that pleading as a whole makes it clear that the applicant's claim is really as I have stated it to be.

It follows that in my opinion, whatever may be the result of the case as regards its substance, the Commission should be ordered to pay the costs of occasioned by its interlocutory application.

I turn to the substance of the case.

The contention that the Commission wrongfully disregarded the applicant's legitimate expectations was, as I have indicated, very fully dealt with by the Finanzgericht. That Court pointed out that a change in the law cannot be held to have defeated legitimate expectations unless that change was of a kind such that it could not be expected. Here it was inherent in the legislation relating to mca's instituted by Regulation No 974/71 that, if Italy were ever to allow the exchange rate of its currency to fluctuate in the manner mentioned in Article 1 of that Regulation, mca's could become applicable in Italy. The system of mca's, which had originally applied only to Germany and the Netherlands, had subsequently been extended to Belgium and Luxembourg. There was nothing to entitle the applicant to bank on its not being extended to France or Italy. Moreover the consequences of any such extension were foreseeable. They were spelt out by Article 2 of the Regulation. I would add for my part, having regard to an argument advanced before us on behalf of the applicant, that, in view of the way in which Article 4 of Regulation No 1013/71 had originally been framed, and of the way in which that Article was amended when Belgium and Luxembourg acceded to the system, no-one can reasonably have expected that, if the system were extended to France or Italy, there would be transitional provisions in favour of

exporters. It was of course open to the applicant, although it was contracting at the very time of the meetings of the Group of Ten in Washington, to do so on the footing that nothing would happen that could render mca's applicable in Italy. But, in so doing, the applicant must be backing its own judgment as to the likely future value of the lira, in other words taking a commercial risk; it could not be relying on any legitimate expectation conferred on it by Community law. There was pressed upon us on behalf of the applicant the contention that, in fact, following the Washington meetings, the Italian Government saw no good reason to introduce mca's and that it was persuaded reluctantly to do so by the Governments of other Member States. Assuming that that is correct, it seems to me, with all respect, to be quite irrelevant. Short of a contention, which, as I have said, has not been advanced on behalf of the applicant, that what happened to the lira after the Washington meetings did not render Article 1 of Regulation No 974/71 applicable to it, so that the introduction of mca's in Italy was unlawful, an analysis of the reasons why mca's were in fact introduced in Italy cannot assist the applicant.

That is, I think, enough to dispose of the contention that there was here a wrongful disregard of the applicant's legitimate expectations. But I think that there is another ground on which that contention must, in any event, fail.

So far as I am aware, there is only one case in which this Court has held that a change in the incidence of mca's could give rise to a liability on the part of the Community under the second paragraph of Article 215 on the footing that such change defeated the legitimate expectations of traders. That is the *CNTA* case (already cited). The effect of the Judgment in that case must be assessed in the light of the final fate of the claims in that case itself (as to which see [1976] ECR 797) and also in the light of the Judgment in Cases 95 to 98/74 and 15 & 100/75, the *'Cooperatives Agricoles* cases' [1975] ECR 1615, and of the Judgment in the third *Merkur* case (already cited). I sought to summarize the law as thus laid down in my Opinion in Case 27/77 *Cargill* v *ONIC* (not yet reported). It boils down, essentially, to this. Although the real purpose of the system of mca's is to prevent fluctuations in exchange rates from disturbing the functioning of the common organizations of agricultural markets, that system could also, in the period (before 1973) when mca's reflected the difference between the official parity of a Member State's currency and its market value in relation to the US dollar, afford to traders in products covered by such a common organization (as distinct from traders in other agricultural products or in non-agricultural products) a form of protection against the risk of fluctuations in exchange rates alternative to normal commercial modes of protection against such risks. So the existence of the system might induce even a prudent trader to omit to cover himself otherwise against an exchange risk. The Community might accordingly be made liable in damages to such a trader under the second paragraph of Article 215, on the footing that his legitimate expectations had been defeated, if, in the absence of overriding considerations of public interest, a Community Institution legislated so as to abolish or reduce mca's in a particular sector of trade with immediate effect and without warning, and, in so doing, failed to adopt transitional measures enabling the trader to avoid loss under a contract to which he was committed, or to be compensated for such loss. The Community could not, however, be made liable on that principle to a trader who had in fact incurred no relevant exchange risk, for example an exporter from France who, under the relevant contract, was entitled to payment in French francs. So, here, the applicant, regardless of any other consideration, could not recover on that principle if

its contract with Signor Pezzotta had prescribed a price payable in Deutschmarks. On the other hand he could, if all the other requirements for the application of the principle had been satisfied, have recovered thereunder if the price had been payable in US dollars. The question is whether he could do so, the price having been fixed in lire. I think not, because the way in which mca's were computed under Article 2 of Regulation No 974/71, as it was framed at the material time, was such that they did not reflect, and were never intended to reflect, fluctuations in the rates of exchange for the currencies of Member States *inter se.* They were intended to reflect only the rates of exchange for those currencies respectively as against the US dollar. So a German exporter who relied on mca's to protect him against exchange risks as between the lire and the Deutschmark could not be described as prudent. He would merely be speculating on the future levels of the exchange rates of each of those currencies in relation to the US dollar. Having done so, he could not complain if the mca's reflected the actual levels of those exchange rates, which of course is what they did.

I turn lastly to the applicant's arguments based on the principle of equality. I can deal with them much more shortly. The applicant submits firstly that it was unfairly treated as compared with German importers and secondly that it was unfairly treated as compared with German farmers.

As regards its treatment as compared with that of German importers, the applicant's complaint is founded on the fact that Article 4 of Regulation No 1013/71 applied to their contracts, but not to exporter's contracts. The answer is, in my opinion, that, as is submitted by the Commission, mca's did not affect German importers and German exporters in the same way. For the former they were imposts, for the latter subsidies.

The applicant's complaint of unequal treatment as compared with German farmers was founded on Council Regulation (EEC) No 2464/69 of 9 December 1969, which empowered the Federal Republic to grant aid to German farmers, partly at the expense of Community funds, in order to compensate them for their loss of income consequent on the revaluation of the Deutschmark that had occurred earlier in that year. On behalf of the applicant it was said that that aid was still continuing and that the tenderness thus shown by the Community Institutions to German farmers was in sharp contrast to the harshness shown to German traders such as itself. With all respect to the applicant, it seems to me that that is the sort of argument that has only to be stated in order to be rejected. Whatever its political merits may be, it is not a legal argument.

In the result I am of the opinion that this action should be dismissed with costs, save that the Commission should be ordered to pay the costs of and occasioned by its interlocutory application raising the question of the action's admissibility.