co-operation cannot make the Community liable to individuals.

That is in any case the position where it is not the Commission's expression of opinion but solely the national authority's decision ratifying it which might be regarded as causing damage to the applicant. Indeed, a review of administrative acts of Member States in applying Community law is primarily a matter for national courts, without prejudice to their power to refer questions for a preliminary ruling to the Court under Article 177 of the EEC Treaty. In these circumstances the remedy to be envisaged in such a case is an action before the national courts.

In Case 133/79

1. SUCRIMEX S.A., Paris,

2. WESTZUCKER GMBH, Dortmund

represented by Messrs Funck-Brentano, of the Paris Bar, with an address for service in Luxembourg at the Chambers of M. Neuen-Kauffman, 21 Rue Philippe II,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, P. Gilsdorf, acting as Agent, assisted by J. Delmoly, a member of its Legal Department, with an address for service in Luxembourg, at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION, at the present stage of the proceedings, for a declaration that the action brought by the applicants under the second paragraph of Article 173 of the EEC Treaty in regard to the principal claim and under Articles 178 and the second paragraph of Article 215 thereof in regard to the alternative claim, is inadmissible,

THE COURT (Second Chamber),

composed of: A. Touffait, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: G. Reischl
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

1. The first applicant, Sucrimex, sold sugar to the second applicant, Westzucker. Westzucker in turn assigned to Sucrimex the rights attached to export licences relating to 2 600 tonnes of sugar to enable the latter to arrange customs clearance of the sugar for the account of Westzucker. The licences were valid until 31 May 1979 and indicated the rate of export refund fixed by tendering procedure.

Sucrimex received the licences on 16 May 1979 and passed them on the same day to a transport undertaking for delivery to the forwarding agent in Dunkirk. The licences were lost en route. At the request of Westzucker, the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], Frankfurt, (hereinafter referred to as the "Federal Office"), which had issued the licences, prepared fresh licences and the 2 600 tonnes of sugar to which they related were exported on 30 and 31 May 1979 under cover of those licences.

Sucrimex subsequently applied on 6 and 7 June 1979 to the Fonds d'Intervention et de Régularisation du Marché du Sucre [Sugar Market Intervention and Stabilization Fund], Paris, (hereinafter referred to as "the Fund") for the payment of the exports refunds at the rate indicated in the licences. By a letter of 5 July 1979 the Fund rejected the applications "in view of the opinion expressed by the Commission" in a telex message signed by the Director General for Agriculture which was sent to the Fund on 3 July 1979. Consequently the Fund agreed to pay only the refund applicable on the day when the customs formalities for export were completed, which was FF 921 339.04 less than the amount requested by Sucrimex.

The Commission's telex message referred to above is worded as follows:

"Following the discussions at the meeting of the Management Committee for Sugar of 13 June 1979, I write to inform you that:

1. When the Federal Office issued the documents referred to above it made an error (the word 'duplicate' not appearing on the licence); these documents which seem to be extracts from licence No 251 55986 are actually duplicates of the extracts which were lost.

   Article 17 (7) of EEC Regulation No 193/75 provides that duplicates may not be submitted for purposes of carrying out export operations.

   The validity of this provision has not been questioned by the Court of Justice in the judgment delivered in Case 168/73.

   Normally the documents could not have been used for the purpose of carrying out export operations owing to their bearing the word 'duplicate'. . ."

Having given the factual background, the Commission continues:

"The Commission's officers feel that Sucrimex cannot claim that it did not know that the documents which it held were not genuine licence extracts.

3. Therefore the officers of the Commission conclude that there is no legitimate reason for paying the refund calculated on the basis of the rate fixed by tendering procedure appearing in those documents.

   Since the sugar exports are deemed to have been made without any licences, the exporter can claim only the normal refund applying on the day when the customs export formalities were completed (See the Commission rules fixing the refunds applicable to exports).

C. Villain, Director General".

The Commission's telex message was preceded amongst other things by a telex message of 23 May 1979 sent by the Association des Organisations Professionnelles du Commerce des Sucres [Association of Sugar Trade Organizations] requesting it to deal urgently with the problem created by the lost certificates and

"at least to give the national organizations provisional authority to deal with this situation by requiring from the holder such guarantees as may be thought appropriate".

The Commission replied first by telephone on 23 May 1979 to the President of the Syndicat du Commerce des Sucres [Sugar Trade Association] in Paris and then by a telex message on 6 June 1979 to the Association des Organisations Professionnelles that where a licence is lost, the duplicate may not be submitted for purposes of carrying out export transactions. The Commission confirmed its position by a telex message of 9 August 1979 sent to Sucrimex.

2. Article 17 (7) of Regulation No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advance fixing certificates for agricultural products (Official Journal L 25, p. 10), referred to in the Commission's telex message of 3 July 1979, reads as follows:

"Where a licence or certificate or extract therefrom is lost, issuing agencies may, exceptionally, supply the party concerned with a duplicate thereof, drawn up and endorsed in the same way as the original

document and clearly marked with the word 'Duplicate' on each copy.

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

3. The principal claim of this application is for the annulment under the second paragraph of Article 173 of the Treaty of the alleged decision which the Commission communicated to the Fund on 3 July 1979 and, in the alternative, for a declaration that the Commission should pay the said sum of FF 921 339.04 by way of damages together with legal interest on the basis of Article 178 and the second paragraph of Article 215 of the Treaty.

To support their *claim for annulment* the applicants argue that the Commission erred in law in the disputed decision by calling the licences issued by the Federal Office "duplicates" They were "identical" certificates. Furthermore the Commission was in breach of Regulation No 192/75 of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal L 25, p. 1) as well as Regulation No 193/75 referred to above. Since the sugar to which the licences related was exported and the "identical" licences submitted and verified on the day of export, the applicants say that they are entitled to payment of the refunds requested.

Moreover, by not taking a decision quickly, the Commission was in breach of the principle of legal certainty which requires that a decision should be taken quickly in order to protect traders engaged in firm and irrevocable transactions. It likewise infringed the principle of the protection of legitimate expectation, since the applicants were entitled to rely on the licences in question. Finally, in the opinion of the applicants, the decision in question was retroactive since on the one hand it treats *a posteriori* a transaction carried out in a regular manner as irregular and, on the other hand, imposes the penalties applying to such an irregularity.

In support of their claim for *damages* the applicants contend amongst other things that the Commission was guilty of negligent failure to act in not clearly explaining its position until 3 July 1979 in spite of the Association's telex message of 23 May 1979.

Referring to their observations concerning the claim for annulment, the applicants next point out that the Commission was in breach of the principles of legal certainty and of the protection of legitimate expectation by treating documents properly issued as non-existent. The applicants conclude that Sucrimex has suffered damage of an amount equal to the refunds not paid owing to the Commission's default and that the conditions for the second paragraph of Article 215 to apply are therefore fulfilled.

4. By a document lodged on 28 September 1979 the Commission raised an objection of inadmissibility under Article 91 (1) of the Rules of Procedure by which it claims that the Court should:

— Dismiss the applications as inadmissible;

— Order the applicants to pay the costs.

5. In their pleading relating to the objection of inadmissibility lodged on 8 November 1979, the *applicants* contend that the Court should:

— Dismiss the objection of inadmissibility as inadmissible and unfounded;

— Reserve its decision on the preliminary objection for the final judgment;

— Order the Commission to pay the costs.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure on the objection of inadmissibility without any preparatory inquiry.

7. By an order of 21 November 1979 the Court decided to assign the case to the Second Chamber pursuant to Article 95 (1) of the Rules of Procedure.

II — Submissions and arguments of the parties on the admissibility of the action

1. As regards the applicants' *claim for annulment* the Commission contends amongst other things that its telex message of 3 July 1979 simply constitutes an informatory letter recalling the rules applicable in a case of this kind and that it cannot have any legal effect.

Furthermore this telex message binds the officers of the Commission only and cannot be imputed to the Institution itself. In fact there is no provision laying down in this matter that the Director General for Agriculture shall have the power to bind the Commission.

More generally, there is no provision laying down a specific procedure to settle cases such as this. The Commission recalls in this respect that the Court, in its judgment of 10 May 1978 in Case 132/77, *Société pour l'Exportation des Sucres* v *Commission* ([1978] ECR 1061), declared that an action for annulment is inadmissible where the alleged act of the Commission which is impugned is outside the specific procedure provided for by Community rules. In the Commission's opinion it is all the more true that the Court has no choice but to declare inadmissible an action for annulment brought against an expression of opinion not given in the context of any specific powers. In the Commission's view the disputed telex message can at the most be regarded as mere internal departmental instructions.

The Commission concludes that the application for annulment made by the applicants is inadmissible since there is no decision of the Commission within the meaning of the second paragraph of Article 173 of the Treaty in this case.

As regards the *claim for damages* the Commission refers to the arguments which it presented in regard to the application for annulment. It expresses the view that the attitude expressed in its telex message cannot be treated as behaviour fulfilling the conditions required by Article 215 of the Treaty for an action to be brought before the Court.

As regards the "negligent failure to act" alleged by the applicants, the Commission points out that it informed the President of the Syndicat du Commerce des Sucres in Paris as early as 23 May 1979 of what the rules provided.

The Commission adds that the applicants could have challenged before the national courts the measures adopted pursuant to Regulation No 193/75 refusing to accept the export licences for

the payment of the refunds at issue. According to the established case-law of the Court the fact that such action could have been taken was sufficient in itself to declare the action inadmissible.

2. As regards the *application for annulment* the *applicants* point out that the disputed telex message was signed by the Director General for Agriculture, and therefore by an official, acting in the performance of his duties, who is responsible for his department and who therefore makes the Commission liable. They further wonder which organs are capable of binding the Commission if it is not bound by a decision of one of its departments.

The applicants further contend that rather than containing mere instructions the disputed telex clearly shows that the Commission intended to take a decision within the meaning of Article 189 of the Treaty in regard to the undertakings concerned. Recalling the judgment of the Court of 31 March 1971 in Case 22/70, *Commission* v *Council* ([1971] ECR 263), the applicants contend that all acts of the institutions within their powers after the preparatory study stage and by which they have intended to assume or impose obligations must be considered to be susceptible of challenge at law. The telex message which was sent to the Fund certainly had the effect of imposing obligations on the applicants. This telex message did in effect decide that the applicants were entitled only to the refund applicable on the day of export even though there was no provisions for this in the regulations. Since the Fund was in no way empowered to recommend such a refund, in the applicants' opinion it had no choice but simply to confirm the terms of the Commission's decision. The telex message in question therefore deprived the applicants of the right to receive the refund indicated in the licences.

The applicants add that the situation here differs from that in Case 132/77 referred to above; the regulation in question in this case does not give the Member States any discretionary power.

Relying mainly on the arguments which they submitted in their application, the applicants emphasize with regard to their *claim for damages* that the damage for which they claim compensation is attributable to a clear case of *ultra vires* action on the part of the Commission. They consider that in the circumstances of the case the Commission could have only two choices: it could either treat the licences as "duplicates" in which case no refund was to be paid, or it could treat them as licences which had been issued as "identical" in which case the Commission must grant them payment of the whole refund indicated therein. Since the Commission's way of resolving the problem cannot be justified in law, the applicants consider that they are justified in seeking the payment of the remainder of the refund by means of an action for damages.

III — Oral procedure

1. At the request of the Court the Commission lodged the minutes of the 530th meeting of the Management Committee for Sugar held on 13 June 1979, at which the question whether duplicates may be supplied for the purpose of carrying out export transactions was discussed in the

presence of a representative from the Fund. The minutes show that, subject to any contrary opinion of the Commission, the Fund intended to pay the refunds in dispute.

It also emerges that the representatives of the Legal Department of the Commission:

— Declare that he could not approve of a solution whereby a replacement licence would be issued for the purpose of completing the export transactions and the exporters would be asked to put up security equal to the refund;

— Requested that payment of the refund provided for by the lost certificates should not be made;

— Did not see any difficulty in the Fund's paying the refund applying at the date of export in regard to the exports made;

— Wished to support any initiative of the departments concerned to amend the existing rules which did not provide any solution for the case in hand.

2. At the sitting held on 30 January 1980, the applicants, represented by Lise Funck-Brentano, of the Paris Bar, and the Commission, represented by J. Delmoly, a member of its Legal Department, presented oral argument.

3. The *Commission* referred amongst other things to the judgment of the Court of 12 December 1979 in Case 12/79, *Wagner* v *Commission*, and in particular to paragraph 10 in which the Court stated that:

"The action for damages provided for in Articles 178 and 215 of the Treaty" was not intended "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".

4. The applicants pointed out *inter alia* that if the Fund had disregarded the Commission's opinion, when accounts were cleared the Commission would have refused to recognize the expenses in question as being for the account of the European Agricultural Guidance and Guarantee Fund.

The applicants further informed the Court that they had brought an action before the French administrative court against the refusal of the Fund to pay the refunds.

5. The Advocate General delivered his opinion on 6 March 1980.

Decision

1 By an application made on 13 August 1979 the French company Sucrimex S.A. and the German company Westzucker GmbH applied to the Court under the second paragraph of Article 173 of the Treaty for the annulment

of a "... decision of the Commission sent to the Fonds d'Intervention et de Régularisation du Marché du Sucre [Sugar Market Intervention and Stabilization Fund] on 3 July 1979 which refused Sucrimex payment of the refund calculated on the basis of the rate fixed by tendering procedure ..." and, in the alternative, under Article 178 and the second paragraph of Article 215 of the Treaty, for an order that the Commission pay the sum of FF 921 339.04 as compensation for the damage suffered by the applicant companies.

2 The action arises from the assignment by Westzucker to Sucrimex of the rights attaching to export licences prepared by the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets] relating to 2 600 tonnes of sugar with advance fixing by tendering procedure of the export refund valid until 31 May 1979.

3 The certificates were lost and the Federal Office prepared new licences and the 2 600 tonnes of sugar to which they related were exported under cover of those licences on 30 and 31 May 1979.

4 In the meantime the Association des Organisations Professionnelles du Commerce des Sucres had asked the Commission by telex message of 23 May 1979 to deal urgently with the problem created by the lost certificates since in its opinion the rule laid down by Article 17 (7) of Regulation No 193/75 of the Commission of 17 January 1975 laying down common detailed rules for the application of the system of import and export licences and advanced fixing certificates for agricultural products (Official Journal L 25, p. 10) was unsatisfactory.

5 That provision reads as follows:

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

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

6 On the same day the Commission confirmed by telephone message to the President of the Syndicat du Commerce des Sucres in Paris and then by telex message of 6 June 1979 to the Association the content of the applicable rules,

adding that its officers were prepared to re-examine the question with the experts from the Member States but that they could not see any satisfactory way of resolving the matter because of the problems of carrying out checks.

7 On 6 and 7 June 1979 Sucrimex requested the Fund to pay the refunds at the rate fixed in advance. The problem of the loss of licences was subsequently discussed at a meeting of the Management Committee for Sugar on 13 June 1979. At that meeting a representative of the Commission's Legal Department stated that he could not approve of a solution whereby a replacement licence would be issued for the purpose of completing the transactions on condition that the exporter put up security equivalent to the refund. He requested that payment of the difference between the refund applicable at the time of export and that provided for in the lost certificate should not be made.

8 After those discussions the Fund received on 3 July 1979 a telex message signed by the Director General for Agriculture of the Commission which, after summarizing the rules applicable and the facts, concluded ". . . that there is no legitimate reason for paying the refund calculated on the basis of the rate fixed by tendering procedure appearing in these documents. Since the sugar exports are deemed to have been made without any licences, the exporter can claim only the normal refund applying on the day when the customs export formalities were completed . . ."

9 By a letter of 5 July 1979 the Fund rejected the applications of Sucrimex of 6 and 7 June, "in view of the opinion expressed by the officers of the Commission" in the telex message referred to above. Consequently the Fund agreed to pay only the refund applicable on the days when the customs export formalities were completed, which was FF 921 399.04 less than that requested by Sucrimex.

10 In support of their application for annulment the applicant companies contend that the Commission is wrong to refer to the "identical" licences as "duplicates", that it is disregarding the regulations on export refunds when rejecting an application for payment of refunds for exports made under cover

of "identical" licences, that it is in breach of the principle of legal certainty for not taking a decision quickly, and finally that it is in breach of the principle of the protection of legitimate expectation since the applicants were entitled to rely on the licences in question; moreover the decision in question is retroactive.

11 In support of their claim for damages the applicants contend that they have suffered damage which is equivalent to the amount of the refunds unpaid owing to the unlawful acts described above and the default of the Commission in not clearly expressing its position until 3 July 1979 in spite of the Association's telex message of 23 May 1979.

12 The Commission has raised an objection of inadmissibility under Article 91 (1) of the Rules of Procedure. It is appropriate to give a decision upon the admissibility of the different heads of the applicants' claims without going into the substance of the case.

13 The Commission contends in support of its objection of inadmissibility relating to the application for annulment that its telex message of 3 July 1979 constitutes only an informatory letter addressed to the Fund, which is limited to summarizing the rules applicable to the case and cannot therefore have any legal effect. Furthermore the said telex message is binding only on the officers of the Commission and cannot be imputed to the institution itself.

14 On the other hand the applicants claim that the Commission's telex message evinces an intention to take a decision in regard to them within the meaning of Article 189 of the Treaty. Moreover, it cannot be disputed with any seriousness that statements made by a Director General in the performance of his duties bind the Commission.

15 In order to determine whether the Commission's telex message of 3 July 1979 constitutes a decision actionable at the suit of the applicants by virtue of the second paragraph of Article 173 of the Treaty, it should be examined to establish whether it was capable of having any legal effect.

16 It is established case-law that the application of Community provisions on export refunds is a matter for the national bodies appointed for this purpose and that the Commission has no power to take decisions on their interpretation but may only express its opinion which is not binding upon the national authorities.

17 Furthermore neither the wording nor the content of the contested telex message shows that it was intended to produce any legal effect.

18 The result of these findings is that in this case there has been no act of the Commission capable of forming the basis of an action for annulment.

19 The application must therefore be dismissed as inadmissible in so far as it is founded upon the second paragraph of Article 173 of the Treaty.

20 In support of its objection of inadmissibility relating to the claim for damages the Commission contends that the opinion expressed in its telex message cannot be regarded as conduct which satisfies the conditions laid down by the second paragraph of Article 215 of the Treaty enabling an action to be brought before the Court. Furthermore, the applicants should have challenged before the national courts the refusal by the national body to grant the disputed refunds.

21 For their part the applicants take the view that since the Commission's solution cannot be justified in law they are entitled to seek payment of the rest of the refund by means of an action for damages.

22 As far as concerns this claim, which is in the alternative and is for an amount equivalent to the sum of the unpaid refunds and therefore closely bound up with the application for annulment, it suffices to call to mind the relationship, described above, between the Commission and the Fund. The telex message, like all the Commission's actions which are in dispute, is part

of the internal co-operation between the Commission and the national bodies responsible for applying Community rules in this field; as a general rule this co-operation cannot make the Community liable to individuals.

23 In any case, it is not the Commission's disputed telex message but the Fund's decision to ratify the opinion expressed in it which might be regarded as causing damage to the applicants.

24 A review of administrative acts of Member States in applying Community law is primarily a matter for national courts without prejudice to their power to refer questions for a preliminary ruling to the court under Article 177 of the EEC Treaty. In the circumstances the remedy to be envisaged is an action before the national courts, to which the applicants have in fact already applied.

25 Therefore the application must also be dismissed as inadmissible in so far as it is based on Article 178 and the second paragraph of Article 215 of the Treaty.

Costs

26 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs; as the applicants have failed in their action they must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application as inadmissible;**

2. Orders the applicants to pay the costs.

Touffait Pescatore Due

Delivered in open court in Luxembourg on 27 March 1980.

For the Registrar

I. A. Pompe

Deputy Registrar

A. Touffait

President of the Second Chamber

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

Mr. President,
Members of the Court,

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

1 — Translated from the German.