other hand it leaves them to bear the relevant business risks. In particular, the organization of the market offers exporters the choice between payment of refunds at the rate in force on the day of exportation and the advance fixing system, which is designed to provide certainty, at the time at which the contract is concluded, as to the amount of refunds to be received.

In Case 62/83

EXIMO MOLKEREIERZEUGNISSE HANDELSGESELLSCHAFT MBH, an undertaking whose registered office is at Hamburg, represented by Peter Lang, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the Chambers of Jean-Joseph Wolter, 21 Avenue du X-Septembre,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Bernhard Jansen, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION for damages pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT (Second Chamber)

composed of: K. Bahlmann, President of Chamber, P. Pescatore and O. Due, Judges,

Advocate General: C. O. Lenz
Registrar: J. A. Pompe, Deputy Registrar

gives the following

JUDGMENTS

Facts and Issues

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

I — Facts

Regulation (EEC) No 876/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1969 (I), p. 234) lays down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds.

Article 5 (3) of the regulation, as amended by Regulation (EEC) No 2732/71 of the Council of 20 December 1971 (Official Journal, English Special Edition 1971 (III), p. 1020) provides that it may be decided that the refund be fixed in advance. In that event, if the party concerned so requests when applying for the licence, the refund applicable on the day on which the application for an export licence is lodged is to be applied to exports effected during the period of validity of the licence. It may be decided that the refund fixed in advance be adjusted if there is an alteration to intervention prices or to the amount of aid applicable to products entitled to aid to those in which such products are incorporated; this provision does not however apply to products for which the refund was fixed without the aid granted being taken into account.

By a communication of 13 November 1981 the Commission informed the Community traders concerned of its intention, pursuant to Article 5 (3) (as amended) of Regulation No 876/68, to carry out an adjustment at the beginning of the 1982/83 milk year of refunds fixed in advance in order to allow them to conclude contracts on that basis for deliveries to be carried out after the beginning of the new year. According to the notice, the adjustment amounts were to be determined according to alterations in the intervention prices, and were to be applicable to refunds fixed in advance at least 14 days before the date of the Council decision on the intervention prices applicable for the 1982/83 milk year. The Commission's notice was republished in the Federal Republic of Germany in the Bundesanzeiger of 2 February 1982.

As a general rule intervention prices are fixed by the Council at the beginning of each milk year, which normally starts on 1 April and finishes on 31 March of the following year. In 1982, however, the Council extended the year five times, from 1 to 4 April, from 5 to 25 April, from 26 April to 2 May, from 3 to 16 May and from 17 to 19 May. The new year started only on 20 May 1982, the date on which the new target prices and intervention prices for milk and milk products, fixed by Council Regulation (EEC) No 1184/82 of 18 May 1982 (Official Journal, L 140, p. 2), came into force.

The new export refunds in the milk and milk products sector were fixed by

Commission Regulation (EEC) No 1324/82 of 28 May 1982 (Official Journal, L 150, p. 46). The rate for butter in tariff subheading 04.03 A was set at 133 European currency units (ECU) per 100 kg net weight, as against 105 ECU for the previous year.

By Regulation (EEC) No 1669/82 of 14 June 1982 (Official Journal, L 187, p. 1), the Commission fixed the rate of adjustment for the butter in question at 31.86 ECU per 100 kg. In order to eliminate certain speculative dealings, the Commission considered it necessary, as stated in its notice of 13 November 1981, to limit the adjustment to cases in which the export certificate had been applied for more than 14 days before the date of the Council decision setting the intervention prices for the 1982/83 milk year. As a result, only refunds fixed in advance on or before 3 May 1982 could benefit from the adjustment.

On 12 May 1982, Eximo Molkereierzeugnisse Handelsgesellschaft mbH, a German company trading in milk products and having its registered office in Hamburg, applied to the Bundesanstalt für landwirtschaftliche Marktordnung [Federal office for the organization of agricultural markets] at Frankfurt am Main for an export licence or advance-fixing certificate for the export to Switzerland of 500 tonnes of butter in tariff subheading 04.03 A. The certificate was issued on 18 May 1982, at the rate of 105 ECU per 100 kg in force on the day on which the application was made. The certificate was issued against the deposit by Eximo of security in the amount of DM 53 150.

After the new intervention prices were fixed, on 29 May 1982 Eximo made a fresh application for an export licence or advance-fixing certificate at the new rate of 133 ECU per 100 kg. The exports were carried out on the basis of this certificate and the first certificate was not used.

Eximo takes the view that it was forced to apply for a fresh certificate after the entry into force of the intervention prices for the 1982/83 year in order to avoid the loss which would have resulted from an export carried out at the rate set by the first certificate. On the other hand, if it had been able to benefit from the adjustment provided for by Regulation No 1669/82, it would have been able to carry out the exports at the rate of 136.86 ECU (105 + 31.86) per 100 kg. As a result, it claims, it suffered a loss of 3.86 ECU per 100 kg, that is, after conversion, a total of DM 47 150; furthermore, it also suffered the loss of the security in the amount of DM 53 150, so that the Community measures in question have caused it damage in the amount of DM 100 300.

II — Written procedure and conclusions of the parties

By application lodged at the Court Registry on 18 April 1983, Eximo brought an action for damages pursuant to Articles 178 and 215 of the EEC Treaty against the EEC, represented by the Commission, in which it claims that the Court should order the Community to pay it the amount of DM 100 300, plus interest at the rate of 0.25% per annum from 18 May 1982 on the amount of DM 53 150, and interest at the rate of 2% per annum above the discount rate fixed by the Deutsche Bundesbank [German Federal Bank] from 29 May 1982 on the balance of DM 47 150.

During the proceedings, the applicant, in particular by a supplementary pleading

of 22 June 1983, lodged at the Court Registry on 4 July, altered its conclusions as to the annual rate of interest for the periods subsequent to 18 May 1982. The Commission disputed the admissibility of the additional claims. The Court (Second Chamber) decided to reserve until final judgment its decision on the admissibility of the applicant's supplementary claims.

In its reply, the applicant supplemented or redefined its application, in the alternative, to the effect that the Community, against which the action is directed, should be represented not only by the Commission but also by the Council.

The Commission contends that the Court should:

Declare the application inadmissible and, in the alternative, unfounded;

Order the applicant to pay the costs.

Upon conculsion of the written procedure, the Court, having heard the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry. However, it asked the applicant to reply in writing to a question; a reply was given within the period prescribed.

By order of 7 December 1983 the Court, pursuant to Article 95 (1) and (2) of the Rules of Procedure, decided to assign the case to the Second Chamber.

III — Submissions and arguments of the parties during the written procedure

A — Admissibility

The *Commission* takes the view that the action is inadmissible in all respects.

The *applicant,* on the other hand, submits that none of the objections raised can be upheld.

According to the *Commission,* to the extent to which it seeks compensation for the loss of the security, the action calls in question a measure adopted by the German intervention agency.

The case-law of the Court makes it clear that the purpose of the action for damages provided for by Articles 178 and 215 of the EEC Treaty is not to review the validity of measures adopted by national authorities which by virtue of the division of powers of between the Community and the Member States are responsible for administrative acts under the common agricultural policy, or to assess the financial consequences of those measures. That power of review belongs to the national courts, which may where appropriate be called upon to make a reference to the Court of Justice for a preliminary ruling. For the sake of the efficient use of legal procedure and because of the risk of inconsistent decisions, it cannot be accepted that a matter be brought simultaneously before national courts and the Court of Justice.

Moreover, so long as there has been no final decision on the forfeiture of the security, the action is precautionary in nature, which is not permissible. It is true that the Court admits actions which are precautionary in nature, seeking recognition of an obligation to pay compensation, as long as damage is sufficiently certain; however, the question of the admissibility of an action for the payment of a fixed sum before the damage actually occurs remains open. There is a risk that such actions might lead to irreconcilable national and Community decisions; the applicant might thus be entitled twice to the same

amount, following a national decision declaring the forfeiture of the security to be illegal and a Community decision granting compensation on the same grounds.

According to the *applicant*, it would be contrary to the principle of the proper administration of justice to require a party first to exhaust all possible avenues under domestic law, and thus to wait a considerable time before obtaining final resolution of his claim. The Court has accepted this principle in cases concerning the payment of sums which the national court would not have been able to grant without subsequent involvement of the Community, or regulations the challenging of which in the national context could at most have prevented only part of the damage. Here the issue is the annulment of an export licence whose validity could be reviewed by a national court only through the use of the procedure under Article 177. In view of the delays which that procedure entails, the possibility of obtaining compensation upon its completion is of little interest. There is no risk of any breach of the principles of the efficient use of legal procedure and of the uniformity of case-law, since every decision of the Court of Justice binds national courts in proceedings dealing with the same subject-matter. An action before the Court is inadmissible only if it is in substance directed against measures which national authorities have adopted on the basis of Community law and the applicant can obtain the same result in the national courts. That however is not the case here.

The *Commission* argues that the applicant might also have turned to the national authorities with reference to the adjustment of the refunds. The full jurisdiction of the Court to hear actions for damages against the Community cannot be contested. In this case however the object of the action is the compensation of damage allegedly suffered by the applicant because it was wrongly deprived of adjustments. But it has made no application to the German intervention agency for the grant of adjusted refunds; there is no final negative decision from which a right to compensation might result. It is true that according to the case-law of the Court, an action for damages based on Articles 178 and 215 may be admissible even when it is not disputed that a national court could not have upheld a claim for payment in the absence of Community provisions authorizing national agencies to make the payments claimed; but those were cases in which the Court had already adjudicated definitively on the existence of rights to payment. In this case the applicant asserts a right to payment for which it should bring an action for enforcement before the national court, which has jurisdiction to make a preliminary reference to the Court.

The *applicant* argues that the action deals only in part with a national measure, that is, the grant of the licence. With regard to its essential element, the question of compensation for failure to adjust the refunds, it is directed exclusively against a Community measure. Since it did not use the licence of 18 May 1982, the applicant could not

request an adjustment; its decision not to use the licence was due to the fact that in view of the rules referred to by the Commission in its notice no adjustment was provided for. The applicant cannot make an application to the national authorities without any legal basis in form or in substance. The Commission's arguments would lead to the prohibition of any direct action for damages before the Court in cases in which a corresponding claim could first be made to the national authority. The result of the system suggested by the Commission would be that the national court would adjudicate on the annulment of the licence, and where appropriate on part of the claim for damages, perhaps after a preliminary reference, and that the Court of Justice would adjudicate directly on the rest of the claim for damages, after all national remedies had been exhausted; such a system would disregard the spirit and aims of the Treaty, and would be contrary to the principles of national and Community procedural law.

According to the *Commission,* the application is also inadmissible inasmuch as it is directed against the Commission alone. The alleged damage resulting from the failure to adjust export refunds is due to the fact that on several occasions the Council extended the 1981/82 marketing year for brief periods. Because of the range and variety of the measures called in question, which include acts of the Council, the action cannot be considered to be based only on the provisions regarding time-limits contained in Commission Regulation No 1669/82.

Moreover, at the stage of the reply, it is not permissible to supplement, in the alternative, the designation of the defendant to include the Council, along with the Commission, as the representative of the Community. The parties to the action must be clearly defined: the application itself must indicate by which institution the Community is represented. A change in this respect during the procedure might deprive the institution concerned of the right to present its defence during the whole of the written stage; in an analogous case the Court has refused to join the Council *a posteriori.*

In this regard the *applicant* points out that the action is directed against the Community as such. It is true that the Council, as a Community institution, has also, by the measures it has adopted, made the Community liable; however, the measures which directly affect the applicant, from the point of view of substance as much as of procedure, were issued by the Commission, which must therefore represent the Community. In the alternative, the application was supplemented in the sense that the Community must be considered as being represented also by the Council; it is not a matter of changing the identity of the defendant, but simply of rectifying a question of representation, which is permissible at the stage of the reply.

With regard to the increase in the claim for interest, the *Commission* refers to Articles 41(1) and 42 (1) of the Rules of Procedure, according to which the application may be supplemented by a reply, which may indicate further evidence, on condition that reasons are given for the delay in indicating it. The supplementary claims do not meet those conditions. According to the first subparagraph of Article 42 (2) of the Rules of Procedure, no fresh issue may be raised in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of

the written procedure. The supplementary claims are therefore vitiated by a procedural defect. In its reply, the applicant fails to indicate the reasons for which it increased its claims regarding interest only after the bringing of the action. New claims have been brought before the Court, without reasons having been given for the delay; this constitutes an inadmissible alteration to the application.

The *applicant* points out that in its application it has already set out the damage it has suffered in so far as interest and charges are concerned; it reserved the right to show that it had suffered greater harm in this regard. The conclusions put forward in the supplementary claims are merely a more specific expression of the initial claim. The bank certificates produced in the course of the proceedings do not amount to new evidence within the meaning of Article 42 (1) of the Rules of Procedure. Interest rates may change during the proceedings and the applicant is not able immediately to produce certificates regarding accruing interest. The first subparagraph of Article 42 (2) is not applicable, since the supplementary claims do not amount to fresh issues.

B — Substance

The *applicant* bases its claim against the Community on damage caused to it by one of the institutions. For its part the *Commission* submits in the alternative that the action is without foundation.

Fault

According to the *applicant*, the wrongful conduct of the Community by which it has incurred liability was of a legislative nature; the wrongful acts in question were the Commission's communication of 13 November 1981, published in the Federal Republic of Germany on 2 February 1982, and Regulation No 1669/82 of 14 June 1982. That conduct was illegal; illegality is presumed in the case of infringement of a superior rule of law, such as the principles governing the exercise of a discretion or the written and unwritten legal rules which must be observed by the Community institutions. In this regard the applicant pleads limitation of its freedom of action in the economic sphere, breach of the principle of the protection of legitimate expectation and disregard of the principle of equality of treatment, amounting to a misuse of powers. The Commission certainly has no great latitude in the exercise of its discretion under Article 5 of Regulation No 876/68 regarding the adjustment of refunds.

The *Commission* denies having been guilty of any misconduct whatever or having committed any breach of the principles referred to by the applicant. It points out its wide discretion in the exercise of its powers in the field in question. The damage alleged to have been suffered by the applicant is due to the risks inherent in any business activity.

(a) Limitation of freedom of action in the economic sphere

The *applicant* submits that during the successive extensions of the 1981/82 milk year it was unable to effect any exports to non-member countries without running the risk of suffering considerable financial loss. Most of those

extensions were for less than 14 days, and for this reason the refunds could not be adjusted. The applicant's freedom of action in business matters was considerably affected and no applicable provision of Community law authorizes any such restriction. It is true that any business activity implies a risk for the trader, but the Commission's exercise of its discretion must necessarily apply the law and must remain foreseeable for any person concerned.

The *Commission* notes that the adjustment of refunds is a matter for the discretion of the Community institutions and that the fact that the latter do not carry out such an adjustment cannot amount to a breach of the law giving rise to compensation. The exercise of that discretion is not restricted to an "all or nothing" alternative but implies the possibility of determining the conditions and time-limits within which payments will be made. It is not the purpose of the refund system to remove for the benefit of traders the risks inherent in any business activity. Having decided to conclude the contract, and having chosen advance fixing, in full knowledge of the time-limits announced in the notice of 13 November 1981, the applicant accepted the risk of not benefiting from the adjustment.

(b) *Breach of the principle of the protection of legitimate expectation*

The *applicant* points out that the Commission's intention, as appears from its communication of 13 November 1981, was to allow traders thanks to the adjustment system to conclude contracts for deliveries to be carried out after the beginning of the new milk year. That was not possible for the transaction in question. In acting contrary to its own intention, the Commission breached the principle of the protection of legitimate expectation.

The Commission cannot rely on the fact that the 14-day time-limit for the advance fixing of refunds had been announced: on the one hand, it should have expected possible extensions of the milk year; on the other hand, between the Commission's intention and the simultaneous establishment of a time-limit there is a contradiction which cannot be covered by any communication. Furthermore, for the beginning of the 1983/84 year, the Commission waived the time-limit condition, thus complying with the objectives of the basic Regulation No 876/68.

The Commission cannot shelter behind the Council, which was responsible for the successive extensions of the year. The defendant, the Community, must be considered as a single whole. Moreover, it was the Commission which adopted Regulations Nos 1669/82 and 1670/82, fixing the new adjustments. It should have expected extensions, and adapted its own measures as a result, when the time came. The Commission itself refers to its duty to amend its decisions in response to economic realities.

The argument to the effect that the time-limit mechanism was necessary in order to avoid speculation is unfounded, since that risk could not yet be foreseen when the Commission's communication was published. The combating of speculation was not the true purpose of the time-limit rules, as the actual consequences of

that mechanism show: it encourages every businessman to think of the possibilities of speculative advance fixing, contrary to the spirit and aim of advance fixing. The Commission's argument that intervention prices for the 1982/83 and 1983/84 years increased to very different extents is irrelevant, since because of the very small margins involved even very small price variations may promote speculative dealings. The Commission has failed to prove that the supposed absence of speculative advance fixing was due to the time-limit mechanism. During the period in question, the market was completely blocked, a state of affairs incompatible with the aims of the common agricultural policy. It may even be suggested that speculative advance fixing or an increase in exports might have been considered welcome, in view of the increasing stocks of butter.

According to the *Commission*, the adjustment of refunds is a matter for the discretion of the Community institutions, whose decision may depend upon all relevant considerations of economic policy. By its communication of 13 November 1981, the Commission, although not bound to do so, informed traders of its intention to carry out an adjustment at the beginning of the 1982/83 year. The principle of the protection of legitimate expectation requires that measures announced be actually adopted. The communication gave notice of the time-limit system; the applicant could not therefore rely on an adjustment which was not subject to a time-limit.

Nor was it inconsistent with the purpose of Regulation No 876/68. Adjustment is discretionary and may be accompanied by restrictions. The extensions of the milk year were to be attributed to the Council; it was not possible to foresee them at the time the communication was issued. The applicant had the same experience and data at its disposal as did the Commission.

The reason for the restriction of the adjustments was the Commission's desire, referred to in the preamble to Regulation No 1669/82, to combat speculative dealings. Traders, informed in advance of the probable rate of increase of the intervention prices, are tempted, when those prices are substantially altered, as was the case at the beginning of the 1982/83 year, to conclude contracts with the sole purpose of exploiting the alterations. The applicant cannot plead that there is no empirical rule whereby intervention prices are always increased. Furthermore, it admits itself that it has engaged in speculation; any speculation is carried out at the trader's own risk.

(c) Breach of the principle of equality

The *applicant* submits that the situation at the beginning of the 1982/83 year was no different from that of the following year, in which however the time-limit mechanism was no longer considered necessary. Since identical situations require identical treatment, the limitations provided for by the rules governing the transition to the 1982/83 year are deprived of all objective foundation. It is idle for the Commission to argue that the danger of speculation was

greater in 1982 than in 1983; instead of discouraging speculation, the time-limit mechanism encouraged traders to speculate on advance fixing. The fact that the applicant did not do so cannot redound to its disadvantage.

The Commission's infringement of the law is made sufficiently clear by the fact that the losses suffered by the applicant are considerable in comparison with normal commercial risks. The question whether and if so how many other exporters suffered the same damage as the applicant is irrelevant; if the applicant were the only one to have suffered loss, or were one of a small group to do so, it would be a matter of genuinely exceptional damage giving a right to compensation under the rules in force in all Member States as regards compensation for damage.

The illegality of the measures in dispute raises a presumption of misconduct; moreover, the applicant made the Commission aware of the illegality of the measures in question even before the adoption of the regulations.

In the *Commission*'s view the applicant is wrong to rely on the principle of equality of treatment in relation to other traders: the time-limit system was applied in the same way to all.

The submission as to a comparison of the two years is also erroneous, since owing to the much smaller alteration of the intervention prices for the 1983/84 year and the resulting decrease in the danger of speculation the circumstances were different. The Commission has wide discretion in this field and is at liberty to alter its decisions on economic policy where circumstances make it necessary.

Damage and the causal link

The *applicant* takes the view that it was compelled to apply for advance fixing when it concluded the contract; in applying for a fresh export licence and a fresh advance fixing it merely wished to minimize the threatened damage. It was able to do this only after the new rates had been fixed. To abandon the contract would have caused it even greater damage. The Community institutions cannot require traders to abstain from making contracts. The damage suffered is the result not of the risks inherent in all business activity but of the illegal measures of the Community.

The applicant has brought an action against the Bundesanstalt für landwirtschaftliche Marktordnung seeking the annulment of the export licence of 18 May 1982 and an order that the action have suspensory effect; in doing so it seeks to avoid losing the security.

With reference to the forfeiture of the security, the *Commission* is of the opinion that it is necessary to await a final decision of the relevant national courts before it can be ascertained whether damage has occurred. In applying for advance fixing, which required lodging security, in spite of the imminent alteration of the prices, and in subsequently refraining from using the licence, the applicant deliberately took the risk of losing the security. The applicant was entirely free to abandon the contract; the argument that in that case its damage would have been still greater is no more than a simple assertion.

The applicant deliberately assumed a risk in regard to the adjustment of the

refunds also. The damage was not caused by the fact that they were not adjusted, since the applicant had decided not to carry out the transaction on the basis of the first licence and the corresponding rate of advance fixing, and had finally carried it out on the basis of the new rates of refund.

IV — Oral procedure

At the sitting on 9 February 1984 Eximo Molkereierzeugnisse Handelsgesellschaft mbH, applicant, represented by P. Lang, and the Commission defendant, represented by B. Jansen, assisted by J. de Jong, principal administrator in the milk products division of the Directorate General for Agriculture, presented oral argument and replied to questions put by the Court.

They enlarged upon the arguments made during the written procedure with regard to the admissibility of the action and the questions of substance.

The applicant also brought up to date and increased its claim for interest alleged to be due on the amounts claimed as damages. It stated moreover that its action for the annulment of the export licence of the Bundesanstalt of 18 May 1982 had been dismissed by order of the Verwaltungsgericht [administrative court] Frankfurt am Main of 27 September 1983; it is clear from that decision that it would have been pointless to bring further proceedings against the forfeiture of the security.

The Commission again submitted that the applicant had not exhausted all possible remedies before the national courts.

The Advocate General delivered his opinion at the sitting on 5 April 1984.

Decision

1 By application lodged at the Court Registry on 18 April 1983, Eximo GmbH, Hamburg, brought an action pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty seeking compensation for damage allegedly caused to it by the Commission in connection with the export of a consignment of butter under tariff subheading 04.03 A, by reason of the circumstances in which, in the transition from the 1981/82 milk year to the 1982/83 year, the adjustment of refunds fixed in advance in the milk and milk products sector was effected (Commission Regulation No 1669/82 of 14. 6. 1982 fixing the adjustment to be made to certain refunds fixed in advance for milk and milk products, Official Journal, L 187, p. 1).

The relevant regulations and the facts of the case

2 Regulation No 876/68 of the Council of 28 June 1968 (Official Journal, English Special Edition 1968 (I), p. 234) lays down general rules for granting export refunds on milk and milk products and criteria for fixing their amount. Article 5 (3) of the regulation, as amended by Regulation No 2732/71 of the Council of 20 December 1971 (Official Journal, English Special Edition 1971 (III), p. 1020), provides that it may be decided that the refund fixed in advance be adjusted, *inter alia*, if intervention prices are altered.

3 By a communication issued on 13 November 1981, the Commission made known its intentions regarding adjustments to refunds fixed in advance for milk products to be exported during the 1982/83 milk year, stating that the amounts of adjustment would be fixed according to changes in the intervention prices and would be applicable to refunds fixed in advance more than 14 days before the date of the Council decision concerning intervention prices applicable during the 1982/83 milk year.

4 It should be recalled that special difficulties were associated with the transition from the 1981/82 to the 1982/83 year, and that the Council delayed five times the start of the new milk year, having failed to arrive at a decision on the intervention prices. It was by Regulation No 1184/82 of 18 May 1982 (Official Journal, L 140, p. 2) that the Council finally fixed the target price for milk and the various intervention prices, *inter alia* for butter, for the 1982/83 milk year, with effect from 20 May 1982. The Commission accordingly fixed new export refunds in the milk and milk products sector by Regulation No 1324/82 of 28 May 1982 (Official Journal, L 150, p. 46).

5 By Regulation No 1669/82, referred to above, the Commission fixed the adjustments to be made to certain refunds fixed in advance in the milk and milk products sector. According to Annex I to the regulation, the rate of the adjustment for the product in question was fixed at 31.86 European currency units (ECU) per 100 kg. Article 1 of that measure, which came into force on the day after its publication in the Official Journal, that is, 2 July 1982, restricts the adjustment to those refunds fixed in advance on or before 3 May

1982. In the sixth recital in the preamble, that temporal limitation is justified in the following terms: "In order to eliminate speculation, it is necessary, as already announced, to limit operation of the adjustment in cases where the export licence was applied for more than 14 days before the date on which the Council set the intervention prices for the 1982/83 milk year."

6 It appears from the case file that on 12 May 1982 the applicant applied for a licence for the export to Switzerland of a consignment of 500 tonnes of butter, with advance fixing of the refunds in the amount of 105 ECU per 100 kg; it obtained the licence on 18 May 1982. In order to obtain the certificate, it was obliged to lodge security in the amount of DM 53 150, pursuant to the applicable rules. It is common ground that the applicant did not use that licence.

7 On 29 May 1982 the applicant applied for and obtained an export licence for the same quantity of butter, with advance fixing of the refund at the rate then in force, that is, 133 ECU per 100 kg. It is likewise common ground that that licence was duly used.

8 The applicant subsequently requested the cancellation of the first export licence. The authorities refused to cancel the licence, and the applicant therefore brought an action against that refusal before the Verwaltungsgericht [Administrative Court] Frankfurt am Main; the action was dismissed by a decision of 27 September 1983. It appears moreover from a document submitted by the applicant that the security has in the meantime been declared forfeit by decision of the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets] 17 January 1984. The applicant declared during the proceedings that it did not intend to contest that decision.

9 Eximo claims that in Regulation No 1669/82 the Commission failed to extend the adjustment of refunds to all advance fixing certificates obtained before the new intervention prices were set. Since the refund fixed in advance in the first licence, increased by the adjustment, would have given a higher amount (105 + 31.86 ECU = 136.86) than the refund due under the new intervention prices (133 ECU), Eximo considers that it has suffered damage amounting to the difference between those two amounts, that is, 3.86 ECU per 100 kg, plus the forfeiture of the security as a result of the fact that it did not use the first export licence, plus interest.

10 The applicant bases its claim on an interference with its economic freedom of action, frustration of legitimate expectation, and the incorrect exercise by the Commission of its discretion in the matter; it alleges moreover a breach of the principle of equal treatment, in view of the fact that for the subsequent milk year the Commission did not maintain the waiting period of 14 days.

11 The applicant justifies its conduct by its desire to mitigate the damage for which it claims compensation from the Community. In this regard it explains that if it had exported at the rate of refund set in the first certificate, the difference between the level of that refund and the refund subsequently fixed according to the new intervention prices (that is, 133 — 105 ECU = 28 per 100 kg) would have been much greater than the difference between the adjusted refund and the new refund, that is, the amount of 3.86 ECU per 100 kg as indicated above, plus the equivalent of the security paid.

12 The applicant refers to the great uncertainty which prevailed at the material time, during the period between the normal end of the milk year on 31 March and the delay fixing by the Council of the new intervention price during May 1982. It states that it was in that climate of uncertainty that it applied successively for two export licences and decided not to use the first one, with the intention of limiting the damage caused by the unforeseeable action of the Council and the introduction, illegal in its view, of a 14-day waiting period by Commission Regulation No 1669/82, the effect of which was to exclude the applicant from the benefit of an adjustment which it might legitimately have expected.

13 In the first instance the Commission raises an objection of inadmissibility. It argues that if the applicant had used the first export licence, it would have been faced with a decision of the national intervention agency which it could have challenged before the relevant court. In support of such an action it could have put forward the arguments on which it has based its action for damages. In those proceedings the national court could, by way of a preliminary reference, have raised any questions of Community law which might have arisen. In those circumstances, the bringing of an action for damages

constitutes an interference with the division of jurisdiction between the national courts and the Court of Justice in relation to the implementation of the regulations concerning the common organization of agricultural markets.

14 It is only in the alternative that the Commission puts forward a substantive defence, arguing first that it adopted the measures challenged by the applicant in the context of the discretion in economic matters conferred upon it by the provisions concerning the common organization of the market, justification for the use of which is given in the preamble to Regulation No 1669/82. Moreover, the Commission points out that the damage alleged to have been suffered by the applicant results from provisions which the Commission was free to adopt in the context of the relevant rules, and that their consequences are therefore part of the commercial risk accepted by any trader. The Commission emphasizes in this regard that the applicant had been duly informed by the communication of 13 November 1981, that it knew perfectly well, moreover, the risks it ran at the time at which it applied for an export licence with advance fixing, and that it could have ensured that it would receive the new rates of refund by applying for an export licence without advance fixing.

Admissibility

15 The objection of inadmissibility raised by the Commission must be evaluated in the light of the special object of this action. It is no doubt true, as the Commission has pointed out, that if the applicant had used its first export licence it could have challenged before the national courts the amount of refunds obtained by virtue of that licence, at the rate of 105 ECU per 100 kg. It must however be admitted that the outcome of such proceedings seems particularly uncertain in view of the fact that the applicant could have questioned the calculation of the refund only on the basis of a regulation adopted after the events in question, whose period of application was so defined that the applicant could not take advantage of the adjustment provided for.

16 Because of that special fact, it may therefore be considered that the applicant was not in a position to avail itself of the possible remedies before the national courts in order to challenge a measure of the Community legislature which it considered to be illegal and prejudicial to it.

17 Since in those circumstances the risk of interference with the division of jurisdiction between the national courts and the Court of Justice may be disregarded, it seems appropriate not to uphold the objection raised by the Commission and to consider the substance of the case.

Substance

18 It is therefore necessary to consider whether the applicant has succeeded in showing that the Community incurred liability by reason of the fact that by Article 1 of Regulation No 1669/82 the Commission excluded the adjustment of refunds fixed in advance for the period during which Eximo applied for and obtained the export licence which it did not use. The question whether the application is well founded must in this regard be examined from the point of view of the requirements to which actions against legislative acts of the Community are subject, according to the established case-law of the Court (see most recently the judgment of 17. 12. 1981, Joined Cases 197 to 200, 243, 245 and 247/80 *(Ludwigshafener Walzmühle* [1981] ECR 3211, paragraphs 17 to 19 of the decision).

19 The application satisfies none of those requirements. It is sufficient in this respect to refer to two facts which seem decisive.

20 It should be pointed out in the first place that the purpose of the common organization of the market in milk products is not to guarantee that traders may at all times export products on the most favourable conditions to external markets. Regulation No 876/68, as subsequently amended, leaves the Commission reasonable discretion to determine the circumstances in which it makes use of the possibility of adjusting refunds fixed in advance in case of an alteration in the intervention prices.

21 In this case, the Commission was justified in setting the conditions for the application of the adjustment, from the point of view of time, in such a way as to avoid the risk of speculation to which the situation which prevailed during the transition from the 1981/82 milk year to the 1982/83 year gave or might in its opinion have given rise. The applicant has not been able to indicate circumstances from which it might be inferred that the Commission committed a manifest error in its assessment of the economic situation at the

time. The uncertainty created by the successive delays of the Council no doubt caused considerable inconvenience for traders but at the same time was such as to arouse fears of speculative dealings. The fact that during the transition to the following year the Commission did not consider it necessary to have recourse to a waiting period similar to that provided for in Regulation No 1669/82 cannot be considered as unequal treatment, since the economic situations of the two periods were not comparable.

22 Secondly, it must be observed, as the Court has already pointed out in the context of a different organization of the markets, in its judgment of 28 October 1982 (Joined Cases 292 and 293/81, *Société Jean Lion* [1982] ECR 3887), that the organization of the market in milk, whose essential purpose is to stabilize the internal prices of the products in question, respects the freedom of traders in their transactions with non-member countries as well as on the internal market. On the other hand it leaves them to bear the relevant business risks. In particular, the organization of the market offers exporters the choice between payment of refunds at the rate in force on the day of exportation and the advance fixing system, which is designed to provide certainty, at the time at which the contract is concluded, as to the amount of refunds to be received.

23 In the framework so defined the applicant was free to choose the time at which to apply for export licences; it was also free to choose according to its best interests between the advance fixing system and that providing for payment of the rate of refund applicable on the date of exportation. It was moreover in a position to assess exactly the consequences of not using the first licence, taking into account the fact that if delivery was not made the security paid could be refunded only in the event of *force majeure*. The use of the advance fixing method, chosen by Eximo, permitted it to know with certainty at the moment of entering into the export contract the amount of refund which would be received. If, as is alleged, its sale price was fixed not on the basis of that amount but in the expectation of an adjustment of which neither the amount nor the time at which it would fall due could be ascertained at the time in question, the applicant voluntarily assumed a risk whose consequences cannot be attributed to the Community. The fact that it expressly mentioned the possibility of an adjustment on the export licence form itself cannot amount to a commitment on the part of the Community.

24 It thus appears that the applicant has not been able to establish any illegality on the part of the Commission or the existence of any damage attributable to the Community.

25 The application must therefore be dismissed. As a result the subsidiary claim for the payment of interest is without object.

Costs

26 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs.

As the applicant has failed in its submissions it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Bahlmann Pescatore Due

Delivered in open court in Luxembourg on 30 May 1984.

For the Registrar

H. A. Rühl

Principal Administrator

K. Bahlmann

President of the Second Chamber