2. The setting of a mandatory time-limit for the submission of applications for the payment of monetary compensatory amounts is a necessary measure intended to ensure that administrative matters are dealt with without undue delay, and a prescribed period of six months is not unreasonable if account is taken of the interests of traders and of current administrative practice. There are no grounds for stating that the rule in Article 15 which bars claims submitted out of time is out of proportion to the aim pursued since in the first place the barring of claims on the ground that the requisite documents have been submitted out of time is not a penalty but, as a general rule, the normal consequence of the expiry of any prescribed period the observance of which is mandatory, and secondly provision is made for exceptional circumstances amounting to *force majeure* to be taken into account.
3. The concept of *force majeure* must be understood in the sense of unusual and unforeseeable circumstances, beyond a trader's control, the consequences of which could not have been avoided even if all due care had been exercised. If it is referred to in a regulation, it must be considered in the context in which it is set.
4. Under the procedure for the payment of monetary compensatory amounts, where the T5 control copy has not been returned the person concerned may not plead *force majeure* if he has not taken the necessary steps to avoid the consequences of the failure to return that form and, in particular, if he has failed to make an application, before the expiry of the six-month period prescribed by Article 15 of Regulation No 1380/75, for other documents to be accepted as equivalent pursuant to Article 11 (5) of that regulation.

OPINION OF MR ADVOCATE GENERAL LENZ
delivered on 22 October 1985 *

Mr President,
Members of the Court,

A — The case in which I am today giving my Opinion concerns essentially the provisions of Commission Regulation No 1380/75 of 29 May 1975 [1] which traders must observe if they wish to claim monetary compensatory amounts on agricultural products in trade within the Community.

1. On 19 January 1977 the plaintiff in the main proceedings, Denkavit France, exported animal feed described as 'Finisher C2' from France to the United Kingdom. The amount invoiced was FF 48 000 plus £200 in freight charges.

* Translated from the German.

1 — Commission Regulation (EEC) No 1380/75 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1975, L 139, p. 37).

Since in trade in agricultural products between France and the United Kingdom use was made of the facility provided for by Article 2 of Regulation No 974/71, [2] namely payment by the exporting Member State of the monetary compensatory amounts payable by the importing Member State, the grant of the monetary compensatory amounts is conditional, pursuant to Article 11 (2) of Commission Regulation No 1380/75 of 20 May 1975, upon the production of proof that customs import formalities have been completed. Such proof is furnished primarily by production of the control copy provided for in Article 1 of Regulation (EEC) No 2315/69 of 19 November 1969, [3] which is known as Control Copy T5.

One such Control Copy T5 was completed on the exportation of the said animal feed but the original was never returned to the office of departure as required by Article 5 (4) of Regulation No 2315/69.

On 25 April 1977 Denkavit informed the defendant in the main proceedings, the Fonds d'orientation et de régularisation des marchés agricoles [Agricultural Markets Guidance and Stabilization Fund, hereinafter referred to as 'the Fund'], in a letter which also referred to other export transactions, that the original of the control copy had not been returned. In a further letter of 4 November 1977 Denkavit sent the Fund copies of Control Copy T5, import certificate C10 and the invoice of 17 January 1977. Denkavit stated that the original of Control Copy T5 had been mislaid by the English customs authorities and at the same time inquired whether payment of the monetary compensatory amounts could be claimed in this way.

In a letter of 7 June 1978 the Fund drew Denkavit's attention to the need to establish a case of *force majeure* and to show that it had exercised all due care at the material time in producing either Control Copy T5 or documents equivalent thereto and in submitting, before the expiry of the six-month period, a complete set of documents as required by the Community provisions. The letter also stated that an officer of the Fund had informed Denkavit on 10 November 1977 that the latter's application of 4 November 1977 could not be granted since the six-month period prescribed by Article 15 of Regulation No 1380/75 had not been observed, and that the documents produced on 4 November 1977 did not meet the requirements of Article 11 of Regulation No 1380/75, as amended by Regulation (EEC) No 1498/76. [4]

On 29 August 1978 Denkavit made a claim to the Fund for payment of the monetary compensatory amounts and at the same time submitted equivalent documents. By letter of 1 September 1978 the Fund informed Denkavit that consideration of the documents furnished in support of the claim for payment of monetary compensatory amounts had not shown that all the requisite steps had been taken to obtain documents equivalent to Control Copy T5 which the United Kingdom customs authorities had mislaid. The Fund referred to its previous

2 — Council Regulation (EEC) No 974/71 of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States (Official Journal, English Special Edition 1971 (I), p. 257), as amended by Council Regulation (EEC) No 1112/73 of 30 April 1973 (Official Journal 1973, L 114, p. 4).

3 — Commission Regulation (EEC) No 2315/69 of 19 November 1969 on the use of Community transit documents for the purpose of applying Community measures for verifying the use and/or destination of goods (Official Journal, English Special Edition 1969 (II), p. 515).

4 — Commission Regulation (EEC) No 1498/76 of 20 June 1976 amending Regulation (EEC) No 1380/75 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1976, L 167, p. 28).

letter of 7 June 1978 and stated that it would reconsider the documents to establish whether it was possible, as soon as evidence was submitted showing that the necessary steps had been taken within the prescribed period of six months from the date of importation of the product, to overlook the fact that the claim was barred by lapse of time.

On 6 November 1978 Denkavit brought an action before the Tribunal administratif [Administrative Court], Paris, for an order setting aside the decision of the Fund of 1 September 1978 and requiring the Fund to pay it FF 19 553.40 by way of monetary compensatory amounts, together with default interest. By judgment of 9 November 1984 the Tribunal administratif, Rouen, which had been designated as the court with territorial jurisdiction by order of the President of the Contentious Affairs Section of the Conseil d'Etat [State Council], requested the Court of Justice to give a preliminary ruling on two questions which are set out as follows in the statement of grounds of the judgment:

'Is the rule that claims submitted out of time will not be entertained, laid down in Article 15 of Regulation (EEC) No 1380/75, contrary to the general principles of Community law in so far as it does not comply with the rule that penalties must be in proportion, and contrary to the spirit of the Community rules on payment of compensatory amounts?

If not, does the fact that Control Copy EC T5 was not returned constitute a case of *force majeure* within the meaning of the abovementioned articles and what conditions apply thereto?'

2. At this point, I think it useful to cite the wording of the provisions of the regulation which are relevant in these proceedings.

Article 11 (2) of Commission Regulation No 1380/75 of 29 May 1975 reads as follows:

'Payment by the exporting Member State of the monetary compensatory amount which should be granted by the importing Member State shall be conditional upon the production of proof that customs import formalities have been completed and that the duties and charges having equivalent effect payable in the importing Member State have been charged.

This proof shall be furnished by production of the control copy provided for in Article 1 of Regulation (EEC) No 2315/69 ...'.

Article 5 (4) of Regulation No 2314/69 reads as follows:

'Without prejudice to the application of the provisions of Article 26 of Regulation (EEC) No 542/69, the control copy shall, after appropriate endorsement by the competent customs office of the Member State of destination . . . be sent to the office of departure without delay . . . '.

Commission Regulation No 1498/76 added Article 11 (5) to Regulation No 1380/75, the first subparagraph of which reads as follows:

'Where the control copy referred to in paragraph 2 is not returned to the office of departure or relevant central body within three months of its issue owing to circumstances beyond the control of the person concerned, the latter may make application to the competent agency for other documents to be accepted as equivalent, stating the grounds of such application and furnishing supporting documents. Such supporting documents shall include the transport document and the document whereby the product concerned is entered with the customs authorities for home use in the Member State of destination or a copy or photocopy thereof certified by the competent authorities.'

Article 15 of Regulation No 1380/75 provides that:

'Except in cases of *force majeure*, no claim for payment of a monetary compensatory amount shall be entertained unless the relevant documents are submitted within six months following the day on which customs formalities were completed.'

3. Denkavit, the *plaintiff in the main proceedings*, has made the following observations on those questions:

(a) Validity of Article 15 of Regulation No 1380/75

The plaintiff takes the view that the sanction of having its claim barred in the event of non-compliance with the period for submitting the relevant documents goes beyond what is appropriate and necessary to achieve the aim pursued, with the result that the contested article must be regarded as invalid. In support of that view, the plaintiff cites the judgment of the Court of 20 February 1979 in Case 122/78. [5]

It is out of all proportion to impose in respect of a purely formal omission the same penalty as that attaching to a failure to fulfil an import or export obligation.

The plaintiff further observes that the six-month period was too short and was therefore extended to 12 months by Article 17 (2) of Commission Regulation (EEC) No 1371/81 of 19 May 1981, [6] which partially repealed and replaced Regulation No 1380/75.

(b) The concept of *force majeure*

In the plaintiff's view the loss of a document by a customs authority is always to be treated as a case of *force majeure*. In support of that proposition, it cites the judgment of the Court of 6 October 1982 in Case 302/81, [7] in which it was held that procedural flaws which are beyond the control of the person to whom compensatory amounts should normally be granted must not have effects which are unfavourable to him.

The rule in Article 11 (5) of Regulation No 1380/75, which enables the trader, after the expiry of three months, to obtain documents that are equivalent to Control Copy T5, simply confers a right but does not impose an obligation on the trader. In any event, the trader is not bound to take steps pursuant to Article 11 (5) of Regulation No 1380/75 within the period prescribed by Article 15 thereof.

(c) In a pleading dated 25 February 1980 which the plaintiff lodged with the Tribunal administratif, Rouen, and annexed to its observations to this Court, Denkavit considers a problem which the national court has not raised, namely when does the period prescribed by Article 15 of Regulation No 1380/75 start to run.

Article 15 provides that the requisite documents must be submitted within a period of six months following completion of the customs formalities, if the claim is to be entertained. If the monetary compensatory amounts payable by the importing Member State have been paid by the exporting Member State and such payment is dependent upon proof of completion of the customs formalities in the exporting Member State, the customs formalities are ultimately completed only when Control

5 — *SA Buitoni* v *Fonds d'orientation et de régularisation des marchés agricoles* [1979] ECR 677.

6 — Commission Regulation (EEC) No 1371/81 of 19 May 1981 laying down detailed rules for the administrative application of monetary compensatory amounts (Official Journal 1981, L 138, p. 1).

7 — *Alfred Eggers & Co* v *Hauptzollamt Kassel* [1982] ECR 3443.

copy T5 has been returned to the office of departure. However, since the said control copy was mislaid and thus was never returned to the office of departure, the period prescribed by Article 15 of Regulation No 1380/75 never started to run.

(d) The plaintiff therefore suggests that the questions submitted by the Tribunal administratif, Rouen, should be answered as follows:

'Article 15 of Regulation No 1380/75, which penalizes failure to observe the time-limit for the submission of the documents needed to obtain payment of the monetary compensatory amounts with the complete and automatic forfeiture of the monetary compensatory amounts to which the trader was entitled, is invalid.

The loss of Control Copy T5 as a result of the negligence of the customs authorities in the Member State of destination is a case of *force majeure* within the meaning of Article 15 of Regulation No 1380/75. In such a case, a trader who has informed the competent office within the period prescribed by Article 15 of Regulation No 1380/75 that the control copy has not been returned and has applied to have other documents accepted as equivalent within the meaning of Article 11 (5) only after receipt of written confirmation from the competent authorities of the loss of the Control Copy T5, does not forfeit the monetary compensatory amounts.

Or

The rule in Article 15 which bars claims submitted out of time is observed by a trader who, in the event of the loss of Control Copy T5 as a result of the negligence of the customs authorities in the Member State of destination,

(i) informs the competent authorities within six months of customs clearance that the control copy has not been returned;

(ii) applies after receipt of written confirmation of the loss of the control copy to have other documents accepted as equivalent and submits appropriate documents in support of his application; and

(iii) submits the documents needed to obtain payment of the monetary compensatory amounts as required by Articles 14 and 15 of Regulation No 1380/75 without delay after the equivalent documents have been lodged with the competent authorities.'

4. The Fund, *the defendant in the main proceedings*, suggests that the questions submitted for a preliminary ruling should be answered in the negative.

(a) Validity of Article 15

Regulation No 1380/75 requires an exporter to take a number of steps within a particular period in order to receive the monetary compensatory amounts. Article 15 is not contrary to the principle of proportionality, the spirit of the Community rules on the payment of monetary compensatory amounts or the general principles of Community law.

(b) The concept of *force majeure*

The defendant understands the concept of *force majeure* as an unusual event which is beyond the trader's control but which has unavoidable consequences for him. A mere failure to return Control Copy T5 cannot amount to *force majeure* since the regulation allows the trader to take steps to avoid the

consequences of an unusual event of that kind. The plaintiff has not shown that it took the necessary steps to avoid the consequences resulting from the loss of the control copy.

(c) The defendant suggests that the questions submitted should be answered as follows:

'Article 15 of Regulation No 1380/75 is not contrary to the general principles of Community law, is in keeping with the principle of proportionality and is not contrary to the spirit of the Community rules on the payment of monetary compensatory amounts. It is therefore valid.

Failure to return Control Copy T5 does not constitute a case of *force majeure* within the meaning of Article 15 of Regulation No 1380/75.'

5 (a) On the question of the validity of Article 15 of Regulation No 1380/75, the *Commission of the European Communities* takes the view that a distinction must be made between cases in which failure to observe the time-limits has unfavourable consequences going beyond forfeiture of the main financial benefit and the present case which is concerned with the grant of the benefit itself. Payment of the amount should undoubtedly be conditional upon the trader furnishing proof that the transaction giving rise to the claim for payment was completed on a specific date. If those conditions were not satisfied the aim of the system for the grant and levying of monetary compensatory amounts could not be achieved. It would mean that traders might obtain unjustified benefits, over and above offsetting the effect of monetary measures on agricultural prices, which alone justifies the establishment of such a system. The imposition of a mandatory time-limit for the actual payment of the amounts due to traders thus forms part of the general purpose of the system of monetary compensatory amounts. According to the 14th recital in the preamble to Regulation No 1380/75, a uniform time-limit must be laid down 'in order to prevent distortions of competition between the trade interests concerned in the Member States' and is thus intended to ensure equal treatment. Accordingly, the imposition of a mandatory time-limit for the submission of claims for the payment of monetary compensatory amounts, non-observance of which is sanctioned by the barring of the trader's claim, is in conformity with the aim of ensuring equal treatment for traders as regards the grant of monetary compensatory amounts and is a necessary and appropriate means of achieving that aim. A prerequisite, however, is that the time-limit should be reasonable and that exceptional circumstances which resulted in its being exceeded by the trader and which are beyond his control should be taken into account to a sufficient extent.

With regard to the practice of the national customs authorities, a period of six months seems adequate and, consequently, reasonable. Sufficient account is taken in the Community rules of the possibility that exceptional circumstances may arise which are beyond the trader's control, inasmuch as those rules expressly provide that claims are not barred by lapse of time in the event of *force majeure*.

(b) On the question of *force majeure* the Commission takes the view that, in general, acts of the authorities constitute unforeseeable and unusual circumstances in relation to traders in so far as such acts amount to maladministration, that is to say where the authorities have either taken no action at all or have acted inappropriately or

belatedly. The trader is not responsible for the loss of Control Copy T5 by the customs authorities.

The central issue, however, in the proceedings before the national court is whether the second condition for recognition of a case of *force majeure*, namely whether the trader has exercised due care, has been fulfilled.

In this case, the mere fact that the plaintiff did not avail itself within six months of the possibility provided for by Article 11 (5) does not lead to the conclusion that it failed to exercise due care. Since procedural defects for which the trader is not responsible should not have adverse consequences for him, he is not bound, if he has complied with the relevant provisions, to take steps anew in order to obtain equivalent documents within the normal period for the submission of claims for the payment of monetary compensatory amounts. However, it does not follow from those considerations that the trader need not have taken reasonable steps within the six-month period, either by taking action to have Control Copy T5 returned or by applying to have other documents accepted as equivalent.

If Control Copy T5 is not returned within the six-month period, the trader should persist in his efforts to obtain the control copy itself or equivalent documents.

(c) The Commission therefore suggests that the questions submitted to the Court by the Tribunal administratif, Rouen, should be answered as follows:

'Consideration of the question raised has disclosed no factor of such a kind as to affect the validity of Article 15 of Regulation No 1380/75.

The loss of Control Copy T5 by the national authorities constitutes a case of *force majeure* within the meaning of Article 15 of Regulation No 1380/75 in so far as the trader has taken reasonable steps to obtain the document or has submitted an application within the six-month period prescribed by Article 15 for other documents to be accepted as equivalent within the meaning of Article 11 (5) and has taken every possible step to have them accepted as equivalent either after the expiry of that period or on being informed of the loss of Control Copy T5.'

B — In my Opinion on this reference for a preliminary ruling I shall first discuss the question whether, and if so in what circumstances, the failure to return Control Copy T5 constitutes a case of *force majeure* within the meaning of Article 15 of Regulation No 1380/75. Only when it is clear in which cases the rule in that provision which bars claims submitted out of time does not apply and, conversely, in which cases it does apply, will it be possible to consider whether the provision is in conformity with superior principles of law of a general nature.

1. As I have already said in my Opinion of 10 October 1985 in Case 165/84,[8] there is an extensive body of case-law on the concept of *force majeure*. As far back as 11 July 1968 the Court stated in its judgment

8 — *John Friedrich Krohn* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1985] ECR 3997.

in Case 4/68 [9] that as the concept of *force majeure* is not identical in the different branches of law and the various fields of application, its significance must be determined on the basis of the legal framework within which it is intended to take effect. As regards the agricultural sector, the Court held in its judgment that an importer who has shown the necessary diligence is in principle released from the obligation to import when circumstances outside his control make it impossible for him to effect the importation within the required period. Such is the case when the event which renders impossible the performance in due time of a contract which, under normal circumstances, ought to have enabled the importer to fulfil his obligation to import, is so unusual that it would have had to be considered as improbable by a prudent businessman exercising all due care. The concept of *force majeure* is not to be interpreted as implying absolute impossibility, but unusual difficulties which are independent of the will of the importer and which arise during the performance of the contract. Further, recognition of a case of *force majeure* presupposes that the consequences of the event could not have been avoided.

In his Opinion of 5 December 1979 in Joined Cases 154, 205, 206, 226 to 228, 263 and 264/78, 39, 31, 83 and 85/79 [10] Mr Advocate General Capotorti summarized the case-law of the Court on the application of the concept of *force majeure* in the agricultural sector as containing two elements: an objective element, namely the occurrence of an extraordinary event beyond the influence of the person concerned and, secondly, a subjective element, consisting in everything possible having been done by the person concerned, acting with care, prudence and diligence, in order to avoid the occurrence of that event.

In his Opinion of 17 November 1983 in Case 284/82 [11] Mr Advocate General Reischl stated that for *force majeure* to apply, it was important that all requisite care had been taken, whether there were circumstances outside the influence of the person under the obligation and whether an event was to be regarded as so unusual that its occurrence would have to be considered as improbable by a prudent person acting with the circumspection of a diligent businessman.

In its most recent published decision on the question of *force majeure*, namely the judgment of 9 February 1984 [12] the Court held that:

'It is apparent from the established case-law of the Court that apart from special cases in specific areas in which it is used, the concept of *force majeure* essentially covers unusual circumstances which make it impossible for the relevant action to be carried out. Even though it does not presuppose absolute impossibility it nevertheless requires abnormal difficulties, independent of the will of the person concerned and apparently inevitable even if all due care is taken.'

9 — *Schwarzwaldmilch GmbH* v *Einfuhr- und Vorratsstelle für Fette* [1968] ECR 377 at p. 385.

10 — *SpA Ferriera Valsabbia and Others* v *Commission* [1980] ECR p. 1035 at p. 1067.

11 — *Acciaierie e Ferriere Busseni SpA* v *Commission* [1984] ECR 568 at p. 571.

12 — *Acciaierie e Ferriere Busseni SpA* v *Commission* [1984] ECR 557 at p. 566.

Where, as in this particular case, the control copy has been mislaid by the authorities of the importing Member State and cannot therefore be returned to the customs office of departure, the following conclusions may be drawn from the aforementioned case-law:

The loss of an official document by the authorities is indisputably an event which is beyond the control of the trader. After clearance of the goods through the customs office of departure the trader no longer has any real power to dispose of the control copy. The document is initially in the possession of the authorities of the importing Member State and subsequently, if everything is in order, in the possession of the authorities of the exporting Member State.

The question arises, however, whether the loss of an official document transmitted by one authority to another is to be regarded as so unusual that its occurrence must be considered improbable. That question must, in my view, be answered in the negative.

No doubt, in a properly organized administrative department documents should not be mislaid. It must however be borne in mind that export transactions are not isolated events but frequent occurrences. Furthermore, the said control copies must be sent from the customs offices of one Member State to the customs offices of another Member State and must then be sent back. If in those circumstances from time to time documents are mislaid, that may be regrettable from the point of view of sound administration, but it cannot be regarded as so unusual or so unforeseeable an event as to be improbable. On the contrary, the adoption of Regulation No 1498/76 shows that such cases were envisaged by the Community legislature. According to the preamble to that regulation, it may happen that, owing to circumstances beyond the control of the party concerned, the control copy cannot be produced although the product has been entered for home use in the Member State of destination provided for. For that reason, the Commission has laid down that, where Control Copy T5 is not returned to the office of departure within three months of its issue, the person concerned may submit an application for other documents to be accepted as equivalent.

Hence the fact that a control copy has been mislaid by the authorities and cannot therefore be returned to the office of departure is not to be regarded as a case of *force majeure* within the meaning of Article 15 of Regulation No 1380/75.

The subjective element in the concept of *force majeure*, namely the question whether the person concerned has taken all the steps required to avoid the consequences of *force majeure*, need not therefore be discussed in further detail.

That finding, according to which the concept of *force majeure* is to be interpreted strictly and does not therefore cover all circumstances that are beyond the trader's control, is confirmed by the scheme of Regulation No 1380/75. *Force majeure* is the only exception to the rule in Article 15 which bars claims submitted out of time. Article 11 (5) however enables the trader to apply to have other documents accepted as equivalent in all circumstances beyond his control. *Force majeure* must therefore be given a different, narrower construction than that of circumstances beyond the control of the person concerned. If *force majeure* were to cover all circumstances

beyond the trader's control, it would be impossible to explain why in one and the same regulation the same concept is designated by different expressions.

Thus the scheme of the regulation does not permit the concept of *force majeure* to be interpreted in the broad sense of all circumstances beyond the control of the person concerned.

2. Before I turn to the question whether Article 15 of Regulation No 1380/75 is compatible with the general principles of Community law and, in particular, with the principle of proportionality, I think two preliminary observations are called for.

It is common ground that the plaintiff exported goods to the value of FF 48 000, which confers entitlement to the payment of monetary compensatory amounts. The plaintiff estimated the amount of monetary compensatory amounts due to it as FF 19 543.40, which is not disputed by the defendant.

The Member States were empowered to grant monetary compensatory amounts by Council Regulation No 974/71 of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States. I shall not consider in detail the particular conditions for the application of monetary compensatory amounts. I set out my views in that regard *in extenso* in the Opinion which I delivered on 14 May 1985 in Joined Cases 71 and 72/84 [13] before the Fourth Chamber of the Court. To summarize, the application of monetary compensatory amounts was considered only in cases where changes in the parities of the currencies might lead to a disturbance in trade in agricultural products. However, the reference margins for the calculation of the monetary compensatory amounts were defined anew by Regulation No 1112/73. [14] Henceforth the criterion was to be the disparity between the conversion rate used in the common agricultural policy and the conversion rate derived from the so-called central rate. The significance of monetary compensatory amounts has thus changed since their introduction. Initially they were conceived as an instrument to neutralize short-term fluctuations in currency rates, whilst later they were used to equalize the different price levels for agricultural products in the Community which arose from the application of different representative conversion rates for such products to agricultural prices uniformly expressed at first in units of account and subsequently in ECU. Monetary compensatory amounts have thus been transformed from an instrument for temporarily combating disturbances in agricultural trade resulting from currency fluctuations into an essential part of the common organization of the market. It was resolved to apply those amounts in order to enable intra-Community trade in agricultural products to continue in view of the existence of different national price levels for agricultural products in spite of the adoption of uniform prices expressed in ECU. That is quite apparent in this case where for goods to the value of approximately FF 48 000 a monetary compensatory amount of FF 19 000 was calculated, that is to say an amount representing more than 40% of the value of the goods.

According to the case-law of the Court, in order to establish whether a provision of Community law is consistent with the principle of proportionality it is necessary to establish, in the first place, whether the

13 — *Surcouf and Vidou* v *European Community, represented by the Council and the Commission* [1985] ECR 2926.

14 — Official Journal 1973, L 114, p. 4.

means it employs to achieve its aim correspond to the importance of the aim and, in the second place, whether they are necessary for its achievement. [15]

The 14th recital in the preamble to Regulation No 1380/75 contains the following justification of the various time-limits laid down in the regulation:

'Whereas, in the interests of sound administration, it seems desirable to require that *application for payment* of the compensatory amount be made within a reasonable period; whereas, in order to prevent distortions of competition between the trade interests concerned in the Member States, *a time-limit* should be laid down *for payment* of the compensatory amount; whereas the fact that in exceptional cases this time-limit cannot be respected should be taken into consideration'. [16]

In its observations to the Court, the Commission has relied essentially upon the second sentence in that recital, stating that trade interests could obtain unjustified advantages in the absence of a uniform time-limit.

First it must be observed in that regard that the recital relating to distortions of competition between the trade interests concerned in the Member States refers to the *time-limit* accorded to the national authorities *for payment* of the monetary compensatory amounts. Distortions of competition to the detriment of trade interests could arise if there were any delay in payment of the monetary compensatory amounts, since traders would thus at the very least be confronted with different conditions relating to capital and interest. In this case, the monetary compensatory amounts were paid by the exporting State, that is France, as a result of an agreement between the Member States concerned. It is scarcely conceivable and therefore unlikely that a Member State whose exports are intended to be encouraged by the grant of monetary compensatory amounts would obstruct its own exports by delaying the payment of such amounts.

However, I have considerable misgivings as to whether that argument necessarily entails forfeiture of the right at issue in this case merely because the trader has submitted his claim for payment out of time. According to Article 8 (1) of Regulation No 1380/75, the monetary compensatory amount to be granted or levied is the amount applicable on the day of export or on the day of import. Thus if the rate at which the monetary compensatory amounts are to be paid is determined by the day of import or the day of export, I fail to see how the trader concerned can influence the amount due to him by lodging his claim out of time. A belated claim can only lead to a belated payment of the monetary compensatory amount and thus to a loss for the trader. Since however it is in the trader's own interest to receive the amounts due to him as soon as possible, it is difficult to see for what reason he should be encouraged, by the setting of a time-limit for the submission of claims, to act promptly in order to avoid distortions of competition.

Thus the only remaining justification for the rule in Article 15 of Regulation No 1380/75 which bars claims submitted out of time is the statement in the 14th recital of that regulation that a time-limit is in the interests of sound administration.

In that connection, it must certainly be acknowledged that the Commission itself and the national authorities have a legitimate interest in being able to close their files on certain administrative matters after a reasonable period. The Commission must therefore be entitled to prescribe that

15 — Judgment of 23 February 1983 in Case 66/82, *Fromançais SA* v *Fonds d'orientation et de régularisation des marchés agricoles (FORMA)*, [1983] ECR 395, at p. 404.

16 — Emphasis added.

claims for the payment of monetary compensatory amounts must be submitted within a reasonable period, failing which certain penalties may be imposed. In that regard it must also be borne in mind that by Council Regulation No 2746/72 of 19 December 1972 [17] responsibility for the financing of monetary compensatory amounts was taken over by the Community. Consequently, the grant of monetary compensatory amounts involves not only a national administrative procedure but also a subsequent balancing of accounts between the Member State which grants the amounts and the Commission as part of the clearance of accounts in respect of the European Agricultural Guidance and Guarantee Fund.

For those reasons, it is certainly necessary to set certain time-limits for the submission of claims for the payment of monetary compensatory amounts and to ensure observance of such time-limits by the imposition of penalties. Nevertheless both the time-limits and the penalties must be in proportion to the aim pursued, namely sound administration.

The preamble to Commission Regulation No 1371/81 of 19 May 1981, [18] which partly replaced Regulation No 1380/75, gives rise to certain doubts as to whether the six-month period prescribed by Article 15 of that regulation is reasonable. The preamble to the former regulation contains the following recital:

'Whereas experience has shown that the time-limit for submission of the relevant documents, if grants of monetary compensatory amounts are to be made, should be increased'.

Accordingly, Article 17 (2) of Regulation No 1371/81 contains the following provision:

'Except in cases of *force majeure*, entitlement to the grant of monetary compensatory amounts shall be lost unless the relevant documents are submitted within the 12 months following the day on which the customs authorities accepted the import entry or the export declaration.'

It is also doubtful whether the penalty, namely complete forfeiture of the monetary compensatory amounts, is reasonable. In its judgment of 20 February 1979 in Case 122/78 [19] the Court stated that in a case where a security is lodged to obtain an import or export licence, forfeiture of the security is proportionate if the particular import or export transaction voluntarily entered into by the trader is not carried out. With regard to forfeiture of the security in the event of the submission of proof out of time, however, the Court held that:

'On the other hand, the provisions of Article 3 of Regulation No 499/76, prompted by "administrative reasons", provide not only for a period within which these proofs must be furnished but also the loss of the whole of the security in the event of failure to comply with that period.

That fixed penalty, which is applied to an infringement which is considerably less serious than that of failure to fulfil the obligation which the security itself is intended to guarantee, which is sanctioned by an essentially proportionate penalty, must therefore be held to be excessively severe in relation to the objectives of administrative efficiency in the context of the system of import and export licences.'

This case, which concerns forfeiture of the monetary compensatory amounts where the

17 — Official Journal, English Special Edition 1972 (28-30 December), p. 64.

18 — Official Journal 1981, L 138, p. 1.

19 — *SA Buitoni* v *Fonds d'orientation et de régularisation des marchés agricoles* [1979] ECR 677, at p. 685.

claim is submitted out of time, calls for the following remarks: the grant of monetary compensatory amounts does not depend on the existence of a relationship between a main and an ancillary obligation, in which non-fulfilment of either obligation attracts the same penalty. The two situations are however comparable, in so far as in both failure to carry out the export transaction is attended by the same legal consequences as the submission of the claim out of time, namely forfeiture of the monetary compensatory amounts.

A further peculiarity of this case is that, except in the case of *force majeure*, which, as I have already explained, does not arise here, the rule which bars claims submitted out of time is of general application, that is to say independently of whether or not the claim was out of time for reasons beyond the control of the trader concerned. In the latter case, however, the legal consequence provided for in Article 15 of Regulation No 1380/75, namely forfeiture of the monetary compensatory amounts, must be regarded as out of all proportion.

The fact that the trader may, under Article 11 (5) of Regulation No 1380/75, take steps after the expiry of the three-month period to obtain other equivalent documents in no way affects that finding. That provision gives the trader an option which, if exercised, can expedite his claim for the grant of monetary compensatory amounts. It is impossible in my view to infer from that option, which is provided for the trader's benefit, an obligation to obtain equivalent documents in the event of negligence on the part of the authorities. Moreover, Article 11 (5) of Regulation No 1380/75 not only confers an advantage on the trader but at the same time relieves the administration of the need to contend with applications by the trader to have other documents accepted as equivalent in the first three months after completion of customs formalities. Furthermore, the remaining period of three months is no doubt too short to enable the trader to take steps to obtain equivalent documents from the authorities of another Member State and to have those documents accepted by his own national authorities.

Finally, I wish to draw attention to a further inaccuracy in the wording of Article 15 of Regulation No 1380/75. Although I do not intend to take issue with the general wording of that provision, I nevertheless find it curious that in a Community regulation on intra-Community trade adopted in 1975, that is seven years after the establishment of the Customs Union, there is still mention of customs formalities. It is, however, precisely the concept of customs formalities which has led to further obscurities in this case. It is not clear which customs formalities are intended, whether customs export formalities or customs import formalities Moreover, the regulation leaves open the question of the time at which customs import formalities are completed. Article 8 contains a rule for customs export formalities, but there is no rule for customs import formalities, completion of which must be evidenced by Control Copy T5. Although that question has been answered by the national court itself and has thus not been referred to the Court in these proceedings, it must be pointed out that in the plaintiff's view customs formalities are not completed until Control Copy T5 is returned to the office of departure. According to that view, the correctness of which need not be considered

here, the question of the interpretation of Article 15 simply did not arise since the period prescribed for the submission of claims could not have started to run owing to the failure to return the control copy.

Although the Community legislature is entitled to prescribe reasonable periods for the submissions of claims, it must make it quite clear when time starts to run. Moreover, the Commission has in the meantime recognized that the wording of Article 15 of Regulation No 1380/75 is imprecise. According to Article 17 (2) of Regulation No 1371/81 which replaced it, the period now runs from the day on which the customs authorities accepted the import entry or the export declaration.

To summarize, therefore, I have come to the conclusion that the rule in Article 15 of Regulation No 1380/75 is invalid in so far as it sets a time-limit for the submission of claims for monetary compensatory amounts even in cases where, although no *force majeure* is involved, the person concerned cannot submit the documents in support of his claim until they are out of time, for reasons which are beyond his control.

In those circumstances it is unnecessary to give a specific answer to the subsidiary question concerning the interpretation of the concept of *force majeure*.

C — I therefore suggest that the questions submitted for a preliminary ruling by the Tribunal administratif, Rouen, should be answered as follows:

Article 15 of Commission Regulation (EEC) No 1380/75 of 29 May 1975 laying down detailed rules for the application of monetary compensatory amounts is invalid in so far as it sets, except in cases of *force majeure*, a time-limit for the submission of documents with a view to obtaining payment of monetary compensatory amounts, even in cases where such documents are submitted out of time for reasons which are beyond the control of the trader concerned.