JUDGMENT OF THE COURT
31 MARCH 1977 [1]

Société pour l'exportation des sucres SA v Commission of the European Communities

Case 88/76

1. *Procedure — Proceedings instituted by individuals — Measure of direct and individual concern — Concept — Admissibility*
   (EEC Treaty, second paragraph of Article 173)

2. *Procedure — Proceedings instituted by individuals — Measure not applicable to the plaintiff — Lack of legal interest — Inadmissibility*
   (EEC Treaty, second paragraph of Article 173)

3. *Procedure — Costs — Unreasonable costs — Payment thereof*
   (Rules of Procedure, Article 69 (3))

1. Proceedings instituted by natural or legal persons are admissible against a measure of an institution concerning them by reason of circumstances in which they are differentiated from all other persons and distinguished individually just as in the case of the person addressed.
2. Proceedings instituted by any natural or legal person against a measure (regulation) which is not applicable to the situation of the plaintiff are inadmissible for lack of legal interest.
3. Even a successful party which, throughout the proceedings, based its position on a presumption which reveals itself to be unfounded may be ordered to pay the costs which it caused the other party to incur.

In Case 88/76

SOCIÉTÉ POUR L'EXPLOITATION DES SUCRES SA, having its registered office in Antwerp, represented by Wilma Viscardini, Advocate at the Padua Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34/B/IV rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, member of the

1 — Language of the Case: French.

Legal Service, with an address for service in Luxembourg at the offices of Mario Cervino, Legal Adviser to the Commission, Bâtiment Jean Monnet, Kirchberg,

defendant,

Application for the partial annulment of Commission Regulation (EEC) No 1579/76 of 30 June 1976 laying down special detailed rules of application for sugar under Regulation (EEC) No 557/76 on the exchange rates to be applied in agriculture (OJ L 172 of 1. 7. 1976, p. 59),

THE COURT

composed of: H. Kutscher, President, A. M. Donner, President of Chamber, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe and G. Bosco, Judges,

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

I — Facts and procedure

(a) The regulations

Article 12 of Regulation (EEC) No 3330/74 of the Council of 19 December 1974 on the common organization of the market in sugar (OJ L 359, p. 1). (This regulation repealed Regulation No 1009/67/EEC of the Council of 18 December 1967 [OJ, English Special Edition, 1967, p. 304]) makes all imports into the Community or exports from the Community of the products concerned conditional upon the submission of an import or export licence. The issue of a licence is conditional on the lodging of a deposit guaranteeing that importation or exportation will be effected during the period of validity of the licence; this deposit is forfeited in whole or in part if the operation is not effected, or is only partially effected, within that period.

Common detailed rules for the application of the systems of import and export licences and advance fixing certificates for agricultural products were laid down by Regulation (EEC) No 193/75 of the Commission of 17 January 1975 (OJ L 25, p. 10); the special detailed rules for the sugar sector are laid down by Regulation (EEC) No 2048/75 of the Commission of 25 July 1975 (OJ L 213, p. 31).

Article 19 of Regulation No 3330/74 provides for the possibility of covering the difference between the prices on the world market and the Community price by an export refund. Article 4 of Regulation (EEC) No 766/68 of the Council of 18 June 1968 laying down general rules for granting export refunds on sugar (OJ, English Special Edition, 1968 (I), p. 155) provides that the refund may be fixed by tender. In Regulation (EEC) No 2101/75 of 11 August 1975 (OJ L 214, p. 5), the Commission issues until a date to be determined subsequently, a standing invitation to tender to determine an export levy and/or export refund on white sugar and, during the period of validity of the standing invitation, weekly partial invitations to tender. The invitations to tender are issued in accordance with the provisions of Regulation No 766/68 of the Council and of Regulation No 2101/75 of the Commission.

Article 4 (1) of Regulation (EEC) No 1134/68 of the Council of 30 July 1968 (OJ, English Special Edition, 1968 (II), p. 396) provides that:

'In the case of an alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account, the Member State concerned, using the new parity relationship and without prejudice to the application of Article 1 (2), shall adjust the following amounts, given in units of account, if they appear in national currency in the documents or certificates issued in pursuance of the common agricultural policy or the special trade systems for goods processed from agricultural products:

(a) amounts which have been fixed in advance for a transaction or part of a transaction still to be carried out after the alteration of that parity relationship;

(b) amounts appearing in agreements concluded between a private individual and an intervention agency for a transaction or part of a transaction still to be carried out after the alteration of that parity relationship.

However, any person who has obtained advance fixing of such amounts for a specific transaction may, by written application which must reach the competent authority within thirty days of the entry into force of the measures fixing the altered amounts, obtain cancellation of the advance fixing and of the relevant document or certificate.'

On the basis of Article 3 of Regulation No 129 of the Council on the value of the unit of account and the exchange rates to be applied for the purposes of the common agricultural policy (OJ, English Special Edition, 1959-1962, p. 274) which justifies measures providing exceptions from the principle that par values should be used to convert one currency into another, on 27 February 1975 the Council adopted Regulation No 475/75 fixing the representative rates to be applied in agriculture. Article 6 of that latter regulation made applicable the provisions of Regulation No 1134/68 laid down for the amendment of the relationship between the parity of the currency of a Member State and the value of the unit of account (see above).

On 15 March 1976 the Council adopted Regulation No 557/76 (OJ L 67, p. 1) repealing Regulation No 475/75 and fixed new exchange rates to be applied in agriculture. Article 5 (1) of that regulation also provided for the application of the provisions of Regulation No 1134/68 while making the following proviso:

'However, Article 4 (1), second subparagraph, of Regulation (EEC) No 1134/68 shall apply only if the application of the new representative rates is disadvantageous for the party concerned' (Article 5 (2))

Detailed rules for the application of Regulation No 557/76 were laid down by Commission Regulation (EEC) No 571/76 of 15 March 1976 (OJ L 68, p. 1). Article 1 (1) of that regulation provides that:

'With respect to products for which a monetary compensatory amount is fixed, cancellation of the advance fixing and the relevant document or certificate as provided in the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 may be applied only:
— in the case of import licences issued in Ireland and Italy,
— in the case of export licences issued in Germany, Belgium, Luxembourg and the Netherlands.'

Article 2 (1) provides that the provisions of the last subparagraph of Article 4 (1) of Regulation No 1134/68 shall apply for the products and Member States concerned with effect from the dates set out in Article 2 (2) of Regulation (EEC) No 557/76 (in the case of sugar: the beginning of the 1976/77 marketing year, that is to say, 1 July 1976). The said provisions apply only to advance fixing and to the relevant documents or certificates issued before 15 March 1976 (Article 2 (2) of Regulation No 571/76).

'Whereas, if this right [the right of cancellation] were widely exercised, it could in certain cases seriously hinder good Community administration of a given agricultural market; whereas provision should therefore be made for it to be replaced by the right to compensation for the disadvantage suffered,'.

On 22 June 1976 the Council adopted Regulation No 1451/76 (OJ L 163, p. 5). In this regulation the following subparagraph is added to Article 5 (2) of Regulation (EEC) No 557/76 (see above):

'Provision may be made for this disadvantage to be compensated for by a suitable measure. In such a case, the provisions referred to in the first subparagraph shall not apply.'

Finally, on 30 June 1976, the Commission adopted Regulation (EEC) No 1579/76 (OJ 172, p. 59), which provides that:

Article 1

'1. The compensation referred to in the second subparagraph of Article 5 (2) of Regulation (EEC) No 557/76 shall be granted for those quantities of white sugar for which customs export formalities are completed on or after 1 July 1976 in connexion with partial awards under Regulation (EEC) No 2101/75 and for which an export licence was issued before 15 March 1976. For the Member States concerned this compensation shall be as shown in the annex.

2. In respect of the export licences referred to in paragraph 1, the right to cancel under the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 may not be exercised.

Article 2

This Regulation shall enter into force on 1 July 1976.'

(b) The subject-matter of the proceedings

The Société pour l'exploitation des sucres possesses export licences certifying the refund fixed in the context of the partial awards which took place before 15 March 1976, in accordance with the provisions of Regulation No 2101/75. Some of the licences in question acquired before 15 March, which were still valid on 1 July, related in the aggregate to a quantity of

27 000 tonnes of sugar. The applicant company states that it used most of the certificates which were due to expire on 31 July 1976 for a total of approximately 15 000 tonnes of sugar, before 30 June 1976. For those due to expire on 31 August 1976 it wished to abandon carrying out the export transactions and to seek their cancellation. By letter of 1 July 1976 addressed to the Office Central des Contingents et Licences (Central Office for Quotas and Licences) in Brussels, it requested the cancellation of these licences for a total amount of 11 000 tonnes of sugar. That office rejected the application for cancellation in reliance on Commission Regulation No 1579/76, which abolished the right of cancellation with effect from 1 July.

In the opinion of the applicant in so far as that regulation takes away acquired rights or legitimate expectations it infringes the principle of legal certainty and legitimate expectation and consequently it cannot properly be relied on. It requests the Court of Justice in accordance with Article 174 of the EEC Treaty to declare the regulation concerned to be void, at least in respect of the parts which contain the abovementioned infringement.

(c) Procedure

The application, dated 14 September 1976, was entered in the register of the Court of Justice on 16 September 1976.

On 1 October 1976, the plaintiff lodged an application for the adoption of interim measures to the effect that the validity of the export licences in question should be extended until one month after the date of the judgment on the substance of the case. In the alternative it requested that the deposit should only be forfeit if the main action was dismissed.

By order of 19 October 1976 the President of the Court of Justice ordered the Commission to inform the competent Belgian authorities that the deposit in question could not be regarded as forfeit before the delivery of the judgment of the Court concluding the proceedings.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without holding a preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:
- annul Article 1 (2) of Commission Regulation (EEC) No 1579/76;
- in the alternative, rule that the abovementioned paragraph is void at least in respect of applications for cancellation submitted on 1 July.

In addition it asks that the Commission should be ordered to pay the costs.

The *defendant* contends that the Court should:
- dismiss the application;
- order the applicant to bear the costs.

III — Submissions and arguments of the parties

Admissibility

In respect of the admissibility of its application based on Article 173 of the EEC Treaty, the *applicant* relies in particular on the judgment of the Court of 18 November 1975 in Case 100/74 *(CAM* v *Commission* [1975] ECR 1393). It takes the view that according to the criteria set out in that judgment it is directly concerned by Regulation No 1579/76, since it holds export licences issued before 15 March 1976 in the context of partial awards in accordance with Regulation No 2101/75 and which had not yet been used on 1 July 1976. It is also individually concerned since it is one of a limited and known number of exporters holding such licences.

The *defendant* has doubts as to the admissibility of the application for several reasons:

— The time-limit for bringing proceedings

If the third paragraph of Article 173 of the EEC Treaty is applied strictly (a time-limit of two months from the publication of the measure) the applicant is time-barred. It is true that under Article 81 (1) of the Rules of Procedure of the Court of Justice the period of time allowed for commencing proceedings against a measure adopted by an institution runs, where the measure is published, from the fifteenth day after publication thereof in the Official Journal of the European Communities. However, it may be asked whether this provision is equally applicable where it is shown that the person concerned was well aware of the contested measure long before the expiry of the period of fifteen days following its publication in the Official Journal. This question concerning the interpretation of the Rules of Procedure is raised in the present case in which as early as 5 July 1976 the applicant had inquired of the Office for Official Publications of the European Communities the exact date of the distribution of the Official Journal publishing the regulation in question.

— The priority to be given to proceedings before national courts

Making references to the decided cases of the Court of Justice the defendant raises the question whether the applicant should not first have initiated proceedings before the Belgian courts, concerning its dispute with the Central Office for Quotas and Licences.

The national court could at the same time have examined the actual implications of the case (forfeiture of the deposit) and it could also have referred to the Court of Justice the question of principle in relation to the validity of Regulation No 1579/76.

The *applicant* argues that the decided cases relied on by the defendant are not relevant to the present case.

— Subject-matter of the application

In the opinion of the *defendant,* it should be asked whether the real subject-matter of the application does not correspond more closely to an action for damages. With regard to the substance of the case the applicant takes the view that the financial compensation granted by the regulation in question does not cover all the profits which it expected to make by cancelling those licences and by obtaining the new refunds.

In any case the claim that within the regulation in question the Court of Justice should merely declare illegal the abolition of the right to cancellation without affecting the right to compensation is inadmissible: Regulation No 1579/76 forms an inseparable whole.

The *applicant* objects to this interpretation of its claim: the amount of the compensation is not at issue. It claims that it was suddenly obliged to use certificates or risk forfeiting the deposit while, as a result of arrangements it had made in reliance on the existing rules, it was no longer capable of so doing.

Furthermore, it denies that the regulation in question forms an inseparable whole: the financial compensation could quite easily exist alongside the right to have licences cancelled. A trader who carries out exports would therefore receive the adjusted refund and financial compensation; a trader who opted for cancellation would receive neither refund nor financial compensation.

Finally, the annulment of Regulation No 1579/76 in its entirety would have the result of not only reintroducing the right of cancellation but would also retroactively abolish the right to compensation with a serious loss for

traders who had taken advantage of such compensation and who would have to reimburse it.

The *defendant* recalls that Regulation No 1811/76 prolonged the validity of licences until 30 September 1976. The applicant cannot therefore complain that it was suddenly obliged to use its licences.

Finally, the applicant fails to appreciate the principle of the protection of legitimate expectations. It is quite clear that traders who received the financial compensation granted by the regulation in question could not be required to refund the amounts received.

The substance of the case

The application

The applicant takes the view that where particular rules expressly or by implication assign rights to individuals the individuals have vested rights which cannot be called in question again. When no right is given to individuals but where the circumstances are such that they may believe with objective foundation that the existing rules on the basis of which they enter into certain business ventures will remain unchanged until the end of the transactions undertaken, there exists the legitimate expectation which is granted protection by Community law, save where there exists an overriding public interest.

In the light of this the plaintiff examines the certifying of traders holding export licences certifying the refund fixed under the awards provided for by Regulation No 2101/75 issued before 15 March 1976 and not yet used on 1 July 1976.

Regulation No 557/76 of the Council assigned to these traders the right to apply for the licences to be cancelled if, by virtue of an alteration of the rates of exchange the refund fixed in advance had to be amended. This right was made subject to the sole condition that any changes occurring in the rates of exchange is disadvantageous for the persons concerned.

The possible disadvantage could have been recognized as early as 15 March 1976, since on that date the Commission laid down and published the compensatory amounts and the coefficients applicable to the refunds. In deciding that, for products for which a compensatory amount is fixed it was only possible to apply for cancellation 'for export licences issued in Germany, Belgium, Luxembourg and the Netherlands', the Commission has impliedly recognized that, by virtue of the change in the exchange rates, the exporters concerned suffered a disadvantage. Therefore from 15 March 1976 those traders had acquired the right to obtain at the appropriate moment cancellation of the licences in question in the full knowledge that the condition to which this right was subject was satisfied.

Then in Article 2 (1) of Regulation No 571/76 the Commission provided that the provisions of the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 (right of cancellation) only apply with effect from the dates set out in Article 2 (2) of Regulation (EEC) No 557/76 (the beginning of the 1976/77 marketing year) which could support the argument that the right of cancellation could only arise for sugar exporters on 1 July 1976. However all the provisions of Regulation No 1134/68 were made applicable as from 15 March 1976 by Regulation No 557/76 and the Commission had no power to derogate from the decisions of the Council by altering the date of application of that provision. Furthermore, it is clear from the preamble to Regulation No 571/76 that the Commission in no way wished to affect the right of cancellation but solely to specify the time at which it could be exercised (second recital). In practice in the sugar sector applications

for the annulment of licences certifying refunds fixed in advance could only be submitted to the competent body from 1 July 1976. It may be concluded that the right of cancellation was acquired by the parties concerned as from 15 March 1976 and that it was only the opportunity to exercise it which was set back to 1 July. Even on the argument that the right was only acquired on 1 July 1976 it is certain that from 15 March 1976 the persons concerned could rely on the possibility of seeking and obtaining cancellation of the licences at the appropriate time. Therefore, it must be admitted that there did at least exist a legitimate expectation.

In view of the compensation provided for, it is true that the disadvantage ceased to exist but the compensation is not capable of resolving the problems of those persons who, in reliance on the possibility of cancelling the licences are no longer able to carry out the exportation. Indeed, some traders could have taken other steps with regard to the goods concerned, for example, they could have taken part in other invitations to tender and have obtained other licences relating to refunds calculated on the basis of the new rates of exchange. The objection cannot be raised that the replacement of the right of cancellation by the right to compensation was envisaged by Council Regulation No 1451/76 of 22 June 1976, and that consequently prudent traders should have avoided taking any risks.

The Council regulation solely made provision for one possibility but gave no certitude as to the actual application of a compensatory measure, and in addition did not fix any date for the introduction of such a measure.

The reason given in order to justify the abolition of the right of cancellation, namely the need to avoid widespread recourse to the right of cancellation in order not to hinder the good administration of the sugar sector, is not sufficient to reveal an overriding public interest. Indeed, reliance on the right of cancellation could have been provided for as from 15 March 1976 and in that case it would have been necessary to provide for compensation as from that date.

The legality of Council Regulation No 1451/76 is not questioned by the plaintiff. As the regulation only contains the provision that the disadvantage can be compensated for by a suitable measure, it in no way obliged the Commission to implement such a provision. Moreover, it is doubtful whether that regulation provided that in the event of the adoption of a compensatory measure the right of cancellation could no longer be exercised. The replacement of the right of cancellation by compensation appears to be an alternative and not an obligation. Thus, in order to attain its object the Commission could have made provision for a simple power for the persons concerned to waive the right of cancellation by accepting the proposed compensation.

Furthermore, most of the traders used the licences before 1 July 1976, which means that the fear of wide recourse to the right of cancellation was not well founded. Applications for cancellation lodged on 1 July were to the plaintiff's knowledge in respect of barely 15 000 tonnes while licences issued before 15 March which were still valid related to a quantity of 120 000 tonnes.

Finally although Official Journal No L 172 bore the date 1 July 1976, it only appeared on 2 July 1976. Therefore, Regulation No 1579/76 was not published on the date specified for its entry into force. As publication in the Official Journal is an essential pre-condition for regulations to take effect, the date of their entry into force cannot be prior to that of their publication. In the present case, it is undeniable that on 1 July the right of cancellation was a definitively vested

right. The abolition of such a right by a measure published one day later has, without any doubt, retroactive effect which, no longer has to be shown to be incompatible with the requirement of legal certainty. Therefore a declaration that the regulation in question is void is inevitable on this head alone.

In any case precisely because of its belated publication Regulation No 1579/76 could not prevent the application for cancellation submitted on 1 July from being accepted.

The defence

The defendant argues that the admissibility of the argument based on legitimate expectation is not self-evident in an application for the annulment of a measure of general application. In this respect it refers to remarks made by the Advocate-General in his opinion in Case 47/75, *Federal Republic of Germany* v *Commission* ([1976] ECR 582).

Nevertheless, it examines the following points:

— Legitimate expectation

Article 2 (1) of Regulation No 571/76 provides that the right of cancellation is only applicable from the beginning of the 1976/77 (sugar) marketing year, because it is from that date that the monetary changes had taken effect.

Although the effect of the 'financial disadvantage' as such was calculable from the time of the monetary measures taken in March 1976 it was only at the time of the completion of the transaction after 1 July that the trader could properly make a complete assessment in order to know whether it was or was not advantageous for him to use the licence with advance fixing in spite of the monetary disadvantage or to have it cancelled, the latter depending in particular on the level of refund applicable at the time of the completion of the transaction. A trader who, before that date, particularly in April or May, had contracted firm obligations in reliance on the cancellation of the licences would have speculated on the future development of the price of sugar and on the future level of the refund. If, to a certain extent, he relied in advance on the use of the right of cancellation it was at his own risk.

Furthermore the export refund fixed in advance under Regulations No 766/68 and No 2101/75 can only apply to a particular transaction such as a contract which has already been concluded or which is about to be concluded. There is no doubt that the advance fixing cannot be used for the purposes of speculation.

— Transitional measures

Commission Regulation No 1811/76 of 27 July 1976 (OJ L 202, p. 8), extending the period of validity of certificates until 30 September 1976 was adopted as a transitional measure which would prevent certain traders who might have been acting in good faith from being placed in a difficult situation.

— The public interest

At the time of drafting of Regulation No 1579/76 (May to June 1976) the Commission had good reason to foresee that the risk of the cancellation of export licences issued under the partial awards carried out in February and March 1976 covered the whole amount of sugar affected, that is to say, exactly 122 800 tonnes. In particular it knew of the intention of several traders to use their right of cancellation (see the extract from the minutes of the 368th meeting of the Management Committee for Sugar held on 21 April 1976). The consequence of such an action would have been twofold for the Community. First, serious uncertainty would have affected the control of the supply side of the sugar balance; the quantities in respect of which licences could have been

cancelled might have been the subject of subsequent export agreements in order for the traders to profit from the higher refunds by means of the new licences. Therefore in reality the new licences did not correspond to any fresh export agreement. Finally not insignificant financial charges would have affected the budget of the European Agricultural Guidance and Guarantee Fund, particularly with regard to the items 'Refunds' or 'Storage costs'.

In the absence of any *legitimate* interests of the traders concerned, that is to say, other than those which may have resulted from speculation, in adopting the measure in question, the Commission gave precedence to the public interest of the general management of the market.

Finally, the defendant emphasizes that as early as 21 April 1976, it requested the competent national authorities to inform the trade of the intention of the Community to substitute compensatory measures for the right of cancellation. This information was transmitted and in the circumstances it is not possible to rely on the argument of legitimate expectation.

Infringement of a vested right

In Regulation No 571/76 the Commission adopted the reasoning of the Council which was given as the grounds for Article 2 (2) and Article 5 (2) of Regulation No 557/76 (cf. in particular the third recital *in fine* and the fifth recital *in fine* of the Council regulation).

In providing that the provisions of the last subparagraph of Article 4 (1) of Regulation No 1134/68 are applicable with effect from the dates set out in Article 2 (2) of Council Regulation No 557/76, Commission Regulation No 571/76 only established the right of cancellation in the present circumstances from 1 July 1976 for the sugar sector.

In so doing the Commission had in no way acted *ultra vires*. Indeed the Council had given it wide powers in that respect: Article 3 (1) of Council Regulation No 557/76 provided that detailed rules for the application of that regulation are to be adopted in accordance with the procedure of the Management Committee, if necessary by derogation from the rules governing the fixing of prices laid down in the relevant regulations.

To summarize the position therefore, on 15 March 1976 traders holding licences fixed in advance certainly possessed no 'vested right', but were merely able to expect the possibility of obtaining their release on 1 July 1976 from their export operations if monetary events were such as to cause them at that moment, and only at that moment, a disadvantage. In the alternative, the defendant maintains that the infringement of vested rights, at least if it does not relate to the essential nature of the property, cannot as such constitute a reason for annulling Regulation No 1579/76. At most the present case might be examined from the point of view of possible compensation.

Finally, having chosen this form of action it may be asked whether the applicant should not have contested Council Regulation No 1451/76 which forms the legal basis of Regulation No 1579/76.

Distribution of the Official Journal

First the defendant points out that the delay in the distribution of an Official Journal is not as such comparable to the formal retroactive effect of the measure published.

Secondly advance notice of the regulation in question was in any event given by Council Regulation No 1451/76 of 22 June 1976. Consequently, the traders had notice that the measure was imminent and therefore the possibility of formal retroactive effects could have been

foreseen. Finally, the abolition of the right of cancellation was the logical, necessary and foreseeable consequence of the Council regulation referred to above and, as such, this measure cannot be regarded as having true retroactive effects. In this respect the defendant relies on the judgment of the Court of 7 July 1976 in Case 7/76 *(IRCA* v *Amministrazione delle Finanze dello Stato* [1976] ECR 1213).

Reply

Infringement of a vested right

The applicant takes the view that the fifth recital of the preamble to Regulation No 557/76 refers to a specific disadvantage resulting from the fixing of the new representative rates. Since the exchange rates applicable from 1 July 1976 had been fixed on 15 March, the traders could have known from that date whether they were going to suffer a loss. The Commission itself drew these conclusions in deciding on 15 March that export licences issued *inter alia* in Belgium could be cancelled (Regulation No 571/76). In addition in stating that the relevant cancellations should only be permitted 'when' and not 'if' the amounts fixed in advance have actually suffered as a result thereof (Regulation No 571/76), the Commission in no way made the acquisition of the right subject to a condition but solely postponed exercise of this right to the time when the disadvantage which had been foreseen in fact occurred.

In any event if the Commission had intended to fix the time at which the right of cancellation would genuinely arise, it would have acted *ultra vires:* Article 3 (1) of Regulation No 557/76 only permits derogation from the rules governing the fixing of prices and the right of cancellation has no connexion with those rules.

With regard to the infringement of vested rights as a ground for the annulment of the regulation in question, the applicant recalls that Article 173 of the EEC Treaty mentions as one of the grounds for an action for annulment the infringement of 'any rule of law relating to' the application of the Treaty. Regard for vested rights is necessary for legal certainty, which constitutes a superior rule of law by which the Community institutions must abide in adopting measures provided for by the Treaty.

Infringement of legitimate expectation

In respect of the admissibility of this submission the applicant observes that if the contested measure was of general application then it is not merely this submission but the whole application which is inadmissible. The defendant did not however raise that objection.

As to the substance the applicant first denies that a trader had to wait until 1 July 1976 to assess the whole position. If, in reliance on the rules in force from 15 March 1976, a trader decided that the licences in question could be cancelled on 1 July, he could at any moment after 15 March have made an economic calculation in order to know whether or not his interests would be served by having the licences cancelled. A trader concluding a contract before 1 July would merely have taken into account the information available at the time when he took those decisions and would as it were have taken his cue from the situation in force at that time. Such a trader would not have acted in anticipation of the use of his rights as he did not rely on future and uncertain rules but rules which were already established and known.

Finally the plaintiff denies that an export refund fixed in advance under Regulations No 766/68 and No 2101/75 can only relate to a specific transaction. Indeed the refund referred to on the licences concerns a specific quantity which the trader undertakes to export

during the period of validity of the licence.

— Transitional measures

Regulation No 1811/76 was only adopted on 27 July 1976, which proves that after the event the Commission realized that it had made an error of judgment. In any event the extension of the period of validity of the licences was not an appropriate transitional measure because although it enabled certain traders to comply with their licences, it is not certain that they could have done so in satisfactory economic circumstances.

— The public interest

The serious inconvenience to the proper management of the market has not been proved by the defendant. First it is difficult to understand how a reduction in exports could compromise supply. Then again the argument based on the financial charges is also irrelevant. In the present case the traders affected wished to cancel the licences because they no longer held the amounts of sugar referred to in the licences which were capable of being cancelled. In most cases they had already obtained new licences for the same quantities and the refunds set out in the new licences had already been entered in the budget of the European Agricultural Guidance and Guarantee Fund long before the adoption of Regulation No 1579/76.

It is not true that at the end of April the risk of the actual use of the right of cancellation affected all the sugar covered by the licences which were capable of being cancelled. The figures in the possession of the applicant show that the actual risk was much lower. The public interest to be protected in the present case is restricted to statistical details which are quite secondary and without real effect. The applicant further points out that it never had any knowledge of the minutes of the Management Committee for Sugar which are confidential. In addition, this method was not appropriate to inform traders of the intentions of the Community. In any event, as they are merely intentions it is not for the traders to prejudge either proposals from the Commission or even less the reaction of the Council to them.

Distribution of the Official Journal

The applicant maintains that a measure is only published when it is brought to the notice of the public. The date of publication is therefore that of the distribution of the Official Journal.

The measure introduced was in no way the logical, necessary and foreseeable consequence of Regulation No 1451/76, as the Commission was not obliged to take that measure.

For the rest the applicant believes that it has shown that the measure was in no way necessary as the concerns of the Commission were without foundation.

Rejoinder

The defendant first clarifies the scope of the rules in question. It states principally that Article 4 of Regulation No 1134/68 cannot be applied to the present case by direct analogy but solely by means of an express provision (Article 5 of Regulation No 557/76). The possibility of cancellation thus conferred is placed in a context which is different from that of Article 4 of Regulation No 1134/68 as such.

First the amendment of the representative rate (the green rate) for the Belgian franc is spread out over a period of time and in respect of sugar only occurs after a delay of three and a half months. Further, the concomitant application of monetary compensatory amounts by virtue of Regulation No 974/71, themselves affected by the modification of the green rate, changes all the factors of the transactions in question and obliges the legislature to

take account of the effect of the monetary compensatory amounts on the transaction in question in order to know whether the person concerned might suffer a disadvantage.

The defendant submits some sample figures of a refund fixed in advance (tendered and entered on the licence) which should in theory have been reduced in application of the new green rate. However, this reduction is counterbalanced by the application of the so-called 'monetary coefficient' fixed in accordance with Article 4 (3) of Regulation No 1380/75 of the Commission, of 29 May 1975 (OJ L 139 of 30. 5. 1975, p. 37) with the result that the refund which was in fact given is still at the previous level.

The coefficient continues to express the relationship between the green rate and the real rate for the currency concerned. Thus it adjusts the refund (or the levy) so that it is converted into the national currency by means of the actual value of the currency (for the Belgian franc, the central rate). The modification of the monetary coefficient (from 0·98 to 0·986 in the present case) has thus automatically restored the refund to its previous level.

As a result the 'disadvantage' arising from the modification of the green rate for the exporter consists in the difference between the monetary compensatory amount before and after the modification of the green rate calculated on the basis of the intervention price.

If the Commission had not regarded as a disadvantage the circumstances arising from the reduction of the monetary compensatory amounts it would not have been possible to apply 'analogously' the provision of Article 4 of Regulation No 1134/68. It was chiefly for that reason that Regulation No 557/76 and Regulation No 571/76 extend the situation provided for by Regulation No 1134/68. The opportunity of cancellation set out in these regulations must be analyzed as being a special measure based on natural justice with the object of protecting a trader from a change (reduction) in the monetary compensatory amount. The legislature first considered that it was reasonable to grant this measure based on natural justice in the form of cancellation of the refund fixed in advance, a consideration derived from the existing rules (Regulation No 1134/68) and the desire for administrative management which was as simple as possible. Having discovered that traders intended to use this opportunity to draw an additional profit from developments in the market which occurred after the monetary event or even for purely speculative purposes the legislature had given a different content to this measure based on natural justice more appropriate to the particular situation existing in the present case, that is direct indemnification for traders in the form of compensation for the disadvantage.

Infringement of a vested right

The defendant recalls three features of Regulations No 557/76 and No 571/76:

- first the persons concerned were only able to seek the cancellation of licences *only if* they suffered disadvantage because of the fixing of new representative rates;
- further cancellation was justified *only if* the modification of the amount fixed in advance was unforeseeable;
- finally cancellation was only made possible *at the time* when the amounts fixed in advance in fact suffered the consequences of the application of the new conversion rates.

From all these factors it is evident that the 'option' of cancellation was subject to substantive conditions which rule out the argument that the right of cancellation was acquired as from 15 March and that it was solely the exercice of the right that was deferred to 1 July 1976.

From a legal point of view, the situation established by the abovementioned regulation divides into two periods: between 15 March and 1 July 1976 (in the sugar sector), the traders concerned could have claimed an expectation of using one of the opportunities made available to them by a choice within a specific period (either to use the licences or to seek their cancellation). As from 1 July 1976 the same traders were given an optional right consisting of requesting the cancellation of the licences referred to by the regulations.

In this respect the present case may be compared with Case 1/73 *(Westzucker v Einfuhr- und Vorratsstelle Zucker,* judgment of the Court of Justice of 4 July 1973 [1973] ECR 723). Is is clear from that case that a conditional right conferred by a Community regulation cannot constitute a vested right before the condition is fulfilled. In the present case this means that so long as the traders could not in fact suffer the disadvantage described they possessed merely an expectation or at the most a conditional right which only becomes vested once the condition precedent is fulfilled.

Furthermore if there must have been a 'vested right' from 15 March 1976 it is difficult to understand why the submission of the application for cancellation was deferred to 1 July 1976. In fact traders could have been given the right immediately which could even have prevented uncertainty with regard to the 'sugar balance'. The real reason for the deferment to 1 July 1976 is that it was only at that date that a trader could reasonably assess whether the transaction was still profitable for him. It would even have been possible to hope that, finally, traders would not be obliged to make use of the possibility of cancellation as the Community for its part has an interest in the certificates being used.

The applicant overlooks the fact that not only the *principle* of the change in rates was decided on 15 March but the change was spread over a period according to the marketing years. The deferment to 1 July is therefore a consequence of the logical system of the agricultural marketing years.

As regards its powers in this respect the defendant states that it had to give its opinion on the consequences of implementing over a period a principle established by the Council: it is difficult to see therefore why it could not fix the date on which cancellation could be granted.

Infringements of legitimate expectation

With regard to the conduct of the traders described by the applicant the defendant observes that the intention to use a future right in order to derive profit from a transaction is not in itself illegal but surely does not merit special protection.

— Transitional measures

The extension of the period of validity of the licences was granted additionally and for reasons of fairness as the additional delay was intended to enable traders to obtain sugar and to dispose of it on the market. The situation was very satisfactory for them since they receive financial compensation in addition to the refund on which they based their financial calculations.

— The public interest

The applicant seems to overlook the significance of the 'sugar balance' of the Community.

The defendant states that the Community authorities properly included all the quantities put up for tender before 15 March 1976 as intended for export in their provisional arrangement of the sugar market. Once it became evident that a substantial part of these quantities could in fact remain on the internal

market the whole management policy of the Community was affected: these quantities affected the final stocks and the export policy of the Community. On the other hand with regard to the budget of the European Agricultural Guidance and Guarantee Fund budgetary provisions are purely on the basis of estimates and cannot be assimilated to the actual expense resulting from market policy. On the other hand in view of the additional quantities affecting the internal management of the Community it is conceivable that there is a need to adopt a policy of increased export refunds which would clearly have fallen on the budget of the European Agricultural Guidance and Guarantee Fund.

Without wishing to enter into the discussion of the figures relating to the quantities of sugar remaining on 1 July the defendant denies that the figure of 15 000 tonnes referred to in the application is significant. It is possible that the notification of the measure foreseen had already affected the actions of exporters before 1 July so that the quantity remaining on that day of the quantities originally put up for tender had no relevance in evaluating the risk of disturbance which in fact existed.

Finally the defendant refers to the judgment of the Court of Justice of 10 December 1975 in Joined Cases 95 to 98/74, 15 and 100/75, *Coopératives Agricoles de Céréales* v *Commission and Council* [1975] ECR 1615, from which it is evident that once the persons concerned are aware of a proposal by the Commission their attention must be aroused as to the probability of the measure proposed.

In brief the real extent of the expectation to which Community texts give rise is restricted to the promise to save traders a disadvantage arising from the change in the representative rate on 1 July 1976. In this respect the expectation was met as Regulation No 1579/76 compensated for that particular disadvantage.

Distribution of the Official Journal

In this respect the defendant reiterates the arguments set out in its defence.

It admits that it was not obliged in the strict sense of the term to adopt the measure in question as a result of the Council regulation; however it was evident and clear for all those concerned that the Commission solely awaited the adoption of that regulation by the Council in order to have a legal basis for adopting formally the particular measure already known in advance.

IV — Oral procedure

The parties presented oral argument at the hearing on 17 February 1977.

The Advocate-General delivered his opinion at the hearing on 16 March 1977.

Decision

1 The application lodged at the Court Registry on 16 September 1976 seeks the annulment of Commission Regulation (EEC) No 1579/76 of 30 June 1976 laying down special detailed rules of application for sugar under Regulation (EEC) No 557/76 on the exchange rates to be applied in agriculture (OJ L 172, p. 59) in so far as it abolishes the right of cancellation of export licences

certifying the refund fixed under the awards provided for by Regulation No 2101/75, issued before 15 March 1976 and not yet used on 1 July 1976 (Article 1 (2)).

2 Regulation (EEC) No 1134/68 of the Council of 30 July 1968 laying down rules for the implementation of Regulation (EEC) No 653/68 on conditions for alterations to the value of the unit of account used for the common agricultural policy (OJ, English Special Edition, 1968 (II), p. 396) provides in Article 4 (1) that in the case of alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account, the amounts which have been fixed in advance for a transaction still to be carried out after that alteration are to be adjusted.

3 In order to prevent the change in the amounts referred to from causing disadvantage to the persons concerned the last subparagraph of Article 4 (1) adds however that a person who has obtained advance fixing for a specific transaction may, by application, obtain cancellation of the advance fixing and of the relevant document or certificate.

4 Article 5 (1) of Council Regulation (EEC) No 557/76 of 15 March 1976 on the exchange rate to be applied in agriculture (OJ L 67, p. 1) which fixed the rates of exchange valid for marketing years commencing in the course of 1976 stated that the provisions of Regulation No 1134/68 were applicable while stipulating however in Article 5 (2) that the second subparagraph of Article 4 (1) referred to above providing for the right of cancellation 'shall apply only if the application of the new representative rates is disadvantageous for the party concerned'.

5 The abovementioned Article 5 (2) was further amended by Council Regulation (EEC) No 1451/76 of 22 June 1976 (OJ L 163, p. 5) which stated in the preamble that 'whereas if this right [of cancellation] were widely exercised, it could in certain cases seriously hinder good Community administration of a given agricultural market' added the following subparagraph to the said Article 5 (2): 'Provision may be made for this disadvantage to the compensated for by a suitable measure. In such a case, the provision referred to in the first subparagraph shall not apply'.

6 By virtue of this latter provision the Commission adopted the regulation at issue, stating in the preamble thereto that: 'Whereas in the sugar sector large scale recourse to the right to cancel export licences issued in connexion with

partial awards under Commission Regulation (EEC) No 2101/75 of 11 August 1975 on a standing invitation to tender in order to determine a levy and/or refund on exports of white sugar, as last amended by Regulation (EEC) No 1406/76, could seriously disturb the Community management of the sector; whereas in order to avoid such a risk provision must be made for the right of cancellation not to apply, for appropriate compensation for the resulting disadvantage and for the terms under which such compensation shall be granted'.

7 Article 1 of that regulation provides that:

'1. The compensation referred to in the second subparagraph of Article 5 (2) of Regulation (EEC) No 557/76 shall be granted for those quantities of white sugar for which customs export formalities are completed on or after 1 July 1976 in connexion with partial awards under Regulation (EEC) No 2101/75 and for which an export licence was issued before 15 March 1976. For the Member States concerned this compensation shall be as shown in the Annex.

2. In respect of the export licences referred to in paragraph 1, the right to cancel under the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 may not be exercised.'

Admissibility

8 The applicant argues that it is directly and individually concerned by the decision which is contained in the second paragraph of the abovementioned article and therefore that his action is admissible under Article 173 of the Treaty.

9 On the one hand, by referring to a clearly defined category of export licences, namely those issued before 15 March 1976 and still valid on 1 July 1976, the provision at issue therefore directly concerns traders holding such licences.

10 On the other, the traders are distinguished individually by the fact that they obtained, for the product in question, advance fixing in licences issued before 15 March 1976 and still valid on 1 July 1976.

11 The provision therefore concerns natural or legal persons affected by reason of circumstances in which they are differentiated from all other persons and distinguished individually just as in the case of the person addressed.

12 Consequently the action is admissible in this respect.

13 However before deciding on the substance of the case it is necessary to examine whether the regulation at issue is applicable to the situation of the applicant.

14 Indeed in the alternative the applicant has argued that the regulation is not applicable to it on the ground that although it was published in an issue of the Official Journal dated 1 July 1976 the issue was only distributed on the following day and that the regulation cannot have a retroactive effect.

15 The Commission admits that this issue of the Official Journal was only published and distributed the following day because of a strike.

16 In spite of the fact that Article 2 of the regulation provides that it shall enter into force on 1 July 1976 the regulation could only properly be applied on the following day.

17 While Community law does not exclude all possibility of retroactive effects the regulation at issue contains no factor capable of attributing to it effects before the day of its actual publication.

18 Consequently it cannot be applied to the applications for the cancellation of licences lodged by the applicant on 1 July 1976.

19 In these circumstances, in view of the lack of legal interest of the applicant, the action is inadmissible.

Costs

20 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

21 However Article 69 (3) provides that the Court may order even a successful party to pay costs which it caused the other party to incur.

22 Throughout the proceedings the Commission based its argument on the express presumption that Regulation No 1579/76 was indeed applicable to the situation of the applicant and therefore Article 69 (3) should be applied in the present case as it has appeared that that presumption was without foundation.

23 Consequently the defendant should be ordered to bear the costs of the case including those of the proceedings for the adoption of interim measures.

On those grounds,

THE COURT

hereby:

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

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

Kutscher Donner Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco

Delivered in open court in Luxembourg on 31 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 16 MARCH 1977 [1]

Mr President,
Members of the Court,

Under the provisions relating to the common organization of the market in sugar which are laid down in Regulation No 3330/74 (OJ L 359 of 31. 12. 1974, p. 1) a refund is granted on the export of sugar outside the Community having regard to the level of the world market

1 — Translated from the German.