JUDGMENT OF THE COURT OF 2 MARCH 1978 [1]

Debayser SA and Others v Commission of the European Communities

"Increase in monetary compensatory amounts"

Joined Cases 12, 18 and 21/77

1. *Agriculture — Conjunctural policy — Monetary compensatory amounts — Exemption from the charge — Discretionary measure — Discretionary power of the Member States*
   (Regulation No 1608/74 of the Commission)

2. *Application for damages — Action directed against national measures taken in implementation of Community law — Inadmissibility*
   (EEC Treaty, Arts. 178 and 215, second para.)

1. It follows from Regulation No 1608/74 taken as a whole that the latter has given the Member States a margin of discretion which permits them to judge the application to each individual case of the discretionary measure, including the circumstances such as to justifiy the grant or the refusal of the exemption from the compensatory amounts.

2. Where the action is in substance directed against measures taken by the national authorities pursuant to provisions of Community law, the conditions for instituting proceedings before the Court of Justice under Article 178 and the second paragraph of Article 215 of the Treaty are not fulfilled.

In Joined Cases 12, 18 and 21/77

DEBAYSER S.A. (Case 12/77),

SUCRES UNION S.A. (Case 18/77),

JEAN LION S.A. (Case 21/77),

having their registered offices in Paris, represented and assisted by Roland and Lise Funck-Brentano, Advocates at the Paris Bar, with an address for service in Luxembourg at the Chambers of Georges Reuter, 1, Rue Notre Dame,

applicants,

1 — Language of the Case: French.

V

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, Member of the Legal Service, with an address for service in Luxembourg at the offices of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building, Kirchberg,

defendant,

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

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, P. Pescatore, Lord Mackenzie Stuart and A. Touffait, Judges,

Advocate General: H. Mayras
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts and the arguments of the parties put forward during the written procedure may be summarized as follows:

I — Facts and written procedure

1. Article 1 of Regulation (EEC) No 1608/74 of the Commission of 26 June 1974 on special provisions in respect of monetary compensatory amounts (Official Journal 1974, L 170, p. 38) provides that:

"Where monetary compensatory amounts are introduced or increased as a result of the fixing or the amendment of the central rate or of the representative rate of the currency of a Member State used in the context of the common agricultural policy, or where the decision of a Member State to permit its currency to float in relation to the currencies of the Member States where the fluctuation of the rate of exchange is kept within a maximum spread of 2.25 %, the Member State in question shall be authorized to waive, on a discretionary basis and according

to the following conditions, the monetary compensatory amount or so much thereof as corresponds to the increase."

The conditions for the application of that provision are laid down in Article 2, which provides that:

"1. Article 1 shall apply only to imports and exports carried out pursuant to binding contracts concluded before the monetary measure referred to in that article.

2. The authorization provided for in Article 1 may be made use of only at the request of the interested party and if such party at the time of making the request furnishes proof that:

(a) in the case in question it is not necessary to levy the newly introduced or increased monetary compensatory amount to compensate for the effects of the monetary measures referred to in that article on the price of the product; and that

(b) to levy such an amount would constitute an excessive additional burden for him, which he could not avoid even taking all the necessary and normal care."

Article 6 of the regulation provides that the regulation applies as of 4 June 1973, the date of the entry into force of Regulation (EEC) No 1463/73 of the Commission of 30 May 1973 laying down detailed rules for the application of monetary compensatory amounts (Official Journal 1973, L 146, p. 1)

2. The system of monetary compensatory amounts had been provisionally set aside in the case of France during 1975 because the franc had at that time returned to the "monetary snake". However, as a result of the decision taken by the French Government on 15 March 1976 to permit the franc to float, a system of monetary compensatory amounts was re-introduced and applied as from 25 March 1976 in trade in agricultural products between France and in particular third countries.

These amounts, FF 4.46 per 100 kilograms of sugar on 25 March 1976 and FF 4.85 on 1 July 1976, subsequently rose after 23 July 1976 and until 27 December 1976 from FF 9.89 to FF 38.67.

In view of the re-introduction of that system, the applicants requested the competent French agency, the Fonds d'Intervention et de Réglementation du Marché du Sucre (hereinafter referred to as "the F.I.R.S.") to apply Regulation No 1608/74 to them.

That request concerned two classes of contract:

— binding conracts concluded *before* 15 March 1976 still to be performed after 25 March 1976, the date on which the monetary compensatory amounts which had newly been re-introduced were applied;

— binding contracts concluded *after* 15 March 1976 and performed after 23 July 1976, the date from which the monetary compensatory amounts underwent the above-mentioned increases until 27 December 1976.

In the first case, the applicants requested exemption from the monetary compensatory amounts which had newly been re-introduced and applied as from 25 March 1976 for the exports referred to in the contracts. With regard to that class of contract, the applicants were informed by a circular from the F.I.R.S. of 29 March 1976 that Regulation No 1608/74 should in principle be applied to them.

In the second case, exemption from the increases in the monetary compensatory amounts which had occurred after the conclusion of each contract was requested for the exports referred to in

the contracts. A circular from the F.I.R.S. of 2 August 1976 informed the applicants that the exemption sought could not be granted in respect of the contracts entered into after 15 March 1976, so that those contracts could not escape payment of the increases in the monetary compensatory amounts applicable on the date of exportation.

In that circular, the Director of the F.I.R.S. stated more particularly that the monetary measure to which Article 2 of Regulation No 1608/74 refers, as defined in Article 1 of that regulation, was in that case "the decision of the French Government of 15 March 1976 to permit the franc to float, which led to the introduction in France of the system of compensatory amounts...".

After the President of the Syndicat du Commerce des Sucres had, by letters of 2 and 25 November 1976, drawn the attention of the Commission to the difficulties encountered by French sugar exporters owing to the application of the monetary compensatory amounts, the Director General for Agriculture of the Commission replied by letter of 7 November 1976 *inter alia* that:

"It is impossible to permit, for the purposes of the application of Regulation (EEC) No 1608/74, every variation in the rate of exchange of a currency to be considered as the monetary event referred to in Article 1.

The 'discretionary relief' regulation was designed with a view to a monetary event of a rather exceptional nature ... Therefore, that regulation considers as a 'monetary measure' which must be taken into consideration for the purposes of its application only the fixing or the amendment of the central rate or of the representative rate used in the context of the common agricultural policy, such as the decision of a Member State to permit its currency to float."

In these circumstances each applicant lodged against the Commission an application for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty, claiming that the Commission should be ordered to compensate for the loss arising from its omission and its refusal to adapt Regulation No 1608/74 to its objective. The three applications were lodged on 25 January 1977 (Case 12/77), 4 February 1977 (Case 18/77) and 9 February 1977 (Case 21/77).

3. By order of 3 March 1977 the Court decided, in accordance with Article 43 of the Rules of Procedure, to join the three cases for the purposes of the procedure and the judgment.

By document lodged on 11 March 1977, the defendant raised, under Article 91 of the Rules of Procedure, an objection that the application should be dismissed as inadmissible and that the applicants should be ordered to bear the costs. By document lodged on 15 April 1977, the applicants claimed that the objection of inadmissibility should be dismissed and that the defendant should be ordered to bear the costs.

The Court decided to open the oral procedure on the objection of inadmissibility raised by the Commission and the parties presented oral argument at the hearing on 9 June 1977. The Advocate General delivered his opinion at the hearing on 29 June 1977.

By order of 1 July 1977, the Court decided to reserve its decision on the objection of inadmissibility for the final judgment, in accordance with Article 91 (4) of the Rules of Procedure.

Under the same article, the President of the Court prescribed new time-limits for the further steps in the proceedings.

By letter of 26 October 1977, the Commission informed the Court that it would not lodge a reply in the present case.

Having heard the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided

that no preparatory inquiry was necessary in this case and opened the oral procedure, requesting the parties to limit their arguments in the initial stage to the problem of the existence of a wrongful act or omission on the part of the Commission.

II — Conclusions of the parties

The *applicants* claim that the Court should:

— Declare that the applications are admissible and well founded;

— Order the defendant to pay damages of

  — FF 668 277.81 (Case 12/77)

  — FF 1 560 866.55 (Case 18/77) and

  — FF 539 325.53 (Case 21/77);

— Order the defendant to bear the costs.

The *defendant* contends that the Court should:

— Dismiss the applications as inadmissible or at least declare them unfounded;

— In any case, order the applicants to bear the costs.

III — Submissions and arguments of the parties

1. Admissibility

In its *document of 11 March 1977* and at the hearing on 9 June 1977, the *defendant* claimed in particular that the disputes at the origin of the applications do not in this case come within the jurisdiction of the Court of Justice and should have first been brought before the national court having jurisdiction.

Since the application of Community rules is involved, the jurisdiction of that court is in fact founded for two reasons:

First, it is necessary to consider that the monetary compensatory amounts in question levied on trade between the Member States and third countries form part of the "own resources" of the Community within the meaning of Article 2 of the Decision of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 224). In view of this decision, the Court ruled that proceedings relating to the recovery of those resources must be brought before the national authorities which may, if necessary, have recourse to the procedure of a reference to the Court of Justice available under Article 177 of the EEC Treaty. Precisely such proceedings are in question in the three present cases.

Secondly, it must be borne in mind that the application of Regulation No 1608/74 is principally entrusted to the Member States who are better placed to "judge the circumstances and to verify the facts of the case" (see the fifth recital of the preamble to that regulation). The national authorities have therefore been entrusted in this case with a wide margin of discretion which, although limited by the special conditions laid down in Regulation No 1608/74, leaves room however in each individual case for considerations based on the principles of natural justice.

Even if the applicants wish to invoke the existence of a lacuna in the system laid down in Regulation No 1608/74, on the ground that that regulation does not take into account all the specific cases which may justify a solution based on the principles of natural justice, the problem in question should also be brought before the national courts which may refer to the Court of Justice for a preliminary ruling questions concerning the validity of the regulation.

The applicants are moreover mistaken as to the nature and effect of the reply of the Director General for Agriculture

of 7 December 1976: that reply may be analysed as merely information given to the Syndicat du Commerce des Sucres and does not therefore constitute a legal "act" which may be contested. This is all the more so since the services of the Commission are only called upon to intervene in very specific cases in which the national authorities envisage complying with the requests for exemption addressed to them (Article 4 of Regulation No 1608/74). For that reason the Commission did not in this case actually have to deal with the requests for exemption lodged by the applicants.

The defendant finally observes, for the record, that by choosing the procedure of an application for damages the applicants have put themselves in an even more difficult situation since in this case the services of the Commission had not reached a decision within the context of and according to the procedures laid down by Regulation No 1608/74 and that therefore there is no causal connexion between the damage claimed and the alleged wrongful act or omission (assuming that that act exists in law).

In its *defence* the defendant makes its argument specific by relying *inter alia* on the opinion delivered on 29 June 1977 by the Advocate General. It points out in particular that the criticisms put forward by the applicants were directed against the levying by the competent French authority of the proportion of the monetary compensatory amounts in excess of the rates applicable on the date on which the contracts were concluded and that they therefore raise a question concerning the validity, in relation to the Treaty, of the measures adopted by the French State for the implementation of the rules in question.

Such a question, in the same way as that of any liability incurred by the Community, may however only be examined by the Court in so far as the national court which has jurisdiction has determined exactly the effect of those questions on the outcome of the dispute between the applicants and the national authority. Since in the present case the matter has not been brought before the national court in that way, in spite of the fact that this would have been quite possible according to the procedures and within the periods prescribed by French law, the present applications for damages constitute a misuse of procedure which obstructs the judicial co-operation between the national courts and the Court of Justice which is provided for in Article 17 of the Treaty.

In their *document of 15 April 1977* and during the hearing on 9 June 1977, the *applicants* contested the validity of that objection by rejecting in particular the argument of the Commission that the applications sought the recovery of "own resources" and that the present case was a dispute coming within the jurisdiction of the national court. The fact that the amount of the alleged loss corresponds approximately to the increase in the monetary compensatory amounts is not a criterion accepted by the Court in its case-law for the purpose of excluding the admissibility of an application under the second paragraph of Article 215 of the EEC Treaty, because the determining factor to be considered in this respect is the purpose of the action. In the present case the applicants are seeking financial compensation for certain effects which were caused by inadequate and unlawful rules. It is inappropriate in this case to invoke the case-law of the Court in the Haegemann Case, Case 96/71 and the I.B.C. Case, Case 46/75, since in those cases the applicants criticized the application of Community rules by the national authority whilst in the present cases they are merely calling in question the wrongful omission of the Commission to adapt Regulation No 1608/74 to its objective.

It is moreover incorrect to state that the alleged loss may be imputed principally to the national authorities. The limited task which the Commission admits to having does not correspond either to the wording of Regulation No 1608/74 nor to the practical experience of traders. In reality, the general supervisory function which the Commission has reserved to itself covers all the provisions contained in Regulation No 1608/74 and is not limited to the application of Articles 4 and 5.

Nor is it possible, for those reasons, to state that the present application should first have been brought before the national court which could, if necessary, have availed itself of the procedure laid down under Article 177 of the EEC Treaty. In fact, the applicants could not in this case have brought proceedings before the national court having jurisdiction, in other words the administrative court, since it is only possible to bring an action before that court by means of an action on the ground of misuse of powers or a *recours en plein contentieux* (proceedings in which the court has unlimited jurisdiction). Neither remedy would have been available in this case because the French national agency at issue has no legislative power in this field and the alleged loss could not be imputed to the national authority.

Moreover, even assuming that the matter could have been brought before the national court, that court would have had necessarily to refer to the Court of Justice under Article 177 of the EEC Treaty the questions concerning the omission which could be imputed to the Commission. Having received giudance on that point from the Court of Justice that court would not however have had jurisdiction to order the Community, if necessary, to compensate for the damage resulting from an illegal omission and would therefore have had to direct the applicants to lodge an application before the Court of Justice itself. In view of the delay which such procedure would in fact have involved, the right of action of the applicants before the Community court would therefore have been very likely to be affected by the period of limitation relating to the period within which proceedings must be instituted which is laid down in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC.

Finally, it is impossible to claim that the applications are inadmissible on the pretext that there is no causal connexion between the contested measure and the alleged damage. First, such an argument is irrelevant so far as the admissibility of the applications is concerned because the problem of the existence of a causal connexion comes within the examination of the substance of the case. Secondly, the letter of the Commission of 7 December 1976, which the applicants have analysed as a precise and incontestable refusal to grant the request of the Syndicat du Commerce des Sucres, has no effect on the outcome of the dispute. The present applications are not in fact directed against that letter but against the general conduct of the Commission consisting in the omission, made specific by that letter, to adapt Regulation No 1608/74 to its objective.

In their *reply* the applicants consider moreover that it is impossible to contest the admissibility of the applications on the ground that an application for damages based on the illegality of or a lacuna in a legal document may be treated as an application for annulment or proceedings for failure to act and therefore seeks to evade Articles 173 and 175 of the Treaty. It has previously been decided on numerous occasions that an application for damages constitutes, on the contrary, an independent application the classification of which does not depend on the fact that its result might be similar to that of another application.

Finally, with regard to the impossibility for the applicants of bringing the subject-matter of the present dispute before the national court, this is confirmed by implication by the very case-law of the Court (the judgment in the Balkan Case, Case 118/76 of 28 June 1977) which, by delimiting the distribution of functions between the Community, to whom problems relating to the basis of assessment, the manner of imposition and the amount of Community charges fall, and the national authorities, to whom recovery of those charges is entrusted, shows that the national court did not in the present case have the power to extend the scope of the exemption from the monetary compensatory amounts by filling a lacuna in Regulation No 1608/74 and that therefore it would have been inappropriate to bring the matter before that court.

2. The substance of the case

The *applicants* put forward their arguments and examine the three essential ingredients of non-contractual liability, which are:

— the existence of damage,

— the existence of a wrongful act or omission,

— a causal connexion between the damage and the wrongful act or omission.

(a) The existence of damage

The applicants first set out the context of the dispute by explaining the provisions of Community law relating to the monetary compensatory amounts on sugar and describe the factual situation in which the alleged damage arose.

They point out in particular that, with regard to the contracts entered into after 15 March 1976 and performed after 23 July 1976, the monetary compensatory amounts to be paid upon exportation were much higher than those at the date on which they were concluded. The reason for this is in particular the specific organization of the market in sugar, which is based upon weekly awards upon tender and provides for the power on the part of the Commission to limit in respect of each award upon tender the quantities awarded and to fix the rates of refund. In these circumstances, most contracts similar to those in the present case are only to be performed several months after the date on which they are concluded and the trader, who must cover the sale, may possibly have to tender several weeks running before obtaining the export licence or licences corresponding to his sale (see application, Annex 7).

The fact that some of the contracts in question were concluded in French francs and other contracts were entered into in Swiss francs or in US dollars has no effect on the problem of the losses suffered on all those contracts.

In the first case, the need for the applicants to remain competitive on the market of the other Member States of the Community prevented them from including in their price calculation any possible increases in the monetary compensatory amounts, which were moreover wholly unforeseeable. The prices laid down in the contracts were thus calculated on the basis of the monetary compensatory amounts applicable on the date of the conclusion thereof. Since the profit margin of sugar merchants, which is approximately 1%, does not enable them subsequently to absorb the risk of those increases, the large increase in the monetary compensatory amounts which occurred after the contracts in question had been concluded corresponds roughly to the loss suffered by the applicants.

In the second case, it is incorrect to consider that, having concluded those contracts, the applicants will not suffer losses since any upward variation in the currency mentioned in the contract will

involve an increase in the amount necessary for the payment in French francs and will thus enable the increase in the monetary compensatory amounts which occurred between the date on which the contract was concluded and that on which it was performed to be at least partially covered. In fact, the situation of those applicants was in that case identical to their situation when selling in French francs.

In fact, in accordance with the recitals of the preamble to Regulation No 2042/73 and acting as prudent traders they had to have recourse, in order to cover themselves against the risk of a variation in the rate of exchange between the French franc and the currency laid down in the contract, to a measure necessary in international trade consisting in transacting arbitrage business in relation to the currency used in the contract on the date on which the contract was signed. They were thus obliged to sell the currency laid down in the contract on credit for French francs on the abovementioned date (in other words, buy on credit, on that date, the equivalent in French francs of the currency laid down in the contract), which however resulted in fixing their position in French francs and leaving them, just as in the case of the contracts laid down in French francs, defenceless against a possible increase in the monetary compensatory amounts between the date on which the contract was signed and that on which it was performed.

The only way to avoid losses resulting from the increase in the monetary compensatory amounts would have been to buy on credit, on the date on which each contract was concluded, whether that contract was concluded in French francs or in other currencies (in principle sold on credit for French francs for the above-mentioned reasons), the equivalent of the price in the four currencies within the monetary snake. But that technique, apart from the fact that it is extremely ponderous, was not possible in this case since it is strictly prohibited by French legislation which permits the buying on credit of currency only under regulations corresponding to an actual importation of goods.

Confronted with that situation, the applicants therefore requested that Regulation No 1608/74, called a "discretionary relief regulation", be applied to them. In refusing this request, the F.I.R.S. explained that the amendment of the monetary compensatory amounts which occurs each week is, according to the Community institutions, only a measure adopted in implementation of the system of the above-mentioned amounts and does not itself constitute a monetary measure within the meaning of Article 1 of Regulation No 1608/74 which is capable of resulting in the application of the discretionary measure laid down therein. This point of view, which is confirmed by the Commission, fails however to meet the objective of that regulation and makes the Commission liable for the damage which the applicants have suffered in this case.

As for the nature and the existence of such damage it is necessary in particular to note that:

— on the one hand, the applicants had been able to foresee, because of the information given by the Commission, that the monetary compensatory amounts applicable since 15 March 1976 were to be increased to FF 4.85 per 100 kilograms on 1 July 1976 on account of the increase in the intervention price of sugar and had therefore taken into account that rate in the structure of the contracts concluded between 15 March 1976 and 1 July 1976. In these circumstances, it is necessary to calculate the alleged damage on the basis of that rate, which was known or foreseeable on the date on which the contracts

were concluded and foreseen as actually still in force on the date on which they were performed:

— on the other, although the contracts entered into with third countries are the subject of export refunds the amount whereof is fixed by regulation on the basis of the price on the world market and is affected by a correcting factor which aims to mitigate the effect of the monetary compensatory amount on the selling price, the increase in the refund owing to that factor does not however wholly reduce the charge arising from the monetary compensatory amounts.

(b) The existence of a wrongful act or omission on the part of the Commission

According to the applicants, the Commission did not comply with the requirements of the rules of natural justice underlying all the Community rules on compensatory amounts, from Regulations Nos 1660/69 and 2042/73 to Regulation No 1608/74. The latter regulation clearly states that:

— the Commission's task is to protect traders who would, through rigid application of the system of monetary compensatory amounts, suffer excessive losses which they could not avoid;

— for that purpose, it intended to introduce a certain flexibility into the Community rules and thus to reserve to itself the power to adopt measures supplementary to those laid down in the regulation enabling that regulation to fulfil its function of giving discretionary relief. Recourse to that power was in this case all the more necessary since the situation of the applicants who, for the above-mentioned reasons, had no means of avoiding the losses suffered on the contracts in question, was not envisaged when Regulation No 1608/74 was drafted because the monetary events at that time were different.

The literal interpretation given to Regulation No 1608/74 by the Commission and the fact that it omitted to adapt its regulation to its spirit are contrary to the principle laid down by the Court of Justice and by learned authors that Community law must be interpreted on the basis of its objectives and its general scheme and so as to bring out its effects.

In accordance with this principle, the Commission should have given identical treatment both to the contracts on which traders suffer losses owing to a monetary measure the repercussions of which affect for the same reason contracts which were concluded before 15 March 1976 and to those entered into after that date.

By its literal interpretation and its omission, the Commission on the contrary was guilty of an illegal act involving discrimination against the applicants and contrary to the principle of the protection of the legitimate expectation of traders.

(c) The causal connexion between the wrongful act or omission and the alleged damage

According to the *applicants*, the existence of such a connexion follows in particular from the fact that:

— the applicants were committed to performing contracts containing prefixed and binding conditions;

— the considerable increase in the monetary compensatory amounts after 23 July 1976, in other words three and a half months after their introduction, was unforeseeable;

— even taking all the necessary and normal care, the applicants had no means of avoiding suffering the loss resulting from the application of the increases in question. This was all the more so since French legislation

on foreign exchange made any guarantee against fluctuations in the monetary compensatory amounts practically impossible for them for the above-mentioned reasons;

— the application to the applicants of the increases in question was not even necessary in the case of the contracts drawn up in French francs in order to compensate for the effect of the depreciation of the French franc on the price laid down in the contract. That depreciation was in fact subsequent to the signing of the contract and could not therefore in any case have influenced the above-mentioned price.

The *defendant* wishes to specify first in its *defence* that "the viewpoint adopted by the Commission" in the letter sent by the Directorate General for Agriculture on 7 December 1976 to the President of the Syndicat Français du Commerce des Sucres merely constitutes information given in reply to that President and is not a measure which is capable of being contested. Because of the way in which that letter was drafted, the context within which the viewpoint expressed therein was adopted and the capacity of the addressee it is impossible to consider it as a legal act adversely affecting the applicants.

Aware of the difficulties which they would encounter by contesting such a letter, the applicants subsequently specified that the applications are in fact directed against the general conduct of the Commission made specific in that letter and consisting "in the omission and the refusal to adapt Regulation No 1608/74 to its objective".

Without prejudice to the admissibility of that amendment, the ground of complaint invoked in this case is in addition unfounded. First, although the concept of natural justice implies a certain moderation of the strict provisions of the law owing to the particular circumstances of individual situations, it would be excessive to convert this concept into a general principle obliging the authors of rules based on grounds of natural justice in all circumstances to go beyond the situations covered by those rules on the pretext that those rules did not take into consideration, at the time at which they were adopted, *all* the particular circumstances of the individual situations.

Moreover, since the regulation in question is a regulation of general application introducing a system which derogates from the strict application of the compensatory amounts, the Commission adopted limited provisions permitting a certain flexibility to be introduced experimentally within the rigid system of monetary compensatory amounts. This special system had therefore to be interpreted strictly and the general rule remained that of the application of the monetary compensatory amounts.

On the other hand, the general system of monetary compensatory amounts itself is called in question when the existence of alleged lacunae in Regulation No 1608/74 is claimed. It is in fact characteristic of the monetary compensatory amounts that the latter may vary permanently, following the fluctuation of the actual rate of exchange of the currency concerned. It is impossible to imagine how such a system could function if it were necessary wholly or partially to grant traders exemption from the impact of the monetary compensatory amounts in consideration of the particular circumstances of each individual case. The applicants in fact disregard the fact that because it is "standard" in nature such a system prevents the taking into consideration of individual situations or otherwise it would become wholly inapplicable.

For that very reason the submission of infringement of the protection of the

legitimate expectation of traders appears to be unfounded. Moreover, for such a submission to be justified a flagrant breach of a superior rule of law for the protection of individuals would be necessary. Such a breach may not however be invoked in the present case since the applicants do not contest an amendment to the Community rules which has affected their legal situation, an argument which is in fact typical in cases in which an infringement of the protection of legitimate expectation is capable of being alleged, but contest the absence of an amendement to Regulation No 1608/74 and claim that such absence is contrary to the principle of natural justice which is contained in that regulation and in which they had complete confidence. However, since some of their contracts were concluded "after" 15 March 1976 it is impossible to see how they could have relied upon the grant of the discretionary measure in view of the conditions laid down in Article 2 (1) of Regulation No 1608/74.

The applicants' request is, finally, not only inadmissible but also not permissible because of the absence of a causal connexion between the alleged damage and the conduct of the Commission, since no act or omission was attributable to the latter in this respect. In fact, the applicants seek to obtain exemption by the Commission "instead of the French State" from the proportion of the monetary compensatory amounts exceeding the rate applicable on 12 July 1976.

The Commission ends by suggesting to the Court that it should reserve the discussion as to the extent of the damage for a subsequent stage of the procedure if it reaches the conclusion that the Commission is liable with regard to the substance of the case.

In their *reply* the *applicants* consider that the suggestion put forward by the Commission that the discussion as to the extent of the damage should be reserved is unjustified. Their requests in fact relate only to the proportion of the damage which was incontestably suffered and easily assessable and do not, because these are difficult to assess, refer to the commercial difficulties caused by the insecurity created in their working conditions and to the failure to make a profit owing to a considerable reduction in their volume of business during the second half of 1976.

With regard to the problem of the existence of lacunae in Regulation No 1608/74, although it is correct that not every case for which no provision is made by that regulation necessarily constitutes a lacuna in the system, it is nevertheless true that the situation in which the applicants are at present is expressly referred to in the recitals of the preamble to the regulation and that therefore the intention of the legislature was to protect it.

The Commission's arguments on the need to interpret the regulation in question strictly are not well founded on that point. In the first place, the system of monetary compensatory amounts is itself a derogation from the fundamental principles of the Treaty so that the discretionary relief regulation is "a derogation from a derogation" because it aims precisely to revive in certain cases the ordinary legal arrangements which preceded the introduction of the monetary compensatory amounts. Secondly, a discretionary relief regulation cannot by its essence be interpreted restrictively because the rules of natural justice form the basis of every legal system and an essential reference point in cases of doubt. A narrow application of that concept would even be contrary to the objective of Regulation No 1608/74.

Moreover, the considerations of the Commission in relation to the standard nature of the monetary compensatory amounts which prohibits individual situations from being taken into con-

sideration are purposeless because the applicants do not claim an "individual" situation but an "abnormal" situation created by a monetary measure to the disadvantage of a whole group of traders.

Having said that, the applicants criticize the argument that the infringement of the principle of the protection of legitimate expectation may only be invoked in the case of an amendment of the rules in force. To analyse a superior rule of law in that way amounts to limiting its application and depriving it of its substance.

According to the very case-law of the Court an omission may moreover be treated as a positive act.

In the present case the applicants have deduced from the measures adopted in the past, the actual classification of Regulation No 1608/74, called a "discretionary relief regulation", and from the general nature of that regulation that with regard to binding transactions they are protected if an unforeseeable alteration in the monetary compensatory amounts causes them excessive losses in the performance of their contracts.

To adapt Regulation No 1608/74 to the situation created by the successive increases in the monetary compensatory amounts would not have been contrary to an overriding public interest: nor would it have favoured speculation since those concerned must adduce evidence of the damage actually suffered.

On the other hand, by thus omitting to adapt the regulation, the Commission infringed, in addition to the principle of the protection of the legitimate expectation of traders, that of legal certainty. At the same time it created a situation which discriminated against the applicants and was thus in flagrant breach of the principle of free competition. The uncertainty created by the failure to adapt Regulation No 1608/74 to its objective in fact placed French exporters in a difficult situation quite apart from the fact that because of the losses suffered, which the French legislation on foreign exchange does not enable them to avoid, the applicants were in a rather reserved position at the beginning of the 1976/1977 marketing year.

In so doing the Commission therefore was guilty of an unlawful act causing the applicants a failure to make a profit, which it is difficult to assess because of their inevitable withdrawal from the market, and a loss which may be assessed on the contracts entered into before the increase in the monetary compensatory amounts but performed subsequently.

Finally, the applicants specify with regard to the problem of the existence of a causal connexion that in the present circumstances it was not for the French State to grant the exemption in question since the Commission alone had the power to adapt Regulation No 1608/74 to its objective and more particularly to the situation in which they were placed on account of the successive increases in the monetary compensatory amounts.

The *Commission* did not lodge a *rejoinder.*

IV — Oral procedure

The parties presented oral arguments at the hearing on 10 January 1978.

The Advocate General delivered his opinion at the hearing on 1 February 1978.

Decision

1 The applicants claim, by the present applications lodged under Article 178 and the second paragraph of Article 215 of the EEC Treaty, that the Commission should be ordered to pay damages for the loss which they have suffered owing to the failure to apply to exports of sugar carried out on the basis of binding contracts concluded after 15 March 1976 the discretionary measure laid down in Article 1 of Regulation (EEC) No 1608/74 of the Commission of 26 June 1974 on special provisions in respect of monetary compensatory amounts (Official Journal 1974, L 170, p. 38).

2 Article 1 of Regulation No 1608/74 provides that: "Where monetary compensatory amounts are introduced or increased as a result of the fixing or the amendment of the central rate or of the representative rate of the currency of a Member State used in the context of the common agricultural policy, or where the decision of a Member State to permit its currency to float in relation to the currencies of the Member States where the fluctuation of the rates of exchange is kept within a maximum spread of 2.25%, the Member State in question shall be authorized to waive, on a discretionary basis and according to the following conditions, the monetary compensatory amount or so much thereof as corresponds to the increase".

3 On the other hand, Article 2 (1) of that regulation specifies that: "Article 1 shall apply only to imports and exports carried out pursuant to binding contracts concluded before the monetary measure referred to in that article".

4 As the result of the decision of the French Government of 15 March 1976 to permit the franc to float, the Commission, by Regulation No 652/76 of 24 March 1976 (Official Journal 1976, L 79, p. 4) re-introduced as from 25 March 1976 the monetary compensatory amounts with regard to France in certain agricultural sectors including sugar.

5 These compensatory amounts, which were increased as from 1 July 1976 by the effect of the new representative agricultural exchange rates laid down by the Council in Regulation No 557/76 (Official Journal 1976, L 67, p. 1) were increased several times between July and December 1976 because of the French monetary situation.

6 The applicants, relying on the above-mentioned Regulation No 1608/74, asked the Fonds d'Intervention et de Régularisation du Marché du Sucre (hereinafter refereed to as "the F.I.R.S."), which is the French agricultural intervention agency for sugar, for exemption in respect of the contracts concluded after 15 March 1976 and still to be performed on 23 July 1976 from the increases in the compensatory amounts after that date.

7 With regard to the latter request, the F.I.R.S. refused to apply Regulation No 1608/74, explaining in its memorandum of 2 August 1976 that "the alteration of the rate of the compensatory amounts, which may occur each week, is only a measure adopted in implementation of that system but does not itself constitute a monetary measure within the meaning of Article 1 of Regulation (EEC) No 1608/74".

8 After the Syndicat du Commerce des Sucres had, in November 1976, brought before the Commission the matter of the difficulties encountered by exporters because of the application of Regulation No 1608/74 in the manner indicated by the F.I.R.S., a senior official of the Commission replied by letter of 7 November 1976 that it is "legally impossible to say that each variation in an exchange rate is a monetary event justifying the application of that regulation".

9 In these circumstances, the applicants lodged the present applications.

10 The Commission objects that the applications are inadmissible, on the ground that the application of the discretionary measure contained in Regulation No 1608/74 comes in the first place within the decision-making power of the Member States.

11 It concludes that the applicants should first have brought their action before the national courts which could if necessary have had recourse to the procedure under Article 177 of the Treaty with regard to any question concerning the interpretation of Regulation No 1608/74.

12 Moreover, assuming that the applications are directed against the above-mentioned letter of 7 November 1976, they should be dismissed as inadmissible since that letter was simply information sent in reply to a report submitted by the Syndicat du Commerce des Sucres and did not therefore constitute a legal act capable of forming the subject-matter of an application under the Treaty.

13 On the other hand, the applicants claim that the Commission has, within the context of Regulation No 1608/74, a general power of supervision over all the provisions contained in that regulation, including Articles 1 and 2, and that that power is such as to make it liable to those concerned.

14 In these circumstances, an application against the French national authority, acting through the F.I.R.S., could not have been brought before the national courts and, assuming that it could have been lodged, would have involved for the applicants the risk of being barred by the period of limitation provided for in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC from bringing proceedings before the Court of Justice.

15 Finally, they specify that their applications are not directed against the above-mentioned letter of 7 November 1976 but against the wrongful conduct of the Commission, made specific by that letter, which omitted to adapt Regulation No 1608/74 to its objective.

16 According to the second recital of the preamble thereto, that regulation is one of the specific measures taken by the Commission to deal with the cases of persons committed to performing contracts containing prefixed conditions and for whom monetary events such as those referred to in the above-mentioned Article 1 involve an increased charge on imports or exports.

17 In order to ensure the satisfactory operation of those specific measures the fourth recital (in the English version) of the preamble to the regulation states that it is appropriate to "introduce a certain flexibility into the monetary rules permitting each individual case to be examined in the light of the loss suffered".

18 For that purpose, the regulation introduced a system based on a discretion authorizing the Member States to apply "on a discretionary basis" to traders committed to performing binding contracts the exemption from the above-mentioned charge.

19 For the purposes of the application of that system the sixth recital (in the English version) of the preamble to the regulation provides expressly that "it is, in principle desirable to entrust the administration of the rules concerned to Member States" on the ground in particular that they are better placed

not only to verify the facts of the case but also to "judge the circumstances".

20 In fact it follows from those rules taken as a whole that they have given the Member States a margin of discretion which permits them to judge the application to each individual case of the discretionary measure, including the circumstances such as to justify the grant or the refusal of the exemption referred to in Article 1 of the regulation.

21 Although the regulation makes the application of the system thus established subject to the Commission's agreement in the cases expressly laid down in Article 4, where a Member State intends to make use of the discretionary measure in respect of contracts the validity of which exceeds a certain length of time, it leaves to the charge of the Member States alone the decision concerning the refusal to apply the discretionary measure.

22 The first paragraph of Article 5 of the regulation merely recognizes in general the right of the Community to be notified by the Member States of the criteria for application which they intend to adopt and the cases in which it is proposed to grant an exemption.

23 The powers given to the Commission for that purpose are, according to the third paragraph of Article 5, intended to ensure the co-ordinated application of the administration by the Member States of the system established by Regulation No 1608/74 and permit the Commission to intervene in that administration only to the extent necessary to ensure that the attainment of that objective is not jeopardized.

24 Moreover, the applications for damages lodged by the applicants request in the present case sums corresponding to the increases in the compensatory amounts levied on the exports in question owing to the refusal of the French national authorities to apply to those exports the discretionary measure introduced by that regulation.

25 Since the action is in substance directed against measures taken by the national authorities pursuant to provisions of Community law, such as Regulation No 1608/74, the conditions for instituting proceedings before the Court of Justice under Article 178 and the second paragraph of Article 215 of the Treaty are not fulfilled.

26 For those reasons, it is necessary to dismiss the present applications as inadmissible.

Costs

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

28 The applicants have failed in their submissions.

On those grounds,

THE COURT

hereby:

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

2. **Orders the applicants to bear the costs.**

Kutscher Sørensen Bosco

Donner Pescatore Mackenzie Stuart Touffait

Delivered in open court in Luxembourg on 2 March 1978.

A. Van Houtte
Registrar

H. Kutscher
President