In Case 112/77

AUGUST TÖPFER & CO. GMBH, Hamburg, represented by Kurt Mittelstein, Hans Paetow and Wolfgang Bichmann, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34b, Rue Philippe II,

applicant,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, assisted by Jacques Delmoly, a member of its Legal Department, with an address for service in Luxembourg at the office of Mario Cervino, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

Application for the annulment of Commission Regulation (EEC) No 1583/77 of 14 July 1977 (Official Journal 1977, No L 175, p. 17) or alternatively for compensation

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

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

gives the following

JUDGMENT

Facts and Issues

The facts, the course of 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of 19 December 1974 on the common organization of the market in sugar (Official Journal 1974, No L 359, p. 1) which repealed Regulation No 1009/67/EEC of the Council of 18 December 1967 (Official Journal, English Special Edition, 1967, p. 304) makes all imports into or exports from the Community of the products concerned conditional on 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 (Official Journal No 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 (Official Journal No 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 (Official Journal, 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 (Official Journal No 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 (Official Journal, 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 documents 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 (Official Journal, 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 the 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 (Official Journal No 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)).

These provisions were re-enacted in Article 4 of Council Regulation (EEC) No 878/77 of 26 April 1977 on the exchange rates to be applied in agriculture (Official Journal 1977, No L 106, p. 27). On that occasion the Council added the following provision as the second subparagraph of Article 4 (2):

"Before the date of application of the new rate it may be decided to offset this disadvantage by an appropriate measure. In this case advance fixing and the certificate or document attesting thereto may not be cancelled."

Detailed rules for the application of Regulation No 878/77 were laid down by Commission Regulation (EEC) No 937/77 of 29 April 1977 (Official Journal 1977, No L 110, p. 1). Article 1 (1) of that regulation is worded as follows:

"With respect to products for which as monetary compensatory amount is fixed, cancellation of the advance fixing and of the relevant document or certificate, as provided for in the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 may be requested only:

— In the case of import licences issued in France, Ireland, Italy or the United Kingdom;

— In the case of export licences issued in the Federal Republic of Germany."

Pursuant to Article 1 (3) the provisions of the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 apply for the sugar sector from the beginning of the 1977/78 marketing year, that is to say from 1 July 1977. The said provisions apply only to advance fixing

documents or certificates issued before 26 April 1977 (Article 1 (4) of Regulation (EEC) No 937/77.

On the ground that "in the sugar sector any large-scale cancellation of export licences issued following partial invitations to tender ... could be seriously prejudicial to Community management of this sector" and, "to prevent this happening, it is necessary to withhold the right to cancel while at the same time providing appropriate compensation for this disadvantage, and also to lay down the conditions for granting such compensation" Article 2 of Regulation No 937/77 provides as follows:

"(1) The compensation referred to in the second subparagraph of Article [4] (2) of Regulation (EEC) No 878/77 shall be granted for white sugar in respect of which the customs export formalities are completed on or after 1 July 1977 in pursuance of partial invitations to tender under Regulation (EEC) No 2101/75 and for which an export licence was issued before 26 April 1977.

This compensation shall be fixed for the Member States concerned as shown in Annex I hereto.

(2) The right of cancellation provided for in the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 shall not apply in respect of the export licences referred to in paragraph (1)".

The compensation was fixed in Annex I to the regulation at DM 2.33 for the Federal Republic of Germany.

The Commission's calculation was based on a 1977/1978 monetary compensatory amount of DM 8.40 derived from the intervention price for the marketing year. The Commission by Regulation (EEC) No 1474/77 of 30 June 1977 (Official Journal 1977, No L 163, p. 1) fixed the compensatory amount at DM 8.86 on the ground that "in the sugar sector amendments introduced with effect from 1 July 1977 make it necessary to take into consideration the intervention price plus the amount of the levy collected on sugar of Community origin under the arrangements for the reduction of storage costs." For this reason the compensation fixed at DM 2.33 proved to be too favourable and so by Regulation (EEC) No 1583/77 of 14 July 1977 (Official Journal 1977, No L 175, p. 17) the Commission reduced this amount to DM 1.87 as from 15 July 1977, the date on which the regulation entered into force.

(b) Facts

The main object of the applicant undertaking, a company with limited liability, is home and foreign trading in large quantities of sugar. It has a large number of export licences issued before 26 April 1977 in respect of which the customs export formalities were effected after 15 July 1977.

In the case of the period subsequent to 15 July 1977 it has in its possession decisions of the German customs authorities relating to 11 761 590 kilograms of sugar exported on the basis of Regulation No 1583/77.

(c) Procedure

The applicant by an application lodged at the Court on 15 September 1977 brought the present action for the annulment of Commission Regulation (EEC) No 1583/77 of 14 July 1977 and, alternatively, for compensation for the damage which it suffered as a result of the application of Regulation No 1583/77.

The Court, after hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

— Annul Commission Regulation (EEC) No 1583/77 of 14 July 1977;

— Alternatively, declare that the Commission of the European Communities must, in accordance with the second paragraph of Article 215 of the EEC Treaty, compensate it for the damage which it has suffered as a result of the application of Regulation No 1583/77.

The *defendant* contends that the Court should:

— Dismiss the application in its entirety as unfounded;

— Order the applicant to bear the costs.

III — Submissions and arguments of the parties

Admissibilty

The *applicant* submits that the contested regulation, together with Regulation No 937/77 and Regulation No 878/77, refers to a specific number of situations which have actually materialized. When the Commission adopted the regulation at issue it ought to have known that it affected the interests of the holders of export licences. Thus the applicant is distinguished individually just as in the case of a person addressed.

The *defendant* does not raise any objection as to the admissibility of the principal claim.

As far as concerns the admissibility of the alternative claim it states that the applicant's arguments have not been stated with sufficient clarity (Article 38 of the Rules of Procedure).

Illegality

The *applicant* considers that Regulation No 1583/77 is illegal because it is in breach of the principles which must be observed in this case and which are contained in Regulations (EEC) Nos 653/68 and 1134/68 of the Council, the latter of which lays down rules for the implementation of the said Regulation No 653/68. According to those principles the interests of the parties concerned who have obtained advance fixing may not be adversely affected. Such principles are confirmed by the second subparagraph of Article 4 (2) of Regulation No 878/77 which provides that "*Before* the date of application of the new rate it may be decided to offset this disadvantage by an appropriate measure".

On 29 April 1977 the Commission, pursuant to that provision, laid down the special rules for the sugar sector (Article 2 of Regulation No 937/77) and fixed the compensation at DM 2.33.

Since the date of application of the new exchange rate was 1 July 1977 it is clear from the second subparagraph of Article 4 (2) of Regulation No 878/77 that there was no legal foundation upon which the Commission could fix a new compensatory amount on 14 July 1977 the date on which it adopted Regulation No 1583/77.

Furthermore the new fixing is illegal because, owing to Regulation No 937/77, holders of licences in the sugar sector are more harshly treated than holders of licences in the other agricultural sectors. The latter were in fact able to choose either to continue the transaction in question on the basis of the licence which they had obtained or to exercise their right of cancellation. Since this option has been withdrawn from licensees in the sugar sector, the latter should have received compensation for the consequential damage which was suffered, as

happened in 1976. The same measures should have been adopted in 1977.

The *defendant* states first of all that the rules governing compensatory amounts are based on the concept of a *disadvantage* under which the traders concerned may be placed by the application to them of the new representative conversion rate in accordance with Article 2 (2) of Regulation No 878/77 (pages 3 to 6 of the defence).

As far as the power to adopt the regulation at issue is concerned the defendant submits that is has complied completely with the provisions of Article 4 (2) of Regulation No 878/77. By enacting the measure contained in Article 2 of Regulation No 937/77 the decision was made before 1 July 1977 to replace the right of cancellation by compensation for the disadvantages. On the other hand Regulation No 878/77 certainly does not provide that the *amount* of the compensation must be fixed before the above-mentioned date.

The *applicant* submits that, when the Commission calculated the disadvantage suffered by the exporter which it was necessary to offset, it merely compared the absolute compensatory amounts as if the disadvantage consisted of the difference between those amounts. It is not taking account of the fact that in any case part of the new compensatory amount can only be used to offset the price increase due to the change in the rate of exchange of the German mark and incorrectly appropriates that part of the 1977/1978 monetary compensatory amount to offsetting the disadvantage caused by the discontinuance of the right of cancellation.

The applicant maintains that the Commission was not entitled to adopt the regulation at issue. It does not understand why the alteration in the amount of the adjustment was not carried out under the provisions of Regulation (EEC) No 1474/77 of 30 June 1977 as provided for in the second subparagraph of Article 4 (2) of Regulation No 878/77.

The *defendant* in its rejoinder points out that there is a fundamental difference of opinion between it and the applicant as to the proper meaning of offsetting the disadvantage within the meaning of Article 4 (2) of Regulation No 878/77.

The Commission takes the view that offsetting the disadvantage must be limited to preventing the holder of a licence with advance fixing of the amount of the refund from being clearly placed at a disadvantage as far as concerns the amounts to be granted after 1 July 1977. On the other hand the applicant is of the opinion that offsetting the disadvantage must include the increase of the compensatory amount which might have resulted from the increase in the price of sugar, that is to say in short must compensate it for any loss of profits.

The Commission points out with reference to the fact that it acted differently the previous year that it cannot be denied the legislative power to define offsetting the disadvantage, if need be, in a restrictive sense.

As far as Article 4 (2) of Regulation No 878/77 is concerned the Commission maintains that the objective of that provision has been attained by the adoption of Regulation No 937/77. It takes the view that the parties concerned could henceforth know that the possibility of cancelling the certificates was ruled out and had been replaced by compensation for the disadvantage suffered.

Certainty of legal relationships and protection of legitimate expectation

The *applicant* takes the view that the holders of licences are under a disadvantage because when the Commission fixed the amounts in 1977 it departed

from the procedure which it had adopted until then. The amount of the compensation or of the adjustment offsetting this disadvantage has been fixed at a rate lower than that which the holders of licences could expect in view of the procedure which had been applied the previous year and of the Commission's behaviour in July 1977.

When the defendant reduced the compensatory amounts on 14 July 1977 it did not take account of the legitimate expectation of the parties concerned that the compensatory amounts would continue in force for current operations or for licences already issued. Since these licences represent situations which had actually materialized there is in fact in this case a true retroactive operation.

The *defendant* replies that entitlement to compensation has not been altered retroactively but only *ex nunc*, as from the entry into force of Regulation No 1583/77. There is nothing in that regulation according to the defendant which affects the rights conferred by the licence upon the exporter; it is solely concerned with the calculation of the compensation.

Nor is there any breach of the principle of the protection of legitimate expectation. It is quite clear that the amount fixed initially by Regulation No 937/77 was intended to produce "overcompensation" of an amount of DM 0.46. The exporters affected therefore had at least to envisage the possibility of a later correction. Since the rules governing the offsetting of the disadvantages had to take account of the special situations which are a feature of each marketing year it is difficult *a priori* to compare the situation during the 1977/78 marketing year with that of the preceding marketing year.

The *applicant* in its reply maintains that contrary to the opinion put forward by the Commission the licences which have already been issued constitute a specific number of situations which have materialized so that any alteration with particular reference to the amount of the adjustment represents a truly retroactive decision.

In so far as the amount called "compensation" has been provided for and fixed precisely in order to compensate for barring the right of cancellation, the applicant has consequently acquired a legal right to the amount of the adjustment which was fixed before 1 July 1977.

The *defendant* argues that the applicant was very well able to verify in detail the method of calculation which the Commission used. The first condition upon which the protection of legitimate expectation depends, namely that the applicant has an actual expectation, has therefore not been fulfilled. The defendant adheres to its conclusions continuing to assert that the conditions permitting this legal principle to be invoked have not been fulfilled and that in this case there in neither an expectation capable of being protected nor any actual damage capable of being suffered as a result of such expectation.

The alternative claim

The *applicant* refers to the considerations relating to the principal claim.

The *defendant* submits that the applicant has not suffered any actual damage.

IV — Oral procedure

The parties presented oral argument at the hearing on 7 March 1978.

The Advocate General delivered his opinion on 12 April 1978.

Decision

1 By an application lodged at the Court on 15 September 1977 the applicant requested the Court to annul Commission Regulation (EEC) No 1583/77 of 14 July 1977 amending Regulation (EEC) No 937/77 as regards sugar exported under certain tendering arrangements (Official Journal 1977, No 175, p. 17) and, alternatively, to declare that the Commission is liable for the damage which the applicant alleges it has suffered as a result of that regulation.

2 The dispute relates to the application of the Community rules governing the consequences of the alterations in the value of the unit of account used for the common agricultural policy as far as concerns export licences involving the advance fixing of amounts to be paid or refunded.

3 Article 4 (1) of 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 (Official Journal, 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 amounts which have been fixed in advance for a transaction or part of a transaction still to be carried out after that alteration shall be adjusted by using the new parity relationship.

Nevertheless the second subparagraph of the said paragraph provides: "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."

4 Council Regulation (EEC) No 557/76 of 15 March 1976 on the exchange rates to be applied in agriculture and repealing Regulation (EEC) No 475/75 (Official Journal 1976, No L 67, p. 1) declares that the provisions of Regulation No 1134/68 are applicable, but Article 5 (2) of Regulation (EEC) No 557/76 makes the reservation: "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."

Council Regulation (EEC) No 1451/76 of 22 June 1976 amending Regulation (EEC) No 557/76 on the exchange rates to be applied in agriculture (Official Journal 1976, No L 163, p. 5) states in the last recital in the preamble thereto that if the aforesaid right of cancellation were widely exercised "it could in certain cases seriously hinder good Community administration of a given agricultural market", and "provision should therefore be made for it to be replaced by the right to compensation for the disadvantage suffered", added a new subparagraph to Article 5 (2) of Regulation (EEC) No 557/76 which reads: "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".

5 Pursuant to Article 5 of Regulation No 557/76 as thus amended the Commission provided in Regulation No 1579/76 of 30 June 1976 laying down special detailed rules of application for sugar (Official Journal 1976, No L 172, p. 59) that the compensation referred to in that article was to be granted for those quantities of white sugar for which customs export formalities were completed on or after 1 July 1976 and for which an export licence was issued before 15 March 1976; at the same time the Commission fixed the amount of the compensation for the different Member States in an annex thereto.

6 The above-mentioned provisions of Council Regulations (EEC) Nos 557/76 and 1451/76 have been replaced by Article 4 of Council Regulation (EEC) No 878/77 of 26 April 1977 on the exchange rates to be applied in agriculture (Official Journal 1977, No L 106, p. 27) which reads as follows:

"(1) The provisions of Regulation (EEC) No 1134/68 in respect of an alteration of the relationship between the parity of the currency of a Member State and the value of the unit of account shall apply.

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

Before the date of application of the new rate it may be decided to offset this disadvantage by an appropriate measure. In this case, advance fixing and the certificate or document attesting thereto may not be cancelled."

In pursuance of that provision Article 2 of Commission Regulation (EEC) No 937/77 of 29 April 1977 laying down detailed rules for the application

of Council Regulation (EEC) No 878/77 (Official Journal 1977, No L 110, p. 1) as amended by Commission Regulation (EEC) No 1372/77 of 24 June 1977 (Official Journal 1977, No L 156, p. 33) provided that:

"(1) The compensation referred to in the second subparagraph of Article 4 (2) of Regulation (EEC) No 878/77 shall be granted for white sugar in respect of which the customs export formalities are completed on or after 1 July 1977 on the basis of export licences issued in connexion with awards made before 26 April 1977 under partial invitations to tender pursuant to Regulations (EEC) No 210/75 and (EEC) No 2732/76.

This compensation shall be fixed for the Member State concerned as shown in Annex I hereto.

(2) The right of cancellation provided for in the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 shall not apply in respect of the export licences referred to in paragraph (1)".

The Annex I referred to in the article quoted fixed the compensation to be granted per 100 kilograms of white sugar at DM 2.33 for the Federal Republic of Germany.

7 Those rules have been amended by Regulation No 1583/77, the measure challenged by this action, which stated in a recital in its preamble that "with effect from 1 July 1977, the compensatory amounts in the sugar sector have been calculated on the basis of the intervention price plus the amount of the levy charged on sugar of Community origin under the system for compensating storage costs" and "as a result of this new method of calculation, it is necessary to adjust the amount of the compensation fixed by Article 2 of Regulation (EEC) No 937/77" and proceeded in Article 1 to replace the amount of DM 2.33 in respect of compensation by DM 1.87.

8 At the relevant time the applicant had in its possession a large number of export licences which gave it the right if it proceeded to export to the compensation in question.

Since it received for the exports which it effected after 15 July 1977, the date of the entry into force of the regulation at issue, compensation calculated at the rate of DM 1.87 only and not of DM 2.33 per 100 kilograms of sugar, it considers that the amendment which has been adopted of the regulation at issue is of direct and individual concern to it.

In its view that regulation is in breach of the principles contained in Regulation (EEC) No 653/68 of the Council of 30 May 1968 on conditions for alterations to the value of the unit of account used for the common agricultural policy (Official Journal, English Special Edition 1968 (I), p. 121) and also in Regulation (EEC) No 1134/68.

In the second place the amendment effected by the regulation at issue is a breach of the principle of the protection of legitimate expectation and is for this reason unlawful.

Admissibility

9 The Commission does not challenge the admissibility of the application. Indeed Article 2 (as amended) of Regulation No 937/77 was already a measure open to challenge within the meaning of the second paragraph of Article 173 because it was of direct and individual concern to holders of export licences issued in connexion with awards made before 26 April 1977 under partial invitations to tender.

Since the latter date was prior to that of Regulation No 937/77 the natural or legal persons to whom the provision referred were identifiable on the basis of the measures implementing the rules governing the export of white sugar.

Consequently, although this provision was in a regulation, it amounted in substance to a decision of just the same direct and individual concerns to holders of export licences, such as the applicant, as if it had been addressed to them.

These considerations apply all the more to the regulation at issue in so far as it has amended Regulation No 937/77.

10 The application is therefore admissible.

The breach of the basic agricultural rules

11 It is true that the general system governing the consequences of changes in the exchange rates, as introduced by the basic regulations, namely Regulation (EEC) No 653/68 of the Council of 30 May 1968 on conditions for alterations to the value of the unit of account used for the common agricultural policy (Official Journal, English Special Edition, 1968 (I), p. 121) and Regulation (EEC) No 1134/68 of the Council laying down rules for its

implementation, provides in general that in the case of an alteration of the parities of national currencies as against the unit of account the holders of import or export licences and similar documents in respect of which there has been advance fixing may apply for their cancellation.

Regulations Nos 557/76 and 878/77 have restricted this right by limiting it to cases where "the application of the new representative rates is disadvantageous to the party concerned" thereby eliminating transactions of a purely speculative nature which might adversely affect the good administration of the common agricultural policy.

Nevertheless the system thus defined leaves traders free to decide individually whether it is in their interest to keep in force the arrangements which led to advance fixing or on the other hand to have them cancelled.

12 The applicant's arguments amount to the proposition that, as far as concerns white sugar, the opportunity afforded by Regulation No 1451/76 to replace the option for traders to have their licences cancelled by the option for the Community to indemnify the parties concerned for the disadvantage by paying appropriate compensation was itself a disadvantage for the traders affected.

In its view this latter disadvantage should be offset in the same way as the specific disadvantage flowing from the change in the exchange rates.

Furthermore it is alleged that this was how the Commission understood the situation during the 1976/77 sugar year, since Commission Regulation No 1579/76 fixed an amount of compensation which took account not only of the consequences of the change in the exchange rate but also of those changes resulting from the alterations in the intervention price for the new sugar year.

13 This argument cannot be accepted as the system for the payment of compensation is not by itself less favourable to the parties concerned than that of the right to cancel.

Although in some specific cases the party concerned may find that one of the two systems proves to be more favourable, in general they each offer the trader advantages and disadvantages which are of equal value, the one by keeping in force commitments which have been entered into but by offsetting the disadvantages arising out of the change in the exchange rate, the other by leaving the trader to face the risks flowing from this change but giving him the right to withdraw from the transaction contemplated having regard to these risks.

In this connexion it is important to state that Article 5 of Regulation No 557/76 and Article 4 of Regulation No 878/77 allow cancellation only if the transaction in respect of which there has been advance fixing results in a disadvantage for the party concerned by reason of the application of the new representative rates, but do not allow cancellation if the transaction has become disadvantageous for other reasons, because for instance of an alteration of prices, especially of the intervention price.

It is therefore fitting that only the disadvantage resulting from the change in the exchange rate be offset and that the fact that the Commission in its Regulation No 1579/76 fixed more generous compensation cannot affect this interpretation.

14 The complaint that Regulations No 653/68 and No 1134/68 have been infringed cannot be upheld.

15 The applicant also relies on the second subparagraph of Article 4 (2) of Council Regulation No 878/77 which provides that the decision to offset the disadvantage must be taken "before the date of application of the new rate" in order to show that the regulation at issue, which was adopted after that date, is illegal.

16 However, the decision "to offset this disadvantage by an appropriate measure" was adopted by Regulation No 937/77 and the amendment by the regulation at issue does not relate to the application of the system of compensation but merely to the amount of compensation.

The regulation at issue applies only to those quantities of white sugar for which customs export formalities are completed on or after its entry into force and does not therefore constitute an amendment having retroactive effect.

17 Consequently this submission cannot succeed.

Breach of the principle of the protection of legitimate expectation

18 The applicant also claims that the regulation at issue constitutes a breach of the principle of the protection of legitimate expectation.

19 The submission that there has been a breach of this principle is admissible in the context of proceedings instituted under Article 173, since the principle in question forms part of the Community legal order with the result that any failure to comply with it is an "infringement of this Treaty or of any rule of law relating to its application" within the meaning of the article quoted.

20 Nevertheless the submission has not been substantiated, since the fact that the Commission, as far as previous exports comparable to those contemplated by the applicant are concerned, had calculated the compensation on bases which were admittedly more favourable but went beyond the objective of Regulations Nos 557/76 and 878/77 cannot give the applicant the right to the continuance of these incorrect calculations.

On the other hand as soon as the inaccuracy of these calculations was discovered the Commission was under a duty to correct it in the financial interest of the Community and in order to prevent privileged positions from becoming established.

The claim for compensation

21 The applicant has requested the Court in the alternative to declare that the Commission is liable for the damage which the applicant has suffered as a result of the application of Regulation No 1583/77.

22 It is clear from the foregoing that in this case everything which the Commission did was in accordance with the rules in question and that the rules must be regarded as valid.

Consequently there is nothing in the Commission's actions which could give rise to any right to compensation.

23 The claim is therefore unfounded and the application must be dismissed in its entirety.

Costs

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

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

On those grounds

THE COURT

hereby:

1. **Dismisses the application;**

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

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 3 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 12 APRIL 1978 [1]

Mr President,
Members of the Court,

Since the regulations and facts which gave rise to this case have been fully and clearly stated in the report for the hearing I will consider straightaway the substance of the application; however, I shall have to take note of certain figures at the risk of belying the pseudo-adage attributed to mediaeval jurists: *judex non calculat*, but that is only to be expected in cases dealing with monetary compensatory amounts.

I — On the question of the admissibility of the application my comments can be brief; moreover the Commission does not challenge it, at least as far as concerns the conclusions aimed at annulment. According to the case-law of the Court (the last case being the judgment of 31 March 1977 in Case 88/76 *Société pour l'Exportation des Sucres, S.A.* v *Commission of the European Communities* [1977] ECR 709) proceedings instituted by a natural or legal person against a provision, even

1 — Translated from the French.