# OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 13 JULY 1977

*My Lords,*

This case comes to the Court by way of a reference for a preliminary ruling by the Tribunal Administratif of Paris. The plaintiff in the proceedings before the Tribunal is the Compagnie Cargill, which carries on business in Paris as, among other things, an exporter of cereals (I shall call it 'Cargill'). The defendant is the Office National Interprofessionnel des Céréales (or 'ONIC'), which is the agency responsible in France for the administration of the Community legislation relating to the common organization of the market in cereals, including that relating to monetary compensatory amounts ('mca's') in so far as they apply to trade in cereals.

The case has been argued at some length and with great learning. It was suggested on behalf of Cargill that it raised questions of far-reaching importance. In my opinion, however, it is a very simple case and the considerations that are relevant to its determination lie in a small compass.

Essentially it concerns the validity of Regulation (EEC) No 2042/73 of the Commission of 27 July 1973, which was described in its title as 'making transitional provisions consequential upon the application on 4 June 1973 of the new system of monetary compensatory amounts'.

This is not the first time that the Court has had to consider that Regulation and the legislation introducing the 'new system' of mca's to which it refers. In Cases 95 to 98/74 and 15 and 100/75 *Union Nationale des Coopératives Agricoles de Céréales and others* v *Commission and Council* [1975] ECR 1615 (the *'Coopératives Agricoles* cases') the Court had before it a number of actions brought under Article 178 of the EEC Treaty by French exporters of cereals who claimed that they had suffered actionable damage as a result of the introduction of that new system, damage which, they said, was inadequately compensated for by the transitional provisions contained in Regulation No 2042/73. The actions all failed, in each case on the facts.

In the circumstances I can, I hope, be comparatively brief in describing the legislation in question.

From their inception in 1971 until the introduction of the new system in 1973, mca's were calculated, under Article 2 (1) of Council Regulation (EEC) No 974/71, by applying to prices the percentage difference between 'the parity of the currency of the Member State concerned declared to and recognized by the International Monetary Fund', on the one hand, and the spot market rate of that currency against the US dollar, on the other hand. During the same period levies on imports into the Community and refunds on exports from it payable under the legislation governing the common organization of agricultural markets (in the case of cereals, under Articles 13 and 16 of Council Regulation No 120/67/EEC) were calculated by reference to world prices ascertained in US dollars converted at par, although, ever since the suspension of the convertibility of the dollar into gold in August 1971, the real or market value of the dollar had been below its par value. By and large this did not matter because mca's compensated for the differences between the amounts of levies or refunds thus artificially computed and what their amounts would have been if computed on the basis of the real value of the dollar.

On 11 March 1973 the Council agreed upon the introduction of what has come to be called 'the snake', that is the system under which the majority of Member States' currencies float together in relation to other currencies, maintaining as between themselves a maximum variation in their spot market rates at any given moment of 2·25 %. Initially, the only Community currencies outside the snake were the Irish pound, the Italian lira and the pound sterling. Each of them continued to float independently.

On 12 March 1973 the Council asked the Commission to make proposals for a reform of the system of mca's to take account of the new situation thus created. Such proposals were made and published by the Commission on 21 March 1973. They resulted in the adoption by the Council on 30 April 1973 of Regulation (EEC) No 1112/73, whereby Article 2 (1) of Regulation No 974/71 was amended so as to make mca's calculable no longer by reference to the US dollar but by reference to the 'central rates' of the currencies in the snake. The effect of this, so far as material in the present case, was to do away with mca's on exports from France.

Article 3 of Regulation No 1112/73 provided that that Regulation should apply 'from the date on which the detailed rules required for its application' should enter into force. Those detailed rules were in fact laid down by Commission Regulation (EEC) No 1463/73 of 30 May 1973. By virtue of Article 19 of that Regulation they entered into force on 4 June 1973, which was also the date on which they were published in the Official Journal. At the same time the system of calculating levies and refunds by reference to the official parity of the US dollar was abandoned in favour of one under which they were calculated by reference to real exchange rates.

Regulation No 2042/73 (OJ L 207 of 28. 7. 1973) (of which the validity is in issue in this case) was, as I have said, adopted by the Commission on 27 July 1973. It recited, among other things, that:

'one of the consequences of the introduction of the new system of monetary compensatory amounts on 4 June 1973 is that the monetary compensatory amount of a Member State no longer reflects the relationship between its currency and the US dollar; ... the fluctuation of the dollar and other currencies in relation to the currencies of the Member States taking part in the joint float is taken into consideration in the calculation of levies and refunds; ... therefore, under the new system, operators have to cover themselves against the risk of exchange fluctuations, while under the former system the risk of changes in the rate of exchange in relation to the dollar was covered by the monetary compensatory amount;

... operators have been aware of the new rules to be applied to parities laid down by Council Regulation (EEC) No 1112/73 of 30 April 1973, amending Regulation (EEC) No 974/71 ...;

... however, the date of application of the new system was fixed on 4 June 1973 by Commission Regulation (EEC) No 1463/73 of 30 May 1973 laying down detailed rules for the application of monetary compensatory amounts;

... if an importer or exporter had fixed a levy or refund in advance before that date, he may sustain loss due to variations in the value of the dollar at the time of the transition from one system to the other;

... in view of the entry into force of the new system on 4 June 1973, it seems fair to provide that, for all imports or exports in respect of which advance fixing of the levy or refund had been requested before that date, the compensatory amount should be that applicable on 3 June 1973.'

The idea behind that is, I think, obvious. As was later to be recognized by this Court in Case 74/74 *CNTA* v *Commission* [1975] ECR 533 and [1976] ECR 797, mca's, although not designed for that purpose, in practice provided traders with some protection against the risk of fluctuation in exchange rates, particularly where they entered into contracts under which prices were fixed in dollars. So the existence of mca's might induce even a prudent trader to omit to cover himself otherwise against such risks. Up to 4 June 1973 the future form that the system of mca's was to take, following the events of 11 and 12 March, was to some extent uncertain. Having regard to that, and to the nexus between the method of calculating mca's and the method of calculating levies and refunds before 4 June 1973, it seemed fair to the Commission to afford traders who had effected after that date importations or exportations to which they had committed themselves before it, under licences whereby levies or refunds had been fixed in advance, protection against the fluctuations in exchange rates that had occurred up to that date. But, as from 4 June, the details of the new system were known and it was up to traders themselves to cover their risks, for instance, if they had entered into export contracts under which prices were expressed in dollars, by selling dollars forward. As it was vividly put to us by the Commission in the course of argument, traders in agricultural products within the scope of Regulation No 974/71 (i.e., broadly speaking, products covered by intervention arrangements and products derived from them) were, as respects the period after 4 June 1973, to be placed in the same position in that regard as traders in other agricultural products and in non-agricultural products.

So Article 1 of Regulation No 2042/73 provided:

'At the request of the party concerned the monetary compensatory amount ... applicable on 3 June shall, in lieu of the amount applicable on the date of importation or exportation, apply to all transactions carried out after 3 June 1973 in respect of which the levy or refund was fixed in advance before 4 June 1973.'

(The English text as published in the Official Journal refers to 'transactions carried out before 3 June 1973', but, as is clear from the texts in the other official languages of the Community, that is a mistake: 'before' should read 'after'. Indeed the Regulation does not make sense otherwise).

Article 2 provided that the Regulation should apply from 4 June 1973.

I turn to the facts of this case.

On 26 November 1973 Cargill wrote to the ONIC applying for payment of mca's due on exportations of barley that it had effected between 4 June and 31 July 1973. Those exportations had been effected under licences obtained by Cargill on 5 April 1973, in which the refunds had been fixed in advance. To its letter Cargill annexed a table showing, in respect of each of those exportations, the amount of the mca due in accordance with Regulation No 2042/73, the amount of the mca that would have been due under the legislation in force before 4 June 1973 if that legislation had continued in force after that date, and the amount of the difference. The total of the amounts shown as due under Regulation No 2042/73 came to FF 464 754·94, the total of the amounts calculated in accordance with the previous legislation came to FF 1 244 407·13, and the total difference to FF 779 652·19. Cargill stated that its claim was for the total of FF 1 244 407·13. It explained that, in its view, Regulation No 2042/73 was invalid in that, as between exporters who had obtained advance fixing of levies before 4 June 1973, it discriminated in favour of those who had completed their exportations before that date and to the detriment of those who had been unable

to effect them until after that date. The latter were thus, said Cargill, left alone to bear the consequences of the severe fall in the value of the US dollar which occurred in June and July 1973, despite the fact that the Regulation was not adopted until 27 July 1973, by which time that fall had occurred. Cargill added that, if, however, the ONIC felt bound to apply Regulation No 2042/73, it would ask for payment of the total of FF 464 754·94 and reserve its rights to claim the balance in appropriate legal proceedings.

To that the ONIC replied, on 13 December 1973, that, according to its computer, the mca's to which Cargill was entitled under Regulation No 2042/73 amounted to FF 467 583·21 and that arrangements had been made for the payment of that sum to Cargill. The ONIC did not comment on Cargill's strictures on the Regulation or on its claim for the larger sum.

On 8 February 1974 Cargill initiated the present proceedings before the Tribunal Administratif of Paris. In those proceedings it claims (1) annulment of the ONIC's 'decision' embodied in its letter of 13 December 1973, (2) an order for payment by the ONIC of the sum of FF 779 652·19, with interest, and (3) costs. As Cargill's pleadings in those proceedings make clear, the claim for annulment is merely formal. The substantial claim is that for payment.

In those pleadings Cargill put forward two contentions. The first was that foreshadowed in its letter to the ONIC, to the effect that Regulation No 2042/73 was discriminatory. In support of that argument Cargill relied in particular on Articles 7 and 40 of the EEC Treaty. Cargill's second contention was that Regulation No 2042/73 was unlawful because it made Regulation No 1112/73 (that is, Your Lordships remember, the Council Regulation instituting the new system of calculating mca's) retroactive. This contention was based on a submission that, but for Regulation No 2042/73, Regulation No 1112/73, and also Regulation No 1463/73 (the Commission Regulation laying down detailed rules for the application of that system), could have been interpreted as applicable only to traders who had entered into contracts after 3 June 1973. Such an interpretation would have ensured that those Regulations did not impinge on vested rights ('droits acquis'). But Regulation No 2042/73 rendered it impossible. (In fact, as appears from information supplied to this Court at its request by Cargill, and to which I shall refer in more detail in a moment, most of the contracts under which Cargill effected the importations here in question were made after 3 June 1973, but that information does not appear to have been before the Tribunal Administratif).

Before the Tribunal Administratif the ONIC contended, among other things, that, if Cargill was right in saying that Regulation No 2042/73 was invalid, the Community legislation applicable to the case must be, not as suggested by Cargill that in force before 4 June 1973, but that in force after that date other than Regulation No 2042/73 itself, with the consequence that Cargill was entitled to no mca's at all.

Those contentions of the parties are reflected in the three questions referred to the Court by the Tribunal, whose Order for Reference is dated 9 February 1977. Those questions are:

'1. Whether Community Regulation No 2042/73 dated 27 July 1973 is vitiated by illegality for having practised discrimination between exporters in contravention of the rules against discrimination laid down by Articles 7 and 40 of the Treaty of Rome, such illegality allegedly having had the effect of placing traders who had fixed refunds in advance before 4 June 1973 in a different situation depending on whether the exports were made

before 4 June 1973 or after that date, the former attracting the whole of the compensatory payments and the others being affected by the obligation on the part of the traders to cover themselves against exchange risks and suffering the effects of the devaluation of the dollar;

2. Whether the same Community Regulation No 2042/73 is affected by illegality in that it confers a retroactive effect on Regulation No 1112/73 adopted by the Council of the European Communities on 30 April 1973 and thus interferes with vested rights;
3. What would be the legislation applicable in the present case, more favourable to the company, if the Court were to hold that Regulation No 2042/73 was illegal?'

While the proceedings leading up to that Order were taking their course before the Tribunal, the *CNTA* and *Coopératives Agricoles* cases were being litigated in this Court. The law there laid down may I think be summarized, so far as relevant, as follows:

(1) Because mca's cannot be fixed in advance, and because the legislation relating to them does not confer on traders any right to the continuance of a particular method of calculating them, no right to an mca vests until the particular importation or exportation that attracts it is effected. The abolition or modification of mca's can never therefore constitute an infringement of vested rights.

(2) However, because mca's, although designed for a different purpose, in practice afford traders a measure of protection against fluctuations in exchange rates, so that traders may be induced to rely on them for that purpose, the Community may be made liable in damages to such traders, under the second paragraph of Article 215 of the Treaty, on the footing that their legitimate expectations have been defeated, if, in the absence of overriding considerations of public interest, the Council or the Commission legislates so as to abolish mca's in a particular sector with immediate effect and without warning, and, in so doing, fails to adopt transitional measures enabling such traders to avoid losses under contracts to which they are committed or to be compensated for such loss. The Community cannot however be made liable on this principle at the suit of a trader who has in fact incurred no exchange risk, e.g. a French exporter who, under the relevant contract, is to be paid in French francs; or at the suit of a trader who has entered into a contract at a time when he could not legitimately expect the continuance in force of the current system of calculating mca's, e.g. a trader who did so after 30 April 1973 (i.e. after the adoption of Council Regulation No 1112/73 but before it had come into force); or, it seems, at the suit of a trader who has entered into a contract the terms of which negative any reliance on his part on the receipt of mca's, e.g. a contract for the sale of 'European barley', capable of being fulfilled either by the sale of Community barley (attracting mca's) or by the sale of other European barley. The narrow scope of the remedy has recently been re-emphasized by the Court in Case 97/76 *Merkur Außenhandel GmbH & Co.* v *Commission* (8 June 1977, not yet reported).

The Court asked Cargill for information about the contracts under which it effected the exportations here in question, specifying in particular their dates and the currencies in which the prices payable thereunder were expressed. Cargill's answer, dated 18 June 1977, annexing, *inter alia*, copies of the contracts, is before Your Lordships. In short, there were six contracts, for a total of 79 500 tons of barley, though Cargill explains that of that amount only 40 338 tons were exported from France and so are material in these proceedings. The balance was

exported from other Member States of the Community. We do not know how the 40 338 tons were distributed between the six contracts. At all events, of those six contracts, the last four were at prices expressed in French francs and, moreover, were entered into at dates ranging from 15 June to 13 August 1973. It was not explained how exportations effected before 31 July 1973 came to be covered in part by a contract entered into as late as 13 August. Be that as it may, it is difficult to see how any of those four contracts could form the basis of an action under Articles 178 and 215 of the Treaty in respect of the change in the system of calculating mca's that was made on 4 June 1973. The first two contracts were dated 24 April and 26 April 1973 and were for 10 000 tons and 20 000 tons respectively. Under these the prices were expressed in dollars, but their subject matter was described as 'European barley'. I refrain from any comment on them, as I do not think it would be right for me to prejudge the outcome of any possible action that might be brought by Cargill under Article 178 in relation to them.

It is however small wonder that Counsel for Cargill were at pains to emphasize, in their argument before this Court, that Cargill was not invoking Articles 178 and 215, but Article 184, of the Treaty (and, incidentally, that, that being so, the information about Cargill's contracts was irrelevant). We were treated in connexion with that point to a most learned and interesting disquisition on the different features in French law of the 'contentieux de la responsabilité' on the one hand and the 'contentieux de la légalité' on the other, and in particular on the difference between 'préjudice' in the context of the former and 'intérêt' in the context of the latter. As to that, I hope that I shall be acquitted of discourtesy to Counsel if I confine myself to two observations. The first is that Community law is not, in such matters, in all respects the same as French law: see for instance Case 90/74 *Deboeck* v *Commission* [1975] ECR 1123 and the earlier authorities to which I there referred (at pp. 1140 — 1142). Secondly, Your Lordships are not in this case concerned with the admissibility of the action brought by Cargill before the Tribunal Administratif of Paris, nor is any doubt raised as to the admissibility of the Tribunal's reference to this Court. This being a case under Article 177, Your Lordships' jurisdiction is limited to ruling on the questions set out in the Tribunal's Order for Reference. One may nonetheless be pardoned for thinking that it would be odd if, by dint of having chosen the procedure that it did, Cargill could indirectly render itself entitled to payment out of Community funds of the full amount of the mca's that it would have received had no change in the system ever been made — for that is, as was accepted on its behalf, what Cargill in fact claims.

So I turn to the actual questions referred to the Court by the Tribunal of Paris.

As to the first, it seems to me, with all respect to those who argued otherwise, that the proposition that Regulation No 2042/73 discriminated as between traders who completed their importations or exportations before 4 June 1973 and those who effected them after that date is simply untenable. The Regulation did not apply at all to transactions effected before 4 June 1973. It left them to be governed in all respects by the earlier legislation then in force. It applied only to transactions carried out after that date and, in relation to them, it conferred on the traders concerned the option of claiming application of the mca that would have been applicable had the transactions been carried out immediately before that date. It is the benefit of that option that Cargill received. One can see, of course, that the combined effect of Regulations No 1112/73 and No 1463/73 was to cause traders to be treated differently in respect of transactions carried out before 4 June 1973 and transactions carried out afterwards, and that Regulation No

2042/73 only partially alleviated the difference. But, rightly in my opinion, Counsel for Cargill expressly disclaimed any argument based on that.

On the second question I need say even less, because the contention that it reflects was expressly abandoned by Counsel for Cargill at the hearing. That contention too was in my opinion untenable, if only because, as was held by this Court in the *Coopératives Agricoles* cases, there can be no vested right to an mca before the importation or exportation attracting it has been effected. No doubt Regulation No 2042/73 was itself retroactive, but, since its sole object was to confer a benefit on private persons, its retroactivity could not in my opinion entail its invalidity.

On the third question I need say nothing at all, because it only arises if either the first question or the second is to be answered in the affirmative. I think it permissible however to recall the inability of Counsel for Cargill to make any submission as to what the answer to it should be, an inability that seemed to me to underline the hopelessness of the contention that they were instructed to advance on the first question.

In the result I am of the opinion that Your Lordships should answer the questions referred to the Court by the Tribunal Administratif of Paris by declaring that consideration of them has disclosed no factor of such a kind as to affect the validity of Regulation No 2042/73.