JUDGMENT OF THE COURT
8 JUNE 1977 [1]

Merkur Außenhandel GmbH & Co. KG
v Commission of the European Communities

'Compensatory amounts'

Case 97/76

Agriculture — Common organization of the markets — Monetary measures — Trade in agricultural products — Disturbances — Compensatory amounts — Abolition or modification — Injury suffered by traders — Liability of Commission — Conditions

The liability of the Community for injury suffered by traders as a result of the adoption of legislative measures governing the system of compensatory amounts could only be incurred if, in the absence of any overriding public interest, the Commission were to abolish or modify the compensatory amounts applicable in a specific sector with immediate effect and without warning and, in the absence of any appropriate transitional measures and if such abolition or modification was not foreseeable by a prudent trader.

In Case 97/76

MERKUR AUSSENHANDEL GMBH & CO. KG, Hamburg, represented by the partner bearing personal liability, assisted by Klaus Landry, Advocate at Hamburg, with an address for service in Luxembourg at the Chambers of Félicien Jansen, 21, rue Aldringen,

applicant

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Götz Zur Hansen, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission of the European Communities, Bâtiment Jean Monnet, Kirchberg,

defendant,

Application for an order for the payment of damages by the defendant;

1 — Language of the Case: German.

THE COURT

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

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

gives the following

JUDGMENT

Facts and issues

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

I — Facts and procedure

1. Merkur Außenhandel GmbH (hereinafter referred to as 'Merkur' concluded contracts with 'Korn- og Foderstof Kompagniet A.S.', Aarhus (hereinafter referred to as 'KFK'), on 18 and 27 February 1976 and with Spurnen Ltd., London, (hereinafter referred to as 'Spurnen') on 25 February and 12 April 1976, for the sale to those companies of a compound made up of 90 % of tapioca and 10 % of molasses (application, page 11). Contracts of sale concerning the same product were concluded with the Dansk Landbrougs Grovvareselskab, Axelborg (hereinafter referred to as 'DLG') on 9 March and 20 May 1976.

The time-limits for delivery fixed for the performance of those contracts came to an end either at the end of July or at the end of August 1976.

2. By a letter dated 12 March 1976 (application, Annex 8), Merkur applied for a notice of tariff classification in respect of the compounds referred to in the aforementioned contracts. By letter of 28 April 1976 the Oberfinanzdirektion (Chief Finance Office) Hamburg issued such a notice, showing that the goods in question fell within subheading 23.07 B I (c) 1 of the Common Customs Tariff (application, Annexes 8 and 9).

Under the terms of the Common Customs Tariff subheading 23.07 B applies to:
— 'Sweetened forage; other preparations of a kind used in animal feeding'
— not being fish or marine mammal solubles.

Subheading I (c) 1 applies in particular to those of the abovementioned preparations which contain more than 30 % by weight of starch but no milk products or less than 10 % by weight of such products.

3. At the time in question the products falling within subheading 23.07 B I (c) 1

were subject to a system of 'monetary' and 'accession' compensatory amounts.

(a) The 'monetary' compensatory amounts applicable before 11 July 1976 were fixed by Commission Regulation No 572/76 of 15 March 1976 (OJ 1976, No L 68, p. 5), in the version contained in Commission Regulation No 1312/76 of 3 June 1976 (OJ 1976, No L 148, p. 1). For the goods referred to under the tariff heading in question, Annex I, Part 1 of Regulation No 572/76 and Annex I, Part 1 of Regulation No 1312/76 fixed:

- As regards Germany, a compensatory amount of 37·01 DM on exports to Denmark and the United Kingdom;
- As regards the United Kingdom, a compensatory amount on imports of £10·407

(b) The 'accession' compensatory amounts concerning the 1975/1976 cereal marketing year were fixed by Regulation No 2006/75 of the Commission of 31 July 1975 (OJ, No L 203, p. 1). As regards the goods exported by the applicant, Annex C of that regulation fixed:

- For June and July 1976, an amount of 17·51 u.a. (units of account) per metric ton for the United Kingdom;
- An amount of 0 u.a. for Denmark.

4. By Regulation No 1497/76 of 23 June 1976 (OJ 1976, No L 167 p. 27), the Commission provided in particular (in Article 1) that for products falling within subheading 23.07 B I (c) 1, containing more than 50 % by weight of products falling within heading No 07.06 of the Common Customs Tariff, the accession compensatory amounts or monetary compensatory amounts shall be those applicable to products falling within subheading 07.06 A of the Common Customs Tariff. Heading No 07.06 refers to nutritious roots and tubers 'with a high starch content', the majority of which are listed under subheading 07.06 A.

Regulation No 1497/76 entered into force on 11 July 1976. At that date, as regards the products falling within subheading 07.06 A of the Common Customs Tariff:

- The 'monetary' compensatory amount was 0 u.a.;
- The 'accession' compensatory amount applying to exports to the United Kingdom was approximately one-quarter of that fixed for the products under subheading 23.07 B I (c) 1.

5. Having learnt from the journal 'Ernährungsdienst' (application, Annex 10) of 19 June 1976 that the Commission was intending to adopt a regulation placing products containing more than 50 % by weight of tapioca under the same tariff classification as that applying to tapioca, Merkur requested the Federal Minister of Food, Agriculture and Forestry (application, Annex 11) to take steps to postpone the date of entry into force of the proposed regulation. As, however, the regulation had been adopted and published in the Official Journal of the European Communities on 26 June 1976 Merkur requested the Commission in a telex message sent on 5 July 1976 to postpone for at least ten days the date of its entry into force, which had been fixed (by Article 3) at the fifteenth day following its publication in the Official Journal. As that request was rejected (by a telex message of 8 July 1976) Merkur requested the Commission by letter of 2 September 1976 (application, Annex 26) to acknowledge that it was entitled to receive compensation until 30 September 1976 in respect of the considerable loss which it suffered as a result of being prevented by the entry into force of Regulation No 1497/76 from performing in full the aforementioned contracts of sale concluded between February and May 1976 for the export to the United Kingdom and Denmark of products falling within subheading 23.07 B I (c) 1.

As the Commission did not comply with that request, on 8 October 1976 the applicant lodged the present application on the basis of Article 178 and the

second paragraph of Article 215 of the EEC Treaty.

6. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without holding any preparatory inquiry. Furthermore, it decided, as a first step, to hear the submissions of the parties on the questions concerning the existence of possible liability on the part of the Commission and to reserve, if necessary, to a later stage of the oral procedure consideration of the questions concerning the extent of the damage.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. Order the defendant to pay the applicant DM 168 185·20, together with interest at 8 % as from the date on which the application was lodged;
2. Order the defendant to pay the costs.

The *defendant* contends that the Court should:

— Dismiss the application as unfounded;

— Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The *applicant* maintains that the entry into force of Regulation No 1497/76 on 11 July 1976 had prevented it from performing in full the contracts concluded between February and May with KFK, DGL and Spurnen. It found itself faced with the alternative either of performing the contracts for the quantities still to be delivered, while foregoing the monetary and accession compensatory amounts originally provided for in respect of those quantities, or of explaining to its purchasers its failure to perform the contracts.

In order to limit as much as possible the loss arising in this difficult situation the plaintiff decided to enter into negotiations with its customers in order to persuade them to agree either to accept delivery of an alternative compound or to terminate the contracts. Those negotiations were successful as the applicant undertook to pay compensation for partial termination and to reduce the purchase price. As a result the material loss finally suffered amounted to DM 168 185·20.

In support of that submission it argues principally that by drawing up the contracts in question it hoped to obtain the monetary and accession compensatory amounts applicable at that time to the products falling within subheading 23.07 B I (c) 1 of the Common Customs Tariff when the products in question were exported. It could legitimately hope that the defendant would not cause it to suffer any loss by intervening through Regulation No 1497/76 in firm and properly concluded contracts. In any case, in accordance with the principle acknowledged by the Court in Case 74/74 *(Comptoir National Technique Agricole (CNTA) S.A.* v *Commission of the European Communities,* [1975] ECR 533) it should not suffer the loss caused by that intervention.

The Commission cannot claim that an overriding public interest required such a transitional period to be fixed. After learning of the proposals for the adoption of Regulation No 1497/76 the applicant informed the Commission on several occasions that it was in fact the only trader concerned by the regulation and that it only had approximately 8 000 metric tons to deliver under the contracts concluded at a much earlier date. The applicant further informed the Commission that, as a result of its very complex methods of production, the extension of the transitional period could not have resulted in further exports of the product being made on the basis of new contracts.

Furthermore, the Commission could have averted the danger of such exports being made by only authorizing the performance, during that period, of contracts concluded either before the entry into force of the regulation or even before the person concerned became aware of the proposals for its adoption. Had it done so there would have been no need to fear that an extension of the transitional period would have frustrated the aim of the regulation.

Moreover, it is not clear why the Commission considered a period of 15 days to be sufficient. It is evident that the purpose of Regulation No 1497/76 was not such as to require it to come into force immediately. Once the Commission decided to allow a transitional period, such period had to be fair and had not to be fixed in such a way as to cause the parties concerned to suffer certain loss. Such a fair period should have expired on 15 August 1976 or, at all events, after 31 July 1976, which would have enabled the applicant to perform its contracts in full by delivering the compound originally agreed upon. The fact that certain deliveries under those contracts were only made by the applicant in August 1976 does not effect the validity of the foregoing submissions. The delays were caused by the fact that the applicant had to produce and prepare a new compound in place of that originally supplied.

Finally, it cannot be claimed that the applicant abused a legal situation of a purely formal nature. The Oberfinanzdirektion Hamburg has itself acknowledged that once the products at issue fall within tariff subheading 23.07 B I (c) 1 of the Common Customs Tariff, both the exports in question and the levy of the compensatory amounts applying thereto are unquestionably lawful.

In its *defence* the *defendant* replies, first, that contrary to the statements made by the applicant the goods sold under the contracts in question are very easily manufactured. They are produced by a caking process which is very widely used in the animal feedingstuffs industry.

It also observes that it was not possible to assume from the official notice of tariff classification issued by the Oberfinanzdirektion Hamburg on 28 April 1976 that the monetary and accession compensatory amounts provided for would be granted. That notice was only applied for and obtained after most of the contracts at issue in this instance had been concluded. Furthermore, it merely records the fact that at a given time a specific product must be classified under a particular tariff heading and it cannot be regarded as having any other consequences.

It is also incorrect to maintain that the applicant found itself faced with the alternative either of making the remaining deliveries and foregoing the compensatory amounts, or of explaining to the purchasers its failure to perform those contracts. That was not the only alternative available in this case. The applicant itself refers to the further possibility of terminating the contracts for the remaining quantities while at the same time paying partial compensation for termination and undertaking to deliver alternative compounds.

Having made those points, the defendant disputes the allegation that in this instance the principle of the protection of legitimate expectation was violated.

It takes the view that the purpose of the 'monetary' compensatory amounts is more to combat the difficulties caused by monetary instability than to protect the individual interests of the traders concerned. As regards the 'accession' compensatory amounts, in the absence of uniform prices within the Community and in so far as they are amounts to be granted on exports, they perform the function which, before accession, was performed by the 'export refunds'. However, the system of compensatory

amounts does not rule out absolutely any possibility of protecting the legitimate interests of the trader.

In the case of the 'accession' compensatory amounts, such protection is offered by the possibility of fixing the amounts in advance; that possibility is also available for the products listed under tariff subheading 23.07 B I (c) 1.

As regards the 'monetary' compensatory amounts, for which no possibility of advance-fixing exists, recognition of the liability of the Community for violation of the principle of the protection of legitimate expectations was held in the judgment of the Court in Case 74/74 *(Comptoir National Technique Agricole (CNTA) S.A.* v *Commission of the European Communities* [1975] ECR 533 at p. 550, Grounds of Judgment Nos 42 and 43) to be subject to the following conditions which, in this instance, are not satisfied:

— *As regards the first condition* the transactions in question must be 'irrevocably undertaken'.

Such is the case as regards transactions for which a trader has obtained export licences subject to giving security. Proof of the irrevocability of the transaction must be subject to much stricter conditions: evidence of the conclusion of the contract of sale is thus insufficient.

— *As regards the second condition:* the alteration to the particular legal situation by the injurious action must be 'unforeseeable'.

The product exported by the applicant was apparently unknown before March 1976. At all events, before that date that product was not exported to the new Member States. It is obvious that the applicant only prepared the compound in question in order to be able to export it to other Member States and benefit from the relatively high compensatory amounts. In fact, the applicant only exported tapioca, under the heading in the Common Customs Tariff relating to compounds used in animal feeding. It thus created an entirely artificial product whose existence was, from an economic point of view, obviously related to the award of high compensatory amounts. In fact, exports of that product ceased as a result of the measures adopted by the Commission in Regulation No 1497/76.

In those circumstances, since the monetary compensatory amount applicable to tapioca only represented a small proportion of the amount applicable to the products falling within subheading 23.07 B I (c) 1, the applicant should have known in advance that the new compound could not for long benefit from a situation which was not justified on economic grounds and which led to a considerable movement of exports of tapioca towards the animal feed sector. Although it is true that when it concluded the contracts in question the applicant was not sure that the exports in question would attract the attention of the Community authorities and would lead them to adopt the measures which were in fact adopted subsequently, nevertheless, in view of the situation the applicant, as a prudent trader familiar with the machinery of the common agricultural policy, could and should have assessed the position correctly and have taken the necessary precautions. Furthermore, it is clear from the contract concluded on 20 May 1976 with the DLG (application, Annex 6) that the applicant expected that the relevant rules might be modified during the period of validity of the contract.

— *As regards the third condition:* the loss must be inevitable.

In this instance the partial 're-acceptance' of the 'exchange risk' should not inevitably have caused the applicant to suffer loss. Moreover, a clause to that effect was included in a contract concluded with one of its purchasers. It is therefore not clear why it could not

have been included in the others. In the same way, when each contract was concluded, a clause could have been included providing for its termination if such an event occurred.

— *As regards the fourth condition:* absence of an overriding matter of public interest which justifies the adoption of the measure in dispute.

It must not be forgotten, first, that monetary compensatory amounts are only provided for in so far as they are necessary in order to avoid disturbances in the foreign exchange markets as a result of fluctuations in the rates of exchange of the various currencies. Having regard to the composition of the compound in question the application to that compound of the high monetary compensatory amount introduced for animal feedingstuffs was unnecessary in order to avoid disturbances in the sector in question. Furthermore, subheading 23.07 B I (c) 1 covers a considerable number of widely differing preparations for animals, composed of the most varied ingredients. The tariff headings of the Common Customs Tariff, which were drawn up in order to provide protection against imports from third countries, are not always immediately suitable to be used as a basis for the application of monetary compensatory amounts. Thus, since it is impossible to provide for all the developments which may take place in the foreign exchange markets, it is sometimes necessary to adapt and perfect that system *a posteriori.*

Secondly, it must be observed that an overriding matter of public interest went against the adoption of stronger transitional measures. In fact, the foregoing considerations show that the applicant had no reason to have confidence in the continuance of the rules in force. The transitional period of 15 days which the Commission allowed, despite the fact that it was not under any legal obligation to do so, was the justifiable limit. The fixing of even that period risked seeing considerable quantities of the product in question exported, on the basis of newly concluded contracts, in order to benefit from the high compensatory amounts applicable. That danger was the more to be feared, since the preparation of the original compound was not as difficult as the applicant seeks to maintain and since it is not the only company to have produced and exported it to the new Member States. In the light of the experience of the Commission the adoption of a 'regulation concerning existering contracts', regarded by the applicant as another possible solution, hardly offers a sufficient guarantee against manipulation. Its systematic application would prevent the proper functioning of the common agricultural policy. Any amendment of the provisions in force would remain to a large extent ineffective, since the traders concerned would in practice be in a position to avail themselves of all the earlier rules without risk by concluding the appropriate long-term contracts. In those circumstances, although the lawful nature of the transactions carried out by the applicant is not in dispute, it is clear that the Commission could and did understand the risks inherent in them.

— *As regards the fifth and sixth conditions:* the action which causes the loss must have been taken without warning and with immediate effect and without providing for any transitional measure which would permit prudent traders either to avoid the loss or to be compensated for it.

That does not apply in this instance. First, the measure in question was not adopted with immediate effect and even if it had not been 'announced' before being adopted the applicant was made aware of it by the publication to which it refers.

Secondly, the transitional measures adopted were such as to enable a prudent trader to avoid or to make up for the loss

suffered. The applicant could have taken action earlier to accelerate its deliveries even more; it could have negotiated with its purchasers and found other possible solutions to its difficulties.

On the basis of the foregoing observations the Commission concludes that no violation of the law occurred in this instance.

If, however, the Court of Justice should consider that a violation of law did occur in this case it would then be necessary to examine the nature of the violation and to consider whether, having regard to the margin of discretion available to the Community legislature in enactments involving such measures of economic policy, the irregularity established constitutes a 'sufficiently flagrant violation' of a superior rule of law.

Finally, as regards the *extent* of the damage, the defendant states that it cannot accept the assessment made by the applicant in its application. Furthermore, it reserves the right to make any observations not only on that point but also on the right to interest claimed by the applicant and on the costs incurred in the preparation of an expert report.

In its *reply,* the *applicant* disputes the allegation that the product in question is 'very easy to manufacture' and is produced by a 'caking process which is very widely used in the animal feedingstuffs industry'.

In fact, the preparation of the compound in question, which is composed of 90 % of tapioca and 10 % of molasses, presented particular difficulties which it required several weeks to solve; these difficulties arose chiefly because the company was at first unsuccessful in producing continuously a homogeneous and uniform compound which could then be pressed into cakes.

Moreover, it is not correct to claim that the animal feed was an artificial product which was only 'discovered' in 1976. As early as 1967 a compound made up of 90 % of tapioca and 10 % of molasses was registered with the Federal Ministry of Food, Agriculture and Forestry in accordance with Article 3 of the Futtermittelanordnung (Regulation on Animal Feedingstuffs) of 24 October 1951 (reply, Annex 2) and since then it has been widely manufactured and exported.

The applicant also observes that, although it is true that in theory the compensatory amounts are granted in the interests of the proper functioning of the common organization of the market, nevertheless the aim of such a system requires them to be paid to the undertakings concerned. Those undertakings are entitled to include the amounts in the calculation of their cost prices; if they cannot do so they can neither conclude contracts nor carry out transactions falling within the area governed by the system in question.

As regards the fact that it was open to the applicant to have the 'accession' compensatory amounts fixed in advance, it must not be forgotten that that possibility only existed in relation to exports to the United Kingdom and that the 'monetary' compensatory amounts to be paid in Germany and the United Kingdom could not be so fixed.

Thus, as the result of Regulation No 1497/76 the applicant lost the right, which was valid until 11 July 1976, to obtain the monetary compensatory amounts in question at the rate fixed for the products under subheading 23.07 B I (c) 1. Furthermore, since the defendant has stated that Regulation No 1497/76 rather constitutes 'a measure comparable to the introduction or abolition of compensatory amounts', the question arises whether that regulation did not also affect the system of advance fixing, with the result that the applicant would also not have obtained the 'accession' compensatory amounts for the sum fixed

in the certificates applicable to exports of the compound provided for in the original contract carried out after 11 July 1976.

After making the foregoing submissions the applicant contests the argument put forward by the defendant that it does not satisfy the conditions which must be fulfilled if the liability of the Community is to be incurred. In particular, it maintains that:

— *As regards the first condition:*

The applicant concluded contracts of sale under private law which under the rule *pacta sunt servanda,* it was bound to respect. It could not therefore include in the contracts clauses relating to withdrawal or termination. Furthermore, as the applicant had obtained, subject to giving security, export licences fixing in advance the amount applying to its exports to the United Kingdom, the binding nature of the contracts concluded with the United Kingdom company was clearly established. No such possibility existed in relation to exports to Denmark but the absence of such licences cannot call into question the binding nature of the contracts concluded with the Danish companies, since the *pacta sunt servanda* rule is sufficient protection for that purpose.

— *As regards the second condition:*

As the compound in question was registered with the Federal Ministry of Food, Agriculture and Forestry in 1967 and has been offered for sale since then, it could not be regarded as unknown in the market. Therefore, the applicant could not have realized straight away that the legal situation existing since that date would come to an end after 10 July 1976.

Furthermore, it cannot be concluded from the 'special condition' contained in the contract of sale concluded on 20 May 1976 with DLG that, at the time in question, the applicant had foreseen the measures subsequently introduced by Regulation No 1497/76. That clause is a general precautionary clause and was prompted by the feeling, prevalent in business circles, that traders must be more and more prepared to adjust themselves to the sometimes serious and unforeseeable action taken by the Commission without regard for contracts which have already been concluded. Furthermore, the special condition in question only appears in the contract of 20 May 1976, so that it cannot be argued that when it concluded the other contracts which were drawn up well before that date the applicant could have foreseen the amendment to the law in force until 10 July 1976.

— *As regards the third condition:*

It was impossible either to negotiate or to impose clauses relating to withdrawal or other special circumstances on purchasers who had also entered into firm commitments for the marketing of animal feedingstuffs composed of certain specific ingredients. In that respect the special clause inserted into the contract of 20 May 1976 constitutes a belated exception.

— *As regards the fourth condition:*

It is therefore incorrect to maintain that the applicant should not have confidence in the continuance in force of the legislation applicable at that time. In particular it cannot be claimed that there was an overriding matter of public interest justifying the implementation of Regulation No 1497/76 without the adoption of adequate transitional measures.

The fact that the high monetary compensatory amount fixed for compound feedingstuffs was, in the defendant's opinion, no longer 'necessary' is not evidence of the vital reasons why the transitional period could not be extended beyond 15 days. First,

the fact that a measure is no longer necessary does not mean that it 'must' be abolished immediately or without the adoption of adequate transitional measures. Secondly, such an argument is valid in relation to the 'monetary' compensatory amounts but not in relation to the 'accession' compensatory amounts. Furthermore, the defendant has itself acknowledged that transitional provisions are necessary and possible (Article 3 of the regulation). It must prove specifically that a longer transitional period conflicted with an overriding public interest. To that end, it cannot claim that by reason of the allegedly simple method of manufacture of the goods there was a danger of the seeing 'considerable quantities of the product in question exported, on the basis of newly-concluded contracts, in order to benefit from the high compensatory amounts applicable'. On the contrary, the process of manufacture of the product is difficult and requires long preparation. The increase in exports of the applicant's product, which only occurred after June 1976, results from the fact that initial difficulties had to be overcome. It would also be interesting to have the defendant provide details of the number of other undertakings which have manufactured and exported the product; they would be found to be few in number.

Furthermore, there was nothing to prevent the defendant from adopting a regulation relating to existing contracts.

— *As regards the fifth and sixth conditions:*

The very fact that, as a result of the entry into force of Regulation No 1497/76, the applicant has suffered the losses alleged shows that the transitional period allowed by that regulation was insufficient to enable a prudent trader to avoid or to compensate for such losses.

The announcement which appeared in the 'Ernährungsdienst' was not the result of action taken by the Commission and, furthermore, was made so late that the applicant only became aware of the Commission's intentions on 22 June 1976.

In its *rejoinder,* the *defendant* replies that, even if it were true that the compound in question had been produced and marketed at an earlier period, nevertheless, whether or not produced in the form of pellets, it did not form part of intra-Community trade before 1 March 1976 and only after that date was it exported from the Federal Republic of Germany to the new Member States in increasing quantities. Before that date there was no demand for that compound in those States and the requirements for tapioca were satisfied by the supply of other compounds than the one in question here.

Furthermore, the arguments put forward by the Commission in relation to the product in question are not contradictory. The statement to the effect that the caking process is in no way unusual refers, of course, to the process generally used for the caking of compounds intended for animal feed and not specifically to the method of manufacture employed by the applicant.

From the description of it given by the applicant the manufacturing process involves two distinct stages: first, mixing the compound and, secondly, pressing it into cakes. Considered objectively both are rather simple. The difficulties referred to by the applicant are the result of the inexperience of the manufacturers who undertook that method of production for the first time. They are subjective rather than objective in nature and are likely to disappear after the initial period. The very fact that many other undertakings have manufactured the same product and exported more than 20 000 metric tons between March 1976 and 10 July 1976 shows that the process in question, considered objectively, was not as complicated as the applicant seeks to claim.

Furthermore, the applicant's argument that the extension of the time-limits agreed on with KFK was made necessary by the difficulties which arose during the initial period, only leads to the conclusion that the applicant had entered into its undertakings without even knowing whether the product agreed on could be manufactured without difficulty. Moreover, the applicant has provided no other more detailed information about the possibility of termination for which provision was so soon made with that purchaser. If the question of damages were really to arise the applicant would have to produce all the agreements made with KFK and DLG concerning deliveries of substitute products.

Having made the foregoing remarks the defendant observers that even after the entry into force of Regulation No 1497/76 the machinery for fixing the 'accession' compensatory amounts in advance, subject to giving security, made it possible for the products for which an export licence with advance fixing had been obtained without any possibility of modifying the compensatory amount fixed in advance. As the applicant had obtained, subject to giving security, the advance fixing of the 'accession' compensatory amount for its exports to the United Kingdom, it was covered against the risk of modification of that amount and thus could not suffer any loss by performing the relevant contracts as originally drawn up.

Furthermore, the 'monetary' compensatory amounts — which could not be fixed in advance — may only be applied at the time when the export (or import) of the goods actually takes place. Before that time the trader only has an expectation which, under certain circumstances, may be protected from interference on the part of the public authorities. Although it is true that the monetary compensatory amounts, for which there is no possibility of advance fixing, must be included among the factors inherent in a commercial transaction, nevertheless no guarantee is given as regards the continuance of the rules in force.

To return to the various conditions which, according to the case-law of the Court, must be satisfied before a claim for compensation is allowed, the defendant's main observations are:

— *As regards the first condition:*

As to the undertaking entered into with Spurnen, the fact that, for the exports to that undertaking, the applicant made use of the possibility of fixing the 'accession' compensatory amounts in advance subject to giving security allows the conclusion to be drawn that the applicant could not terminate those contracts without forfeiting the security given. Thus, as regards those contracts, the first condition may be regarded as satisfied.

As regards the contracts concluded with the Danish purchasers, the defendant does not question their real and binding nature on the pretext that no advance-fixing certificates exist for them. Nevertheless, clear proof must be given that the applicant was unable either to withdraw from the contracts or to terminate them and, furthermore, that it had been unable to include in them any clauses covering those matters. One might, on that point, imagine a clause such as that contained in the contract concluded on 20 May 1976 with DLG. Contrary to the argument put forward by the applicant the Commission considers that such a clause could in fact have been inserted into all the contracts concluded with the Danish purchasers. The applicant itself has admitted that the basis of all those contracts was its undertaking to deliver animal feed with a nutritional value of at least 950 Scandinavian units. The applicant maintains that the product originally agreed upon, composed of 90 % of tapioca and 10 % of molasses,

constituted 1 018 units of nutritional value.

Thus, pure tapioca — which may contain up to 3 % of molasses — could have constituted or even exceeded the nutritional value of 950 units. If that had not been so DLG would certainly not have accepted the clause relating to the possible delivery of pure tapioca.

— *As regards the second and third conditions:*

The considerations set out above concerning the 'artificial nature' of the product in dispute and the limited guarantee which the application of the monetary compensatory amounts could offer to a prudent trader also apply in this case. Furthermore, the special clause included in the contract of 20 May 1976 with DLG is not a mere general, precautionary measure. It shows that, even earlier, the applicant was not confident that the rules would remain in force. It could and should have taken steps earlier to adopt precautionary measures of that nature.

— *As regards the fourth condition:*

It is quite clear from the reasons set out above that the rules in dispute were adopted in the public interest: the compensatory amounts are only provided for (see Regulation No 974/71) in so far as they are necessary to avoid disturbances in the exchange markets as a result of fluctuations in the rates of exchange. The public interest requires that the financial resources of the community only be used to the extent necessary to attain the desired lawful objective. In this instance, the conditions laid down by the basic Regulation No 974/71 for the application of the monetary compensatory amounts are not fulfilled. The use to which the compound in question, which was composed almost exclusively of tapioca, was to be put was substantially the same as that of its basic product for which, according to the criteria laid down in that regulation, it was unnecessary to apply the monetary compensatory amounts during the period in question. It was thus inevitable that the two products should be assimilated.

Furthermore, it must not be forgotten that, in principle, rules adopted in the general interest take immediate effect, even as regards situations which arose under the earlier law. The fact that such rules conflict with a personal interest in the continuance in force of the earlier law does not imply that that interest must in all cases be protected. Rather is it necessary to weigh up the public and private interests in order to decide whether, for each measure, the private interest merits protection.

That is not the case in this instance since the applicant, as well as the other interested parties, could have foreseen a change in the existing situation.

The fact that the Commission fixed a time-limit for the entry into force of the regulation, without being under any legal obligation to weigh up and assess the interests at stake, does not imply any tacit acknowledgement of a personal interest worthy of legal protection.

The Commission has already given its opinion in its defence on the secondary question whether the transitional measure adopted was adequate. In addition, the fact that more than 20 000 metric tons of the same product were exported from Germany between March and 10 July 1976 by other undertakings which were in a position comparable to the applicant's was evidence that considerable quantities of the product were manufactured and that an important pattern of trade was clearly developing with the new Member States. It was therefore to be feared that new contracts would be concluded for even larger deliveries and that the quantities already ordered would be exported in a short time.

Finally, as regards the argument relating to the 'regulation concerning existing contracts', it must not be forgotten that a regulation of that nature would have had to be drawn up on the basis of general criteria and that its application would not have been limited to the case of the applicant. For that reason achievement of the aim pursued by the rules in dispute would in all probability have been frustrated.

— *As regards the fifth and sixth conditions:*

Regulation No 1497/76 was not adopted with immediate effect. The transitional period provided for enabled a prudent trader to take the necessary measures. In that respect it is also observed that there was no obligation on the Commission to adopt transitional measures.

IV — Oral procedure

The parties presented oral argument at the hearing on 26 April 1976.

During the hearing the Commission contended that if the Court were to acknowledge the existence of liability on the part of the Commission the costs should be reserved until judgment be given on the extent of the loss to be compensated.

The Advocate General delivered his opinion at the hearing on 18 May 1976.

Decision

1 The application, which was lodged on 8 October 1976, seeks an order for the payment of damages by the European Economic Community in compensation for the injury which the applicant claims to have suffered as a result of Commission Regulation No 1497/76 of 23 June 1976, which came into force on 11 July 1976 (OJ 1976, No L 167, p. 27), the effect of which was to modify certain compensatory amounts.

2 In support of the application the applicant maintains that as a result of the modification it was prevented from performing in full contracts of sale, entered into before the entry into force of the regulation, for the delivery to two Danish companies and to one English company of products under tariff subheading 23.07 B I (c) 1 containing more than 50 % by weight of tapioca.

As the monetary compensatory amounts and the accession compensatory amounts provided for in respect of deliveries of the products in question were modified by Regulation No 1497/76, the applicant had to limit the loss resulting from that modification by undertaking to deliver alternative products under more onerous conditions in return for partial termination of the original contracts.

By omitting to provide in the regulations for adequate transitional measures to protect the legitimate expectations of the traders concerned, without the omission being justified by an overriding matter of public interest, the Commission flagrantly violated a superior rule of law, thus incurring the liability of the Community under the second paragraph of Article 215 of the EEC Treaty.

3 Article 1 of Regulation No 1497/76 provides that 'for products falling within subheading 23.07 B I (c) 1 ... of the Common Customs Tariff, containing more than 50 % by weight of products falling within heading No 07.06 ... thereof the accession compensatory amounts or monetary compensatory amounts shall be those applicable to products falling within subheading 07.06 A thereof'.

Tariff subheading 23.07 B I (c) 1 of the Common Customs Tariff refers to sweetened forage and other preparations of a kind used in animal feeding 'containing more than 30 % by weight of starch' and 'less than 10 % by weight of [milk] products.'

Tariff heading No 07.06 refers, *inter alia,* to a group of nutritious roots and tubers 'with high starch content', most of which are classified under tariff subheading 07.06 A.

On the entry into force of Regulation No 1497/76 there were no monetary compensatory amounts applicable to the products under tariff subheading 07.06 A and the accession compensatory amounts applicable to trade with the United Kingdom were less than those applicable to products covered by subheading 23.07 B I (c) 1.

Thus, as regards the products falling within subheading 23.07 B I (c) 1, which are referred to in Article 1, the effect of Regulation No 1497/76, which was intended to improve the functioning of the system of compensatory amounts in agriculture, was to abolish the monetary compensatory amounts and to reduce the accession compensatory amounts applicable to trade with the United Kingdom. There was at that time no provision for the application of any amount to trade in those products with Denmark.

4 As regards in particular the accession compensatory amounts applicable to trade with the United Kingdom, a system of advance-fixing had been introduced by the Community rules in force at that time for the products falling within subheading 23.07 B I (c) 1.

The applicant has stated that it obtained, subject to giving security, export licences fixing in advance the amount applicable to those exports.

Since Regulation No 1497/76 contains no provisions which adversely affects the above-mentioned system of advance fixing, the modification of the accession compensatory amounts could not in this instance have affected the right of the applicant to export its product to the United Kingdom on the basis of the amount fixed in advance and, thus, could not be regarded as the action giving rise to the loss which it claims to have suffered as a result of that regulation.

The defendant has expressly acknowledged that as a result of the system of advance fixing the applicant eliminated the risk of a modification of the accession compensatory amounts applying to its exports to the United Kingdom.

In those circumstances, the question of the possible liability of the Commission can only arise in this instance in relation to the abolition, as a result of Regulation No 1497/76, of the monetary compensatory amounts which, under the Community rules in force at the time, could not be fixed in advance.

It is appropriate to consider the legal basis for the application in the light of the foregoing limit on its subject matter.

5 The system of compensatory amounts introduced by Regulation No 974/71 of the Council of 12 May 1971 (OJ, English Special Edition 1971 (I), p. 257) is intended principally to safeguard the level of prices in the Member States concerned against the disturbances which might be caused by monetary instability and might jeopardize a normal trend of business in agriculture.

The aim of the system of compensatory amounts is, in particular, to obviate the difficulties which monetary instability may create for the proper functioning of the common organizations of the market, rather than to protect the individual interests of traders.

In that regard, Article 6 of Regulation No 974/71, to which reference is made by Regulation No 1497/76, empowers the Commission to act in accordance with a specific procedure to fix not only the compensatory amounts but also the detailed rules for the application of the regulation, including those 'which may include other derogations from the regulations on the common agricultural policy'.

Thus, Regulation No 1497/76, which was introduced within the context of that power, is a legislative measure adopted by the Community in the area of economic policy in the higher interest of the proper functioning of such market organizations.

In those circumstances, although the possibility of protecting the legitimate interests of the trader cannot be excluded, nevertheless the Community could only be rendered liable for the damage suffered by such traders as a result of the adoption of legislative measures governing the above system if in the absence of any overriding public interest the Commission were to abolish or modify the compensatory amounts applicable in a specific sector with immediate effect and without warning and in the absence of any appropriate transitional measures and if such abolition or modification was not foreseeable by a prudent trader.

6 It is clear that in this instance the regulation at issue did not take effect immediately and without warning, since its entry into force had been fixed for the fifteenth day after its publication in the Official Journal of the European Communities.

Furthermore, the file shows that an announcement in the 'Ernährungsdienst' of 19 June 1976 informed the interested parties that the Commission was intending to adopt a regulation to subject to the same tariff classification as tapioca any product composed of more than 50 % of tapioca.

The applicant acknowledges that it became aware of that announcement on 22 June 1976.

7 In the light of those circumstances the Commission cannot be said to have adopted the measure in dispute with immediate effect and without warning in violation of the principle of the protection of the legitimate expectation of the parties concerned.

It is also unjustified to allege that the Commission failed to adopt appropriate transitional measures to accompany the entry into force of the regulation at issue, enabling the interested parties and in particular the applicant to avoid the risk of an unforeseeable modification of the compensatory amounts.

On that point the applicant maintains that the Commission could at least have authorized performance in full of the contracts concluded finally and

irrevocably before the entry into force of the regulation or before the trader became aware of the proposals for its adoption.

8 In the present case the 'respect for existing contracts' referred to by the applicant would amount to granting to the contracts concluded a guarantee equivalent to that which they normally obtain from fixing the compensatory amount in advance.

The Community rules on monetary compensatory amounts applicable here made no provision for such amounts to be fixed in advance.

Although in certain cases concerning monetary compensatory amounts which cannot be fixed in advance the Commission has made provision for transitional measures out of a desire to respect existing contracts, nevertheless, the cases in which such measures have been adopted differ widely from the present and relate, in particular to cases in which the compensatory amounts in question were levied rather than granted on imports and exports and thus constituted an increased burden on the trader.

9 At all events, the adoption of transitional measures on the basis of the principle referred to by the applicant could only have been envisaged by the Commission if it appeared that the modification of the monetary compensatory amounts in question could not have been foreseen by a prudent trader.

On the other hand, the very fact that the regulation relating to those amounts had not provided for them to be fixed in advance, although that possibility existed in relation to the accession compensatory amounts, should have warned a prudent trader that the Commission intended the system of monetary compensatory amounts to be very flexible.

Thus, in the light of the structure of the Community rules applicable and taking into account the nature and aims of the machinery for monetary compensatory amounts, in particular, where such amounts are granted rather than levied on exports, it seems impossible that a modification of the monetary compensatory amounts could be regarded as unforeseeable by a prudent trader.

That such a modification was not unforeseeable in this instance is all the more clear from the express provision for it in the contract concluded by the applicant on 20 May 1976 with the Danish company DLG in which the vendor reserved the right to supply a similar product should the monetary

compensatory amounts in force when the contract was concluded be modified or abolished.

10 In fact, as the product in dispute contains 90 % of tapioca and 10 % of molasses it could, even before the entry into force of Regulation No 1497/76, have been defined as having a 'high starch content' and therefore have been classified under subheading 07.06 A, which refers to precisely that type of product.

The possibility of the monetary compensatory amounts applicable to products falling within subheading 07.06 A being applied to such a compound could still less be ruled out since, according to information provided by the Commission and not contested by the applicant, as a result of the difference existing between the compensatory amounts applying to each category of product exports of the compound in question were tending more and more to replace exports of the basic product.

11 The result of all the foregoing is that the conditions fixed for the entry into force of Regulation No 1497/76 do not amount to a flagrant violation of a superior rule of law for the protection of the individual sufficient to incur the liability of the Community under the second paragraph of Article 215 of the Treaty.

The application must therefore be dismissed as unfounded.

Costs

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

The applicant has failed in its submissions.

On those grounds,

THE COURT

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 8 June 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL MAYRAS DELIVERED ON 18 MAY 1977 [1]

Mr President,
Members of the Court,

In February, March, April and May 1976 the Kommanditgesellschaft in Firma Merkur, Hamburg, concluded a certain number of contracts by which it undertook to sell to certain Danish companies and one United Kingdom company considerable quantities of 'pellets of tapioca containing added molasses', for which it obtained from the competent German authorities on 28 April 1976 a notice classifying the goods in question under tariff subheading 23.07 B I (c) 1 (sweetened forage containing more than 30 % by weight of starch and no milk products). That certificate did not in itself entitle the applicant to any right to an export refund.

Manioc, the product which is used in the manufacture of tapioca, falls within heading No 07.06 when it is in root form and heading No 11.06 when it is in the form of flour.

The products listed under the headings Nos 07.06 and 11.06 and subheading 23.07 B I (c) 1 are governed by the common organization of the market in cereals (processed cereal-based products).

As you are aware, on 12 May 1971 the Council adopted Regulation No 974/71 authorizing the Member States which, for the purposes of commercial transactions, allow the exchange rate of their currencies to fluctuate 'temporarily' by a margin wider than that permitted by the International Monetary Fund, to charge on imports from Member States and third countries and to grant on exports to Member States and third countries compensatory amounts on certain specific agricultural products under conditions fixed by that regulation. This is known as the system of 'monetary compensatory amounts'.

The detailed rules for the application of Regulation No 974/71 were fixed for the first time by Regulation No 1013/71 of

1 — Translated from the French.