On those grounds,

THE COURT,

hereby:

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

2. **Orders the applicants to pay the costs of the applications;**

3. **Orders the intervener to pay the costs of the intervention.**

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 18 January 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 13 DECEMBER 1978

My Lords,

These actions are brought under Article 173 of the EEC Treaty by the seven undertakings that produce sugar in Guadeloupe and Martinique. In each action the Applicant claims a declaration that Council Regulation (EEC) No 298/78 of 13 February 1978 is void. The Applicants' trade association, the Syndicat Général des Producteurs de Sucre et de Rhum des Antilles Françaises, has intervened in support of the actions.

The Council having taken, by way of preliminary objection under Article 91 of the Rules of Procedure of the Court, the point that the actions are inadmissible, the Court decided to hear argument limited to that point. This it did on 30 November 1978. It is accordingly to that point that I confine myself now.

Your Lordships are familiar with the common organization of the market in sugar, which now rests on Council Regulation (EEC) No 3330/74 of 19 December 1974 (OJ No L 359 of 31. 12. 1974), and in particular with the quota arrangements prescribed by Article 23 *et seq.* of that Regulation.

Article 23 provides that those arrangements are to apply in the marketing years 1975/76 to 1979/80 inclusive.

Article 24 (1) provides that Member States shall allot a "basic quota" to each undertaking that used its basic quota during the 1974/75 marketing year. The English text of Article 24 (1) in fact says "used up", thereby suggesting that an undertaking is entitled to no quota for any of the years 1975/76 to 1979/80 unless it exhausted its basic quota in 1974/75. It is clear, however, from a consideration of the texts in the other five languages, and of the recitals and provisions of the Regulation taken as a whole, that the English text is in that respect wrongly worded. An undertaking's right to a basic quota for any year is not dependent on its having used the whole of its basic quota for 1974/75. The point is of some importance in this case, since it is alleged by the Council and not denied by the Applicants that none of the Applicants has ever, since before 1974/75, produced more than a fraction of its basic quota.

Article 24 (2) prescribes the manner in which the Member States are to make the allocation provided for by Article 24 (1). The method, shortly stated, is this. There is allotted to each Member State, by the last subparagraph of Article 24 (2), a "basic quantity". In the case of France the basic quantity is 2 996 000 metric tons, which is divided into two parts: 2 530 000 metric tons for Metropolitan France and 446 000 metric tons for the French Overseas Départements. The first subparagraph of Article 24 (2) lays down a formula by which each Member State is to divide its basic quantity, or the part of it allotted to each of its regions, between the undertakings situate in the State, or in that region, by reference to the output of each of them during the years 1968/69 to 1972/73. That formula is such as to confer no discretion at all on a Member State. Its operation is however expressed to be without prejudice to certain provisions, which are these:

(a) The second subparagraph of Article 24 (2) provides that where the reference output of an undertaking is less than its basic quota for 1974/75, the latter shall be used instead of the former in operating the formula;

(b) The third subparagraph confers on Member States a limited discretion to depart from the formula in certain defined circumstances;

(c) Article 24 (3) — which is of crucial importance in this case — provides that:

"The Council, acting by a qualified majority on a proposal from the Commission, shall adopt the general rules for the application of this Article and any derogations thereform."

(d) Finally, Article 24 (4) provides that any detailed rules necessary for the application of Article 24 may be adopted in accordance with the "Management Committee procedure".

I need hardly remind Your Lordships that sugar produced within an undertaking's basic quota, commonly called "A" sugar, is entitled to the full benefit of the price support mechanisms provided for by the Regulation, notably reimbursement of storage costs (Article 8), intervention buying (Article 9) and export refunds (Article 19).

By virtue of Article 25, each undertaking for which a basic quota has been fixed may be allotted a "maximum quota" equal to its basic quota multiplied by a coefficient which is fixed annually by the Council. Sugar produced by an undertaking outside its basic quota but within its maximum quota, "B" sugar, is also entitled to the full benefit of the price support mechanisms, but is, by virtue of Article 27, subject to a production levy.

By virtue of Article 26, sugar produced by an undertaking outside its maximum quota, "C" sugar, is entitled to no price support and may not be disposed of on the internal market. It must be exported from the Community without benefit of refund.

On the same day as it adopted Regulation No 3330/74 the Council adopted also Regulation (EEC) No 3331/74 "on the allocation and alteration of the basic quotas for sugar" (OJ No L 359 of 31. 12. 1974). This the Council did under Article 24 (3) of Regulation No 3330/74, so that it could have done it on the basis simply of a proposal from the Commission. However the Council did have, in addition, the benefit of an Opinion of the European Parliament and of an Opinion of the Economic and Social Committee.

The greater part of Regulation No 3331/74 is concerned with the consequences, in relation to basic quotas, of such events as mergers of undertakings, transfers between undertakings and closures of undertakings. The Regulation, however, also confers on Member States power, "in order to take account of any changes in the structure of the sugar industry or beet-growing sector" to "reduce the basic quota of each undertaking by a total amount which does not exceed, for the whole period from 1 July 1975 to 30 June 1980, 5% of the original basic quota allocated to each of them for the 1975/76 marketing year" — see the third recital and Article 2 (1). Article 2 (1) goes on to provide that "Member States shall allocate the quantity deducted to one or more other undertakings". Article 2 (2) confers a special power on the Italian Republic to alter the basic quotas of undertakings within its territory in so far as is necessary for the implementation of restructuring plans submitted to the Commission.

Regulation No 298/78 (OJ No L 45 of 16. 2. 1978), of which the Applicants wish to challenge the validity in these actions, was adopted by the Council, so far as is relevant under Article 24 (3) of

Regulation No 3330/74, on a proposal from the Commission, without any Opinion of the European Parliament or of the Economic and Social Committee. It recites that:

"... since the common organization of the market in sugar entered into force, production in the French departments of Guadeloupe and Martinique has never reached the amount of the basic quotas allocated to the undertakings established in these departments and the area under sugar cane has actually declined on Martinique; ... the production outlook does not indicate any change in this situation for most of the undertakings concerned;

... in the French department of Réunion, the area given over to sugar cane could be extended; ... the only alternative crop, that of the geranium, is in steady decline and the outlook for it is poor;

... in the department of Réunion, sugar cane is grown by approximately 15 000 planters working small areas; ... therefore, the possibility of extending these areas should be taken up so that these planters can enjoy a more equitable income; ... the planters' incomes cannot be improved unless the basic quotas of the sugar undertakings for which they produce are increased;

... therefore, it should be made possible for Réunion to be allocated a part of the French Republic's basic quantity assigned by Regulation (EEC) No 3330/74 to its overseas departments which is not used up in Guadeloupe and Martinique; an increase should therefore be authorized in the percentage limit up to which the French Republic may modify the basic quotas for the undertakings established in its overseas departments; ... this will require an amendment to Council Regulation (EEC) No 3331/74 ..."

The operative part of the Regulation consists of two Articles.

Article 1 adds or purports to add to Article 2 of Regulation No 3331/74 a new paragraph 3 the essential terms of which are these:

"By way of derogation from the first, second and third subparagraphs of Article 24 (2) of Regulation (EEC) No 3330/74 and paragraph 1 of this Article, the French Republic may, under the plans for restructuring the sugar-cane and sugar sectors in its overseas departments, reduce the basic quota for each undertaking established in these departments by a quantity not exceeding, for the entire period 1 July 1977 to 30 June 1980, 10% of the basic quota applicable to each undertaking during the 1976/77 sugar marketing year.

...

The French Republic shall allocate the amended quotas ...

The restructuring plans and the resultant measures affecting the basic quotas shall be communicated forthwith to the Commission."

Article 2 merely prescribes the date when the Regulation is to come into force and the date (1 July 1977) with effect from which it is to apply.

In these actions, the Applicants challenge the validity of that Regulation on two grounds.

First they contend that the Regulation is incompatible with Regulations No 3330/74 and No 3331/74. In support of that contention they argue that Article 24 (2) of Regulation No 3330/74

established the principle that basic quotas should be fixed for a period of 5 years. The extent to which derogation from that principle was to be allowed was determined by the Council by Regulation No 3331/74. So far as here relevant a Member State was permitted to reduce an undertaking's basic quota by up to 5% for the whole 5-year period. The Council had no power, say the Applicants, subsequently to increase the percentage to 10%.

Secondly the Applicants contend that Regulation No 298/78 is incompatible with paragraph 3 of Article 40 of the Treaty which forbids discrimination between producers within the Community. The Regulation, they say, singles them out as the only producers of sugar within the Community who, leaving aside the special position of Italian producers, are to be liable to have their basic quotas reduced by more than 5%. Having regard to the recitals in the Regulation, it must in particular be taken to create discrimination between themselves and producers in the Réunion.

The Council submits that the actions are inadmissible because the Regulation does not constitute a decision of direct and individual concern to the Applicants, within the meaning of Article 173.

Such a submission theoretically gives rise to three questions:

1. Does the act of which the validity is challenged, " although in the form of a regulation", in truth constitute a decision?

2. If so, is it a decision of direct concern to those challenging it?

3. If so, is it a decision of individual concern to them?

The first question has not in this case loomed large in the arguments of the parties. They have concentrated on the second and third questions, on the footing, I imagine, that, from correct answers to them would follow a correct answer to the first question.

The Council has gone so far as to say that Regulation No 298/78 concerns the Applicants neither directly nor individually. That, it seems to me, cannot be right. The Applicants form part of a fixed and identified class of traders, namely those producers of sugar in the French Overseas Départements who, having used their basic quotas in 1974/75, were allotted quotas for the five subsequent years. There is ample authority in this Court to the effect that, where an act of a Community Institution affects such a closed class differently from all other persons, it is of "individual concern" to each member of it. I reviewed the earlier authorities to that effect in my Opinion in Case 100/74 *CAM* v *Commission* [1975] 2 ECR at pp. 1406 et seq. Since then there have been the Judgments of the Court in that case itself (see in particular paragraphs 15 to 19) and in Case 88/76 *Société pour l'Exportation des Sucres* v *Commission* [1977] ECR 709 (see in particular paragraphs 10 and 11). Such a class must be distinguished from a category of persons, the identity of those within which at a given moment may be susceptible of more or less precise determination, but which is defined in a

general way so as to include, for instance, anyone engaging in a particular trade.

The Council is in my opinion on firmer ground when it argues that Regulation No 298/78 is not of "direct" concern to the Applicants, because all it does is to confer a discretion on the French Republic. There again the authorities in this Court are clear and consistent. Where an act of a Community Institution does not itself have an immediate effect on a person's rights, but merely empowers a Member State to take action that may have such an effect, it is not the act of the Community Institution, but the action, if any, of the Member State, that may be of direct concern to that person; and that action is open to challenge, if at all, in the appropriate national Court, not in this Court under Article 173 — though of course the validity of the Community act may be questioned on a reference from the national Court under Article 177. On this point also the earlier authorities are collected in my Opinion in the *CAM* case, since which their effect has been confirmed by the Judgment in Case 123/77 *UNICME* v *Council* [1978] ECR 845, on which the Council rightly, in my opinion, relies.

Two decisions of this Court, namely those in Cases 106 & 107/63 the first *Toepfer* case [1965] 1 ECR 405 and in Case 62/70 the *Bock* case [1971] 2 ECR 897 establish the existence of an apparent exception to that principle. They show that, in certain circumstances, an act of a Community Institution which, on the face of it, does no more than confer a discretion on a Member State, may be regarded as nevertheless of direct concern to a person affected, if at the time when the act was adopted it was a foregone conclusion how the Member State would exercise the discretion. No doubt with those authorities in mind, Counsel for the Applicants told us at the hearing that, if certain correspondance (which is not in evidence) between the French Government and the Commission were examined, it would be found that Regulation No 298/78 had been adopted at the French Government's request. He told us also that the discretion conferred on the French Republic by the Regulation had been exercised by means of an Arrêté of which the Applicants had been notified in August 1978. I confess that what he told us did not seem to me to be enough to bring the present case within the exception. But, in any event, I am of opinion that the Court must adhere to the well established rule that it cannot take notice of issues raised for the first time at the hearing, particularly in the absence of the evidence necessary for their determination.

By their pleadings, the Applicants sought to escape from the conclusion that the Regulation was not of direct concern to them and that their actions were therefore inadmissible, in three ways.

First they took a procedural point. They submitted that the Council's interlocutory application under Article 91 of the Rules of Procedure was itself inadmissible because the Council had therein not only raised the question of the admissibility of the actions but also broached, albeit succintly, matters relating to the substance of their case. As

to that I think I need say only that, in my opinion, an application under Article 91 is not invalidated if it goes into matters of substance — though, no doubt, if it does so at excessive length, the party making it may be penalized in costs.

Secondly the Applicants sought to distinguish the *UNICME* case on the ground that the applicants there were not a closed class. That is undoubtedly true, and it means that the *UNICME* case is distinguishable on the question of "individual concern"; but it does not affect the relevance of that authority on the question of "direct concern".

Thirdly the Applicants submitted that Regulation No 298/78 was of direct concern to them because its immediate effect (if it were valid) would be to take away from each of them the "right" not to have its basic quota reduced by more than 5% for the whole period from 1 July 1975 to 30 June 1980. The discretion purportedly conferred on the Government of the French Republic by the Regulation would constitute, they said, an impairment of the "right".

In connexion with that third submission the Applicants put forward two subsidiary arguments.

One was that the submission, resting as it did on the proposition that each producer of sugar in the Community has, under the combined effect of Regulations No 3330/74 and No 3331/74, a "right" not to have his basic quota reduced by more than 5%, was so "intimately linked" with the substance of the case that the question of the admissibility of their actions ought not to be resolved on an interlocutory application.

As to that, I think it enough to say that, in my opinion, an applicant in an action before this Court cannot, by dint of basing on the same proposition an argument going to the admissibility of that action and an argument going to its substance, preclude the Court from considering the question of its admissibility as a preliminary point under Article 91 of the Rules.

The Applicants' second subsidiary argument was that the "right" of each of them not to have its basic quota reduced by more than 5% was an asset of its business which it was entitled to show in its balance sheet. Indeed the Applicants put in a report by the Société d'Expertise Comptable Fiduciaire de France in which it is said that it is the practice of sugar manufacturers to include the value of their basic quotas in their balance sheets, and an example is given of an issue of shares that was made by one of the Applicants in consideration of the transfer to it of assets that included such quotas.

It seems to me obvious, however, that an undertaking cannot rely on the way in which its balance sheet is drawn up, even though it be so drawn up on the advice of accountants, as evincing the rights to which it is entitled under Community legislation. The ascertainment of those rights is a matter of law, not of accountancy.

So the real question is whether the Applicants are correct in submitting that, by the combined effect of Regulations No 3330/74 and No 3331/74, there was conferred on them a right not to have their basic quotas reduced by more than

5% during the period 1 July 1975 to 30 June 1980.

The Applicants do not deny, of course, that, by Article 24 (3) of Regulation No 3330/74, the Council retained for itself, acting by a qualified majority on a proposal from the Commission, power to enact derogations from the previous provisions of that Article. What, as I understand it, the Applicants say is that the Council could only exercise that power once for all: having exercised it by Regulation No 3331/74, the Council was precluded from ever exercising it again during the currency of Regulation No 3330/74.

I can for my part see no reason for interpreting Article 24 (3) so restrictively. I do not overlook that, in his Opinion in Cases 103, 125 and 145/77 *Royal Scholten-Honig (Holdings) Ltd. and others* v *Intervention Board for Agricultural Produce and another* (20 June 1978, not yet reported), Mr Advocate General Reischl expressed the view, *passim,* that the rules relating to quotas in the common organization of the market in sugar, which were to remain in force until 1980, had established "rights". He qualified this, however, by the use of the phrase "in a certain sense". Moreover, it does not appear to me, from a reading of his Opinion as a whole, that he had in mind the specific question that is raised in the present case.

The power of the Council under Article 24 (3) is no doubt circumscribed, inasmuch as it is subject to the general principles of Community law that exist to ensure that discretions vested in Community Institutions are not exercised arbitrarily or unfairly. But, as I have said, I can see no reason for holding that it is not a continuing power.

At the hearing Counsel for the Applicants submitted that, if Regulations No 3330/74 and No 3331/74 did not confer vested rights on the Applicants, those Regulations did at least give the Applicants legitimate expectations, which Regulation No 298/78 disappointed. I do not think that that is so, but there again the point was not pleaded and the Court cannot, in my opinion, take cognizance of it.

For those reasons, and without entering into the question whether Regulation No 298/78 could, in any case, be regarded as constituting a "decision", I conclude that the Applicants' arguments should be rejected and that these actions should be dismissed as being inadmissible. If Your Lordships share my opinion, it will be appropriate, I think, to order the Intervener to bear the costs occasioned by its intervention and the Applicants to bear the remaining costs — see Case 26/76 *Metro* v *Commission [1977]* ECR *1875.*