JUDGMENT OF THE COURT (FIFTH CHAMBER)
27 NOVEMBER 1984 [1]

Agricola Commerciale Olio Srl and Others v Commission of the European Communities

(Olive oil)

Case 232/81

1. *Application for annulment — Natural or legal persons — Measures of direct and individual concern to them — Regulation preventing the carrying out of contracts of sale concluded between a national intervention agency and undertakings submitting tenders*

   (EEC Treaty, Art. 173, second paragraph)

2. *Agriculture — Common organization of the markets — Oils and fats — Offer for sale of stocks held by a national intervention agency — Conditions fixed by Commission extremely favourable to purchasers — Calling into question of contracts of sale already concluded — Not permissible*

   (Commission Regulations Nos 71, 2238 and 2239/81)

1. A regulation the purpose of which is to prevent the carrying out of contracts of sale concluded between a national intervention agency and undertakings submitting tenders when the legal position of the parties has already been definitively determined is of direct and individual concern to those undertakings.

2. The mere fact that the conditions on which the Commission permitted the sale of stocks of olive oil held by a national intervention agency proved to be extremely favourable to the purchasers does not entitle the Commission to prevent the agency from carrying out the contracts which had been concluded in accordance with the said conditions.

In Case 232/81

AGRICOLA COMMERCIALE OLIO SRL, whose registered office is at Ostuni,

ASTOLIO SRL, whose registered office is at Ostuni,

1 — Language of the Case: Italian.

AZIENDA AGRICOLA BELLARIA SPA, whose registered office is at Trecate,

ITALIANA OLII E RISI SPA, whose registered office is at Aprilia,

S. GIORGIO SEZIONE AGRICOLTURA SPA, whose registered office is at Pomezia,

represented and assisted by Giuseppe Celona, Giovanni B. Compagno, Giuseppe Guarino and Paolo Tabellini, Avvocati, with an address for service in Luxembourg at the Chambers of Georges Margue, 20 Rue Philippe-II,

applicants,

v

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Peter Karpenstein, Legal Adviser of the Commission, acting as Agent, assisted by Guido Berardis, a member of the Commission's Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION pursuant to Article 173 of the EEC Treaty for a declaration that Commission Regulations (EEC) Nos 2238 and 2239/81 of 3 August 1981 (Official Journal, L 218, pp. 27 and 28) are void,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case the course of the procedure, the conclusions and the submissions and arguments of the parties may be summarized as follows:

I — Facts

By Regulation No 71/81 of 12 January 1981 (Official Journal L 11, p. 5) the Commission decided that the Italian intervention agency, Azienda di Stato per gli Interventi sul Mercato Agricolo (hereinafter referred to as "AIMA"), should put up for sale some 33 000 tonnes of virgin olive oil from intervention purchases made during the 1977/78 olive marketing year.

The oil had been put up for sale by tender as extra virgin olive oil on several occasions but had not been sold. The Commission was of the opinion that the market situation on 12 January 1981 appeared to be suitable for offering the oil for sale again.

The oil was put up for sale in six lots of about 5 500 tonnes each (Article 2) and the selling price was fixed at LIT 210 000 per 100 kg (Article 4).

On 2 February 1981, the first day on which the applications to purchase could be submitted, 60 undertakings made offers, each for the total six lots of 5 500 tonnes.

Regulation No 71/81 provided that in such circumstances lots should be drawn (second paragraph of Article 6 (1)). The drawing of lots did not take place immediately. Certain undertakings contested the admissibility of the applications submitted by other companies, in particular those which had been formed specially for the purpose of taking part in the sale.

The Commission agreed to suspend the sale until such time as the necessary verifications had been carried out. The lots were not drawn until 1 June 1981, when the five applicants in this case and the applicant in Case 264/81, Savma, were each allocated one lot.

On 3 August 1981, the Commission adopted Regulation No 2238/81 (Official Journal L 218 p. 27) which repealed Regulation No 71/81 with effect from 13 January 1981. In the preamble to Regulation No 2238/81 the Commission declared that as a result of the delay in carrying out the sale caused by consideration of the above-mentioned complaints, conditions on the olive oil market had altered so that to make the sale on the conditions originally laid down would result in serious disturbance on the market. The Commission considered accordingly that it was necessary to cancel the sale in the overriding general interest.

On the same day, the Commission adopted Regulation No 2239/81 (Official Journal L 218, p. 28) reopening the sale by tender of the same quantity of olive oil held by the Italian intervention agency. That sale was restricted to the six undertakings

designated by the drawing of lots (Article 3). However, the sale was no longer to take place at a fixed price but on the basis of the best tender received and on condition that the price offered was at least equal to the minimum selling price to be fixed not later than 31 August 1981 in accordance with the procedure set out in Article 38 of Regulation No 136/66, on the basis of the tenders received (Article 6). Applications to purchase had to be submitted not later than 24 August 1981 at 2 p.m. (local time) (Article 4). Withdrawal of the oil was to begin on 15 September 1981 and the purchaser was required to withdraw, in each period of 30 days, at least 10% and at most 20% of the purchased quantity (Article 9).

II — Written procedure and measures of inquiry

By an application lodged at the Court Registry on 10 August 1981, the applicants brought the present action pursuant to Article 173 of the EEC Treaty for a declaration that Regulations Nos 2238 and 2239/81 are void.

By application under Article 83 of the Rules of Procedure of the Court of Justice, the applicants also sought to have the operation of the said regulations suspended. By application of 19 August 1981 Savma SpA applied for leave to intervene in the application for the adoption of interim measures in support of the defendant's conclusions. Leave to intervene was granted by order of the President dated 20 August 1981.

On 21 August 1981 the President made an order partially suspending application of Article 10 of Regulation No 2239/81. The applicants who participated in the new sale by tender were required to pay only the amount which they would have had to pay under the terms of the sale undertaken pursuant to Regulation No 71/81. Payment of the remainder was suspended until the Court gave judgment in the main action.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the procedure without any preparatory inquiry. However, it invited the Commission to reply to certain questions and to furnish some information.

The Commission replied to those questions and furnished the information in a letter of 15 June 1982.

In the light of those replies, the Court decided to order a preparatory inquiry to be carried out by the Third Chamber. The Chamber asked the parties to provide it with the names of witnesses best placed to inform it about the state of the olive oil market in Italy in 1981. It invited the applicants to comment on the Commission's replies to the questions put to it by the Court.

The Chamber also put certain questions to the Italian Government pursuant to Article 21 of the Protocol on the Statute of the Court of Justice.

The applicants commented on the information suplied by the Commission in a letter received by the Court on 20 October 1982.

The Chamber then requested the Italian Central Statistics Institute for information pursuant to Article 21 of the Protocol on the Statute of the Court of Justice, and sent a second series of questions to the Commission.

On 19 May 1983 the Third Chamber heard evidence from Mario Guida, Secretary-General of Fedoliva (European

Federation of Olive Oil Industries) and Director-General of Assitol (Italian Association of Olive Oil Industries).

After closure of the preparatory inquiry, and after hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to assign the case for judgment to the Fifth Chamber.

III — Conclusions of the parties

The *applicants* claim that the Court should:

1. Declare the action admissible and well-founded;

2. Declare void Regulations Nos 2238 and 2239/81;

3. Order the defendant to pay the costs.

The *Commission* contends that the Court should:

1. Declare the action inadmissible or dismiss it as unfounded;

2. Order the applicants to pay the costs.

IV — Submissions and arguments of the parties

1. Admissibility

The *Commission* expresses serious doubts as to the admissibility of the application. Regulation No 2239/81 repealed Regulation No 71/81, which was a regulation in the proper sense of the term. Regulation No 2238/81 is a management measure relating to the olive oil market which takes no special account of the relatively few traders who might consider themselves directly concerned. Moreover, the applicants did not acquire individual rights and the traders who were excluded from the sale brought proceedings before the national courts, which shows that the Commission's action affected a much wider group of persons than the applicants.

Since the Commission is convinced that its action is well founded from the economic and legal points of view, it does not wish to insist on this aspect of the case which is a procedural matter and which the Commission submits for the Court's consideration.

The *applicants* contest the objection raised by the Commission. They contend that the two regulations at issue are in fact decisions. The content of Regulation No 2238/81 is general and abstract only in appearance. In fact, it was an act of authority whose content was specific and concrete and which was addressed only to the six undertakings who had been allocated lots, and to AIMA, and by virtue of which the existing concrete relations, which were already of a contractual nature, were destroyed. Regulation No 2239/81 provides expressly for a sale by tender in which only those companies which had been allocated lots in accordance with Regulation No 71/81 were invited to take part. The applicants are thus directly and individually concerned by that regulation.

The applicants cite the past decisions of the Court in support of their argument.

The *Commission* replies that the contested regulation is general in character and was adopted solely to meet the imperative requirements of the public interest and not in order to affect any particular trader. The regulation directly affects the market position of all other traders in the olive oil sector.

2. Breach of essential procedural requirements

The *applicants* state that the procedure laid down in Article 38 of Regulation No 136/66 (Official Journal, English Special Edition 1965-1966, p. 221) was not followed by the Commission. That article requires that the opinion of the Management Committee for Oils and Fats be obtained before measures are adopted. If there is disagreement, the question must be referred to the Council. While the measures provided for in Regulation No 71/81 were adopted in accordance with the opinion of the Committee, Regulation No 2238/81 expressly states that the Committee had not delivered an opinion, and that the earlier opinion stood.

The *Commission* points out that the applicants are mistaken. The recital in question does not mean that the Committee was not consulted, but, on the contrary, that there was no majority for or against the draft regulation after consultation had taken place. In that case, the Commission was entitled to adopt the regulation. It is only in the case of a majority against the draft regulation that the matter must be referred to the Council for a decision.

The *applicants* reply that the Commission was only entitled to take decisions after the Management Committee had expressed an opinion in favour of the draft regulation. In any event, the Commission could not decide without having considered the opinion of the Management Committee.

The *Commission* maintains that Article 38 of Regulation No 136/66 permits the Commission to adopt measures if the opinion of the Management Committee is favourable to the proposal or if there is no majority of either 45 votes in favour or 45 votes against.

3. Unlawfulness on the grounds of infringement of acquired rights

The *applicants* contend that Regulation No 2238/81 appears to be flatly contrary to the general principle that repeal of measures which affect the established position of third parties is unlawful. Such repeal is unlawful, and the Commission does not have the power to adopt such a measure because the Council could not have delegated power to the Commission so to infringe acquired rights of third parties.

The applicants have acquired all the rights of the purchaser under the contracts of sale which were concluded following the offer made to the public by the notice of sale, the applications to purchase which were properly submitted and the drawing of lots.

Since the lots were expressly identified in the notice of sale, the applicants have become owners of the lots pursuant to Article 1376 of the Italian Civil Code, which provides that ownership is acquired by simple consent in the case of a contract of sale in respect of a specified object.

Since by virtue of its entry into force Regulation No 71/81 had become a rule of Italian domestic law, it is obvious that the lawfulness of its repeal must be considered on the basis of the principles of Italian law.

In Italian law, repeal of an administrative measure can only take effect *ex nunc* and cannot affect events which have already taken place. There is all the more reason therefore for those limits to apply in Community law.

The repeal of Regulation No 71/81 entailed infringement of the acquired rights of the applicants, which is not in conformity with the case-law of the

Court of Justice, in particular with the judgment of 6 March 1979 (Case 92/78 *Simmenthal* v *Commission* [1979], ECR 777).

If Regulation No 2238/81 is to be regarded as a kind of expropriation measure, it is unlawful because of the absence of compensation.

The *Commission* relies on Regulation No 136/66 as subsequently amended (see in particular Council Regulation No 1562/78 of 29 June 1978, Official Journal L 1985, p. 1), which fixes a target price intended to ensure that producers obtain a fair income. To achieve that end, stabilizing machinery is provided for, which includes the purchase of oil by intervention agencies and its sale in the Community under conditions which do not disturb the market (Articles 8 and 12).

The Commission points out that intervention has the double purpose of supporting the market price by withdrawing surplus quantities and of putting the product back on the market when that appears to be appropriate, great care being taken to avoid disturbing the market. The purchases and sales carried out by the intervention agency do not merely constitute successive transfers of ownership. They must be regarded as "public law relationship" which permit the public authorities to withdraw from contractual obligations if the situation changes in such a way that the public interest can only be served if the contract is rescinded or amended.

At Community level, the Commission considers that it has an obligation to ensure that the common market organizations continue to function correctly, and to that end to adopt any measures which may be necessary to avoid disturbances.

The Commission doubts that the drawing of lots gave rise to a right of ownership in favour of the applicants.

The sale procedure laid down in Regulation No 71/81 consisted of several phases, followed by the allocation of the goods by means of a registered letter signed by the Director-General of AIMA. That letter of allocation closes the procedure and declares the person to whom the lot has been allocated owner of it. It is also from the date of receipt of that letter that the person to whom the lot has been allocated becomes bound by the obligations arising from that allocation, that is, he must provide a guarantee and be present when the containers are sealed.

Only then is the contractual relationship complete, since the public authorities have decided definitively that the operation, which constitutes an act of management of the olive oil market and not simply a sale which has no other purpose, is appropriate.

It must be recognized that the Commission has the power and the duty (confirmed by Article 12 (2) of Regulation No 136/66) to ensure, in the exercise of its discretion in economic matters, that agricultural management measures are appropriate, particularly when, as in this case, the applicant had no right of ownership.

Even if the applicants had become owners of the goods, the Commission considers that it was entitled to expropriate them. All national legal systems permit the public authorities to expropriate the property of a private individual, upon payment of fair compensation, when the public interest

requires it. The Commission considers that it has sufficiently proved the existence of such a public interest.

The applicants received fair compensation in that they were given the first opportunity of acquiring the olive oil, at a price which was, to be sure, above the earlier price but which still left them a more than sufficient profit margin. If, for one reason or another, one of the companies had not obtained one of the lots, the Commission would have granted it appropriate compensation in another form.

The *applicants* reply that both Regulation No 71/81 and the notice of sale issued by AIMA on 28 January 1981 referred expressly to a "sale" and to a "contract" the execution of which was to be guaranteed, and provided that in case of delay, the oil was to remain in storage at the "purchaser's" risk. If the guarantee was not provided, AIMA could have regarded the sale as automatically "terminated", which presupposes the existence of a complete, previously concluded contract.

Regulation No 2238/81 also speaks of a "sale" which must be cancelled. That regulation contains provisions which are retroactively applicable to the relationship between AIMA and the six undertakings which had already been established.

The effects of Regulation No 71/81 were exhausted by the sale of the olive oil by AIMA. The Commission cannot therefore adopt measures which alter those effects.

The principles that measures may not be retroactive and that acquired rights must be respected are recognized in both national law and Community law. Acquired property rights must be all the more respected because Community law protects the legitimate expectation of private individuals.

In the "common market", the basic principle of a "market" namely, the sacrosanct character of contractual relations, must be respected.

The idea that giving the owner who has been deprived of his property the opportunity to buy back the same goods can be called "compensation" is so absurd and iniquitous as to require no comment.

The Commission's arguments regarding public law contracts are quite extraordinary. The reference to planning law, governed by the public interest, is not relevant in the context of private law contracts.

In the reply and the rejoinder, the parties exchanged observations on the question of whether the sealing of the containers and the provision of guarantees took place in the context of the first sale.

The *Commission* contends that the Commission's power and duty to ensure that agricultural management measures are appropriate was exercised in the context of a complex sale procedure culminating in the "allocation" of the goods, which constituted the final and definitive manifestation of the will of the public authorities to carry out the intended operation, exclusively in the public interest. It was only then that the contractual relationship was complete.

The Commission does not agree with the applicants' statements that Regulation No 71/81 no longer has legal effect. Above and beyond the allocation of the goods, the payment of the guarantees, the sealing of the containers and the periodic withdrawal of oil have yet to take place.

The Commission endorses the applicants' arguments regarding the public interest and planning law, and sees in them a confirmation of its own position.

Even if there was an expropriation, the Commission is of the opinion that the applicants' rights received adequate consideration in relation to the public interest.

They were offered compensation in a special form based, on the one hand, on the public interest which was protected by virtue of the higher selling price and, on the other, the private interest of the applicants, which was not to be paid enormous sums of money as compensation but rather to obtain considerable quantities of olive oil on favourable terms so as to carry on their own production. The Commission could have offered the oil for sale again to a larger number of traders, which would have further reduced the opportunities open to the applicants.

4. Insufficient statement of reasons and error regarding disturbance of the market

The *applicants* maintain that the recitals in the preamble to Regulation No 2238/81 do not make clear either the scope or the nature of the events relied upon and limit themselves to an allusion which is so vague as to be capable of being used for any measure, at any time, in any place and under any circumstances.

The Commission did not indicate the reason for its sudden change of view after a period in which it had not reacted, even though it was aware of what was happening.

The applicants contest the Commission's statements regarding developments on the market and the effect on it of the sale of the olive oil. The Commission started from false premises and made manifest errors of fact.

The Commission bases its argument on an increase in the market prices for olive oil. However, those increases were foreseeable both because of the general trend of the market and because of the prices fixed by the Council for the 1980-81 marketing year, with the regular increases provided for in Article 9 of Regulation No 136/66.

The quantity in question constitutes no more than 7% of the annual consumption of olive oil in Italy and could not all be put on the market at the same time.

Regulation No 71/81 also provides that all the oil may be sold to a single purchaser.

The effect of a sale at a favourable price is not a disturbance of the market but an increase in the profit margins of the applicants because prices are determined on the basis of supply and demand.

The *Commission* replies that it considered it essential to cancel the sale of the olive oil because the procedure had taken longer than could have been foreseen and therefore the sale would have been carried out at a time when conditions were radically different from what they had been initially, with the result that the sale would have seriously disturbed the olive oil market. The Commission therefore exercised the discretion which the Court has recognized that it has in regard to the management of economic matters which are complex and difficult to understand.

At the time of the sale at LIT 210 000 per 100 kg, the intervention price

(December 1980) was about LIT 200 000. The market price for refined oil was approximately LIT 220 000, which would have permitted a substantial profit to be made.

After the delays in the tendering procedure, conditions on the market had radically changed. On the one hand, the 1980-81 harvest was much smaller than expected, and on the other, prices had increased to an unforeseeable degree, because of the lower production, the limited quantities of lampante grade olive oil available on the world market and, partly, because ot the devaluation of the green lira.

The conditions of sale, which were already favourable, thus became unreasonably so, and that situation would have permitted a limited number of traders not only to make enormous profits at the expense of the European taxpayer, but also to dominate the olive oil market in Italy by excluding from that market all other traders, who could obtain that type of oil only on much less favourable terms.

With regard to the statement of reasons for the decision, it is perhaps succinct but it is not for that reason insufficient. The six companies involved know what the situation is.

The *applicants* reply that the Commission asked AIMA to carry out the drawing of lots at the end of May and that the Commissioner, Mr Dalsager, confirmed the sale of the olive oil when he replied, on 22 June, to a question from the European Parliament. The unforeseeable effects to which the Commission refers in justification of its action took place before that confirmation.

The Commission's argument that the 1980/81 harvest showed signs of being far below expectations is not mentioned in the preambles to the contested measures.

The figures provided by the Commission regarding prices, costs and profits are incorrect.

Contrary to the Commission's forecast, the oil in question was placed on the market, following the order of the President of the Court of 21 August 1981, without producing catastrophic effects.

The *Commission* considers that the applicants are seeking to draw unreasonable conclusions from Commissioner Dalsager's answer. His reply was that when Regulation No 71/81 was adopted, the conditions for a sale existed. The fact that that answer is dated 22 June 1981 proves nothing. The Commission's decisions require serious consideration and it can take some considerable time to bring them to fruition.

The Commission contests the applicants' statement that the oil was placed on the market without causing any disturbance whatsoever. The market price for lampante grade olive oil was about LIT 235 000—236 000 and was rising (it had reached about LIT 240 000 in March 1982) because of the persistent shortage on the market, whilst the intervention price had increased rapidly, reaching LIT 242 000 in March 1982. On the other hand, the market price for refined oil has fallen regularly since the oil purchased by the applicants in this case and in Case 232/81 was placed on the market.

For that reason, other traders are in difficulties. Because they are obliged to obtain supplies on the market at a higher price, they have had to reduce the price

of their refined products and thus reduce their profit margins.

Those difficulties would have been even greater if the market price for lampante grade oil had been closer to the intervention price instead of moving away from it, a phenomenon which is totally unwarranted in a healthy market.

5. Misuse of powers

The *applicants* allege that the purpose of the contested regulations was not to protect the market but to legitimate the failure to execute a contract, to deprive the applicants of profits justified by the commercial risk involved and to favour another, clearly-defined group.

The Commission has also failed to observe Article 42 of the Treaty, which lays down the general principle that the competition rules do not apply to production of and trade in agricultural products, since the alleged disturbances in the market are merely the effect of competition in a situation typical of all sales by tender.

The *Commission* replies that its purpose was to avoid serious disturbances on the market caused by marketing an enormous quantity of oil at a derisory price. Reduction of the applicants' huge profit margin was a secondary factor and not a major objective.

The reliance on Article 42 of the Treaty is misplaced because Regulation No 26 of the Council extended application of most of the competition rules to agriculture, and in any event those rules are not relevant.

The concept of "disturbance" is relied upon in Article 12 (2) of Regulation No 136/66, which deals with the sale of olive oil by the intervention agencies.

V — Examination of a witness

When examined, the witness, Mr Guida, stated that prices were the best barometers of the market. Between October 1980 and October 1981 the price of lampante grade oil increased by about 15%. That increase could be explained by various factors: first, the application of the monthly increases in the intervention price, secondly, the devaluation of the green lira and thirdly, inflation in Italy. Moreover, it was normal for prices to increase in the summer, when olive oil consumption was higher and therefore created a demand which exceeded the supply. The way in which prices had developed must be regarded as normal.

It was also incorrect to say that there was a shortage in the sense that the product was not to be had at all. The fact that very little lampante grade oil was offered to the intervention agency meant simply that it was possible to dispose of it on the market, and that there was therefore a sufficient quantity to meet the needs of consumers. With regard to the refineries, they had been working at a loss for some time because the margin between their cost price and their selling price was inadequate. However, the witness was not aware that the refineries had had difficulty in obtaining supplies of lampante grade oil.

VI — Oral procedure

At the sitting on 19 June 1984, oral argument was presented on behalf of the applicants by G. Celona, P. Tabellini, G. B. Compagno and G. Guarino, and on behalf of the Commission by G. Berardis.

In reply to a question put by the Court, the Commission stated that what it meant by risk of disturbance on the olive oil market was the danger that the applicants would get control of a share of the market to which they were not entitled, and thus exclude other traders from that market.

The Advocate General delivered his opinion at the sitting on 25 September 1984.

Decision

1 By application lodged at the Court Registry on 10 August 1981, Agricola Commerciale Olio Srl, Astolio Srl, Azienda Agricola Bellaria SpA, Italiana Olii e Risi SpA and San Giorgio Sezione Agricoltura SpA brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Commission Regulation No 2238/81 of 3 August 1981 repealing Regulation No 71/81 on the sale of olive oil held by the Italian intervention agency (Official Journal L 218, p. 27), and Commission Regulation No 2239/81 of 3 August 1981 re-opening the sale by tender of olive oil held by the Italian intervention agency (Official Journal L 218, p. 28), are void.

2 Article 12 of Regulation No 136/66 on the establishment of a common organization of the market in oils and fats (Official Journal, English Special Edition 1965-1966, p. 221), as amended by Council Regulation No 1562/78 of 29 June 1978 (Official Journal L 185, p. 1), obliges the intervention agencies designated by the producer Member States, as a means of stabilizing the olive oil market, to buy in, under certain conditions and at the intervention price fixed for the marketing year involved, olive oil of Community origin which is offered to them by producers. According to the second paragraph of that article, the intervention agencies are to sell within the Community the olive oil bought in by them under conditions such that the market at the production stage is not disturbed.

3 The sale of the olive oil held by the intervention agencies was governed by Commission Regulation No 2960/77 of 23 December 1977 on detailed rules for the sale of olive oil held by intervention agencies (Official Journal L 348, p. 46) and Council Regulation No 2754/78 of 23 November 1978 on intervention in the olive oil sector (Official Journal L 331, p. 13). The preambles to those two regulations emphasize that the sale is to take place without any discrimination between Community purchasers and on the most favourable economic terms, and that sale by tender appears to be the most appropriate system for that purpose. For that reason, Article 2 (1) of both regulations provides that another selling procedure may be used only where special conditions so warrant. Finally, the preamble to Regulation No 2960/77 expressly declares that where there is a risk of market disturbance, provision is to be made for limiting the quantity which may be awarded to any one tenderer.

4 By Regulation No 71/81 of 12 January 1981 (Official Journal L 11, p. 5), the Commission decided that the Italian intervention agency (AIMA) should put up for sale some 33 000 tonnes of virgin olive oil from intervention purchases made during the 1977-78 olive marketing year, divided into six lots of about 5 500 tonnes each, at a fixed price of LIT 210 000 per 100 kg. It was stated in the preamble to the regulation that the olive oil purchased by the Italian intervention agency during the said marketing year had been put up for sale by tender on several occasions but it had only been possible to sell a small proportion of that oil. The preamble also stated that the existing market situation was suitable for putting the oil up for sale again and that production of olive oil in the 1980/71 marketing year was expected to be plentiful. However, so as not to interfere with the normal sale of production from that marketing year, it was stated that the purchasers of the oil should be obliged to refine it or market it outside the Italian and Greek markets.

5 The regulation provided that sales were to commence on the tenth day following posting of the notice of sale and that lots were to be awarded in the order of submission of applications to purchase, until the lots put up for sale had all been disposed of. If applications to purchase were submitted on the same day for the same lot, AIMA was to designate as purchaser the

applicant who submitted applications to purchase several lots or, where that was impossible, AIMA was to determine the purchaser by drawing lots. Finally, the oil was to be withdrawn every 30 days from 15 March 1981, in quantities equal to at least 10% and at most 20% of the purchased quantity. The purchaser was to pay the purchase price for each lot of oil withdrawn not later than the end of the fifth month following that in which the quantity concerned was withdrawn.

6 On 2 February 1981, the first day on which applications to purchase could be submitted, 60 undertakings submitted such applications, each being for all of the lots put up for sale. The award of lots was delayed, with the agreement of the Commission, because certain traders contested the admissibility of applications submitted by other undertakings. The drawing of lots provided for in the regulation did not take place therefore until 1 June 1981, and designated the applicants in the present case, as well as another undertaking (the applicant in Case 264/81), as purchasers of one lot each.

7 On 3 August 1981, the Commission adopted the first of the regulations which the applicant seeks to have declared void, namely Regulation No 2238/81 repealing, with effect from 13 January 1981, the aforementioned Regulation No 71/81. In the preamble to Regulation No 2238/81 the Commission stated that the sale had been delayed as a result of the inquiry undertaken into the above-mentioned complaints, but that the consignments put up for sale had finally been allotted to tenderers in accordance with the provisions of Regulation No 71/81. The Commission went on to say: "... meanwhile, the conditions on the olive oil market have altered so that to make the sale on the conditions originally laid down would result in serious disturbance on the market; ... in particular, quantities could be sold by these operators at prices which would shut other operators out of the market", and accordingly "it is necessary, in the overriding general interest, to cancel the sale in question". Finally, measures were to be taken in parallel in order to take account of the situation of the operators to whom lots had been allocated.

8 Those measures were the subject of Regulation No 2239/81 of the same date, which is the second of the regulations at issue, and by virtue of which the olive oil referred to in Regulation No 71/81 was to be put up for sale by

tender in six lots, the sale being "reserved for tenderers designated pursuant to ... Regulation (EEC) No 71/81". The oil was to be sold not later than 10 September 1981 and withdrawn in lots commencing on 15 September 1981. The purchaser was to pay the purchase price for each of those lots at the time of withdrawal.

9 At the request of the applicants the President of the Court made an order on 21 August 1981 ([1981] ECR 2193) partially suspending the application of Regulation No 2239/81 inasmuch as the applicants were, in respect of the lot which had been allocated to each of them on the basis of their tenders, to be required to pay only so much of the price tendered as was equal to the amount which they would have had to pay under the terms of the sale undertaken under Regulation No 71/81. Payment of the remainder was suspended until the Court had given judgment in the main action.

Admissibility

10 The Commission expresses doubt as to the admissibility of the action. It points out that the provisions in the regulations at issue are of a general and abstract character and that they are therefore not of direct and individual concern to the applicants within the meaning of the second paragraph of Article 173 of the Treaty. The Commission states that when those regulations were adopted, AIMA had not yet sent letters to the applicants allocating the lots at issue to them. It is those letters of allocation which closed the sale procedure and declared the applicants owners of the lots.

11 In that connection, it should be emphasized that Regulation No 71/81 fixes unconditionally not only the price and the quantities of oil put up for sale, but also all the other conditions of sale, leaving no place for additional contractual stipulations. The applications to purchase could not be withdrawn and the regulation provided that designation of the purchasers from among those who submitted applications was to be by the drawing of lots, without the effect of the latter being subject to any "letter of allocation" being sent. Thus from the time when lots were drawn, at the very latest, the situation as between the parties to the sale was determined. Regardless of when ownership was transferred, it follows that any intervention on the part

of the Community institutions preventing AIMA from carrying out its obligations to the tenderers designated by the drawing of lots necessarily constitutes a measure of direct and individual concern to them. Consequently, the application is admissible.

Substance

12 The applicants' principal submission is that Regulation No 2238/81 infringes the general principle that a measure cannot be repealed if that would prejudice the acquired rights of third parties. They contend that even if it is regarded as an expropriation measure, the regulation is unlawful by reason of the fact that the compensation offered is inadequate. Moreover, the applicants contest the Commission's statements in the preamble to the regulation regarding the development of the olive oil market and the effect on that market of the sale which had been contracted for. In the applicant's view, the Commission took false premises and made manifest errors of fact. Moreover, there was a misuse of powers, since the purpose of the regulations was not to protect the market but to deprive the applicants of their profits.

13 The only reason given by the Commission to justify the retroactive repeal of Regulation No 71/81 is that carrying out the sale on the conditions originally laid down woud have resulted in serious disturbance of the olive oil market. It states that during the period which elapsed between the adoption of the first regulation and that of the second the conditions on that market had radically altered. On the one hand, the 1980/81 harvest was much below what had been predicted, and on the other, prices had increased beyond what had been predicted because of the fall in production and the limited quantities of lampante grade oil available on the world market, as well as the devaluation of the green lira.

14 In those circumstances, the conditions of sale, which were already favourable, became unreasonably so and would have permitted a limited number of traders not only to make enormous profits at the expense of the European taxpayer but also to dominate the olive oil market in Italy by excluding from that market all the other traders, who could only obtain that type of oil on much less favourable conditions.

15 With regard to those arguments, it should first be emphasized that the very number of applications to purchase submitted on the first day of the sale should have made the Commission realize that the conditions of sale were, even then, extremely favourable compared to normal market conditions. Moreover, the means of observing market conditions at the disposal of the Commission should have permitted it to revise its forecasts regarding the 1980/81 harvest long before the contested regulations were adopted.

16 Furthermore, the information which the Court has obtained in no way confirms the proposition that the changes relied upon were of as radical a nature as the Commission states. Thus, a witness whose competence was recognized by all the parties stated that it would be wrong to say that during the period in question there was a real shortage, and that he was not aware that the refineries had had any difficulty in obtaining supplies of lampante grade oil. As regards prices, the witness declared that there had been an increase of about 15% in the price of lampante grade oil between October 1980 and October 1981, and that that development should be regarded as normal having regard to seasonal fluctuations, the monthly increases in the intervention price, the devaluation of the green lira and the rate of inflation in Italy.

17 Moreover, the Commission has not explained how a market on which there is a shortage and on which prices are tending to rise could be disturbed solely by the arrival on that market, at regular intervals, of additional quantities of the product likely to be sold at moderate prices. The Commission admitted, in particular during the oral procedure, that the disturbance that it feared was of a more indirect nature in the sense that the profits to be made by the undertakings who had been successful in the drawing of lots would have allowed those undertakings to obtain control of a share of the market to which they were not entitled, thus excluding other traders from the same market.

18 The mere fact that the conditions on which the Commission permitted the national agency to put the products up for sale proved to be favourable, and even extremely favourable, to the purchasers, does not entitle the Commission to prevent that agency from carrying out the contract which had been concluded in accordance with the said conditions. With regard to

the possibility of an abusive use of those profits it should be pointed out that the quantity put up for sale was divided between six independent undertakings. The Commission has not even tried to show how and why one of those undertakings would have used the profits so as to exclude, or to have the effect of excluding, other traders from the market.

19 It appears, therefore, that the only ground relied upon by the Commission to justify the repeal of Regulation No 71/81 is vitiated by errors of fact. It is therefore unnecessary to consider whether, in other circumstances, the Commission would have been entitled to repeal the said regulation retroactively and what would have been the consequences of such a repeal as regards the right of the undertakings to compensation. Regulation No 2238/81 repealing Regulation No 71/81 must be declared void, and consequently Regulation No 2239/81 must also be declared void.

20 With that possibility in mind, the Commission asked the Court to apply the second paragraph of Article 174 and to declare that the repeal of the periods of time for payment laid down in Regulation No 71/81 should be regarded as definitive. The Commission emphasized that those periods tend to lower the real price even further, whereas the nominal price is already very favourable.

21 That application cannot be accepted. The said periods for payment are part of the general conditions of sale laid down in Regulation No 71/81. In the circumstances of this case, the Court does not consider that it is necessary to treat that condition any differently from the condition regarding price.

Costs

22 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Commission has failed in its submissions it must be ordered to pay the costs, including those relating to the application for the adoption of interim measures. Savma SpA, which intervened in support op the Commission's conclusions in the procedure for the adoption of interim measures, shall bear its own costs.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Declares Commission Regulation No 2238/81 of 3 August 1981 repealing Regulation No 71/81 on the sale of olive oil held by the Italian intervention agency void;

2. Declares Commission Regulation No 2239/81 of 3 August 1981 re-opening the sale by tender of olive oil held by the Italian intervention agency void;

3. Orders the Commission to pay the costs, including those relating to the application for the adoption of interim measures, and orders Savma SpA to bear its own costs.

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 27 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Fifth Chamber