OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 14 NOVEMBER 1979

My Lords,

In this action the applicant, the Kommanditgesellschaft in Firma Hans-Otto Wagner GmbH Agrarhandel, of Bad Homburg, which I shall call "Wagner" and whose business, as Your Lordships know from previous cases, includes trading in sugar, claims damages from the Commission under Article 178 and the second paragraph of Article 215 of the EEC Treaty in the following circumstances.

Your Lordships are familiar with the procedure for fixing refunds on exports of white sugar by tender, governed in the main by Commission Regulation (EEC) No 2101/75.

On 11 March 1976 Wagner received from the Bundesanstalt für Landwirtschaftliche Marktordnung (the "BALM"), pursuant to Article 11 of that Regulation, a statement to the effect that a tender that it (Wagner) had submitted for the export of 500 tonnes of white sugar had been successful. Wagner thereupon became bound, under Article 12 (b) of the Regulation, to apply for an export licence for that quantity of sugar. That entailed of course that Wagner should lodge security guaranteeing that the exportation covered by the licence would be effected (see Article 12 of Council Regulation (EEC) No 3330/74 on the common organization of the market in sugar). The licence was in fact issued to Wagner on 18 March 1976 (Annex 2 to the application).

In the meantime, on 15 March 1976, the Council had adopted Regulation (EEC) No 557/76 altering the representative rates (the "green rates") for Member States' currencies, including that for the Deutschmark. In the case of sugar the new representative rates were to apply from the beginning of the 1976/77 marketing year, i. e. from 1 July 1976. Article 5 of the Regulation provided that the provisions of Regulation (EEC) No 1134/68 concerning alterations in the relationship between the parity of the currency of a Member State and the value of the unit of account should apply but, in the case of the last subparagraph of Article 4 (1) of Regulation No 1134/68, "only if the application of the new representative rates is disadvantageous for the party concerned". That subparagraph, so far as here material, conferred on a person who had obtained advance fixing of an export refund a right "by written application which must reach the competent authority within 30 days of the entry into force of the measures fixing the altered amounts, [to] obtain cancellation of the advance fixing and of the relevant document or certificate".

Article 2 of Commission Regulation (EEC) No 571/76 of 15 March 1976 "laying down detailed rules for the application of Council Regulation (EEC) No 557/76" made it clear that, in the sugar sector, the date as from which a

person would be able to apply for cancellation of a relevant document under the last subparagraph of Article 4 (1) of Regulation No 1134/68 would be 1 July 1976. It also stated that the provisions of that subparagraph would "apply only to advance fixing and to the relevant documents or certificates issued before 15 March 1976". It is common ground that that has consistently been interpreted by the Commission and the competent authorities of Member States (including the BALM) as extending to export licences issued after 15 March 1976 to persons whose tenders had been accepted before that date under the procedure for fixing refunds on exports of sugar by tender, the reason being that the acceptance of such a person's tender made the issue to him of an export licence inevitable and automatic.

We were told on behalf of Wagner that it decided, soon after the licence dated 18 March 1976 had been issued, not to use it but to wait until 1 July 1976 and then apply for its cancellation.

On 22 June 1976, however, the Council adopted Regulation (EEC) No 1461/76. The preamble to that Regulation, after referring to the provisions of Regulation No 557/76 and Regulation No 1134/68 under which a person had a right to cancel a document referring to an amount fixed in advance if he were placed at a disadvantage as a result of the fixing of the new representative rates, recited that:

"... if this right were widely exercised, it could in certain cases seriously hinder good Community administration of a given agricultural market; ... provision should therefore be made for it to be replaced by the right to compensation for the disadvantage suffered".

The operative part of the Regulation added two sentences to Article 5 of Regulation No 557/76 to the effect that provision might be made for the disadvantage in question "to be compensated for by a suitable measure" and that, in such case, the provisions allowing cancellation should not apply.

On 30 June 1976 the Commission adopted Regulation (EEC) No 1579/76 in implementation of Regulation No 1451/76. The preamble to Regulation No 1579/76 recited among other things that:

"... in the sugar sector large scale recourse to the right to cancel export licences issued in connection with partial awards under Commission Regulation (EEC) No 2101/75 ... could seriously disturb the Community management of the sector; ... in order to avoid such a risk provision must be made for the right of cancellation not to apply, for appropriate compensation for the resulting disadvantage and for the terms under which such compensation shall be granted".

Article 1 of the Regulation provided:

By paragraph 1, for compensation as shown in an Annex to be granted "for those quantities of white sugar for which customs export formalities are completed on or after 1 July 1976 in connection with partial awards under Regulation (EEC) No 2101/75 and for which an export licence was issued before 15 March 1976"; and

By paragraph 2 that "In respect of the export licences referred to in paragraph 1, the right to cancel under the last subparagraph of Article 4 (1) of Regulation (EEC) No 1134/68 may not be exercised".

The Annex provided that in the Federal Republic of Germany the compensation should amount to DM 3,21 per 100 kg of white sugar.

We were told that here again the reference to export licences issued "before 15 March 1976" has been interpreted by all concerned as including licences issued after that date in respect of tenders accepted before that date.

Article 2 of the Regulation provided that it should enter into force on 1 July 1976 and the Regulation was published in an issue of the Official Journal dated 1 July 1976. Unbeknownst, however, at the time, to Wagner, to the BALM or even to the Commission, the actual publication of that issue was held up until 2 July 1976 by reason of a strike at the Office for Official Publications of the European Communities. That fact came to light in the proceedings before this Court in Case 88/76 *Société pour l'Exportation des Sucres* v *Commission* [1977] 1 ECR 709. The Court there held that, in consequence, the Regulation did not enter into force until 2 July 1976 and so did not affect an application for cancellation of an export licence made on 1 July 1976.

On 29 June 1976 Wagner had addressed a telex to the Einfuhr- und Vorratsstelle für Zucker und Rohtabak (the predecessor of the BALM) protesting against the amendment of Regulation No 557/76 by Regulation No 1451/76, of which, Wagner said, the "retroactive provisions" were prejudicial to it and seemed to offend against "the principle of good faith". Wagner asked (1) to be told what compensation it would receive, (2) that the validity of its export licence (which was to expire on 30 August 1976) should be prolonged an (3) to be told the considerations ("Gesichtspunkten"), other than opportunism, that had led to the adoption of Regulation No 1451/76 and, further, whether that Regulation applied to all products subject to a common organization of the market. Wagner said, in that telex, that it had, since the end of March 1976, felt entitled to rely on the possibility of applying for cancellation of the licence; now it would have to envisage using the licence. (A copy of the telex is Annex 3 to the application.)

On 1 July 1976 Wagner sent to the BALM by hand a letter applying for the cancellation of its licence and for the release of the security that it had lodged (Annex 4 to the application).

On 5 July 1976 the BALM wrote to Wagner in confirmation of a telephone call made on 2 July 1976 and in answer to both Wagner's telex of 29 June 1976 and its letter of 1 July 1976 (Annex 5 to the application). The BALM said that it had transmitted the telex of 29 June 1976 to the Commission on the same day and had arranged for its contents to be discussed at a meeting of the Management Committee for Sugar fixed for 30 June 1976. That discussion had taken place and, in the light of it, the BALM (1) rejected Wagner's request for an extension of the period of validity of its licence, (2) rejected its application for cancellation of the licence and (3) stated that, whilst Regulation No 1451/76 was applicable to all common organizations of markets, it was only in the sugar sector that the Commission had yet implemented its provisions.

Wagner did not avail itself of the opportunity open to it under German law to challenge the rejection by the BALM of its application for cancellation of the licence. It was explained to us on behalf of Wagner that the risks were thought to be too great, particularly in that, in the event of the failure of such a challenge, the security lodged by Wagner would be forfeited.

So Wagner decided to use the licence. In so doing, it was virtually bound to make a loss. During 1976 world market prices for sugar were below Community prices and falling. Moreover the Community intervention price was raised on 1 July 1976. The fall in world market prices was not steady. According to statistics put before us by the Commission (in Annex II to the defence), the accuracy of which was not questioned on behalf of Wagner, the world market price, expressed in DM per 100 kg, moved as follows:

— March 1976: DM 96.08
— April 1976: DM 86.97
— May 1976: DM 88.74
— June 1976: DM 88.54
— July 1976: DM 94.34
— August 1976: DM 82.46
— September 1976: DM 71.77

Thus an exportation effected after 1 July 1976 of sugar bought at Community prices then ruling, with the benefit of a refund fixed in March 1976, must almost inevitably result in a loss.

Perhaps those market conditions explain Wagner's decision, in late March 1976, to refrain from using its licence and to await 1 July 1976 to apply to cancel it. The inference is strong that Wagner, when it lodged its tender in early March 1976, had misjudged the future trend of the market in sugar, and that it saw in Regulation No 557/76 an opportunity to escape from the obligation it had incurred when its tender was accepted.

As to the actual amount of the loss made by Wagner, and indeed as to the way in which that loss should be computed, the parties are at issue.

This action was brought by Wagner on 24 January 1979. In the application Wagner claimed that the Commission was liable to compensate it for the loss because it had been caused by the Commission's conduct. The decision of the Court in Case 88/76 showed that Regulation No 1579/76 did not apply to an application for cancellation of a licence made on 1 July 1976. The BALM's decision of 5 July 1976 rejecting Wagner's application for cancellation was therefore unlawful. That decision had been brought about by the Commission in that it was based on Regulation No 1579/76, which was an act of the Commission, and in that the Commission, which knew or ought to have known that Regulation No 1579/76 did not enter into force until 2 July 1976, had failed to inform the competent national authorities, and in particular the BALM, of that fact in good time.

In the application Wagner computed its loss in the following way. It had used the licence, it said, to cover to the extent of 475 tonnes exportations that it effected under a contract dated 19 August 1976

for the sale of 525 tonnes of fine German castor sugar to a Swiss company (Annex 6 to the application). For the remaining 50 tonnes comprised in that contract it had used another export licence with which this case was not concerned. The total of the proceeds of the sale of those 475 tonnes and of the export refunds and monetary compensatory amounts received by Wagner in respect of them (including an additional sum received as a result of this Court's decision in Case 108/77 *Wagner* v *HZA Hamburg-Jonas* [1978] ECR 1187) came to DM 517 144.38. Wagner indentified the 475 tonnes as forming part of some sugar that it had bought from the Firma Süddeutsche Zucker AG and for which it was billed in September 1979 (Annex 11 to the application). Adding to the purchase price of the sugar certain expenses that it had incurred in fulfilling its contract, Wagner reckoned its total outlay as having been DM 580 990. Its loss on the transaction was therefore DM 580 990 less DM 517 144.38 = DM 63 845.62 DM. That, said Wagner, was the loss that could have been avoided if the export licence in question had been cancelled pursuant to its application dated 1 July 1976. It accordingly claimed that sum, with interest, from the Commission.

The Commission, as I have mentioned, does not accept Wagner's computation of its loss. The Court invited the parties to confine their submissions at the hearing to the question of liability, leaving aside any question as to the computation of the loss.

In answer to a question put by the Court Wagner admitted that it had received the compensation of DM 3.21 per 100 kg provided for by Regulation No 1579/76. To the Court's further question whether that compensation was not sufficient to make up for the disadvantage caused by the alteration in the representative rate of the Deutschmark, Wagner answered that the question was irrelevant because its claim was founded on the circumstances that it had relied on being able to exercise its right to cancellation of the licence and that it would have suffered no loss if the BALM had not rejected its application for cancellation. The Commission for its part told us that, not only was the DM 3.21 per 100 kg adequate to compensate for any disadvantage resulting from the alteration in the representative rate of the Deutschmark, but that, owing to the way in which it had been calculated, it was more than adequate.

In my opinion, in the question that Wagner dismissed as irrelevant there lies the key to this case. It is manifest that the provisions of Regulation No 557/76 and Regulation No 571/76 (as originally enacted) enabling the holder of an export licence to apply for its cancellation, in the case of sugar after 1 July 1976, had as their purpose and as their only purpose to safeguard him from any disadvantage he might suffer, after that date, as a result of the alteration in the representative rates of Member States' currencies. Those provisions were not intended to vest in the holder of a licence an option, exercisable after that date, to cancel the licence if he found that that would be to his advantage for other reasons. So much was pointed out by Mr Advocate General Reischl in Case 88/76 (see [1977] 1 ECR at pp. 733 to 735) and more clearly still by the Court

itself in Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019 (see paragraphs 11 to 13 of the judgment). It follows, in my opinion, there being no reason to doubt that the compensation of DM 3.21 per 100 kg received by Wagner was at least adequate to make up for any disadvantage it might have suffered as a result of the alteration in the representative rate of the Deutschmark that, even accepting Wagner's computation of its loss, there can be no ground whatever for holding that the Commission should compensate it for that loss, which can only have been due to factors other than the alteration in the representative rate of the Deutschmark.

Taking, as I do, that view of the case, I need not, I think, take up Your Lordships' time discussing the points pleaded by the Commission by way of defence, such as that the action was inadmissible; that the Comission was not at fault as alleged; and that in any case the true cause of Wagner's loss was not the Commission's conduct but Wagner's own failure to challenge the BALM's decision in the German courts. It should not, however, be assumed that I necessarily agree with the Commission on any of those points.

In its reply Wagner took a new point, viz. that Regulation No 1579/76 was invalid because it took away vested rights. The Commission pointed out, rightly in my opinion, that Article 42 (2) of the Rules of Procedure of the Court rendered such a new point inadmissible. In any event, not only does that point fly in the face of what was said by Mr Advocate General Reischl in Case 88/76 and by the Court in Case 112/77, it is also irrelevant since, as the Court held in Case 88/76, Regulation No 1579/76, did not affect applications for cancellations of licences lodged on 1 July 1976.

In the result I am of the opinion that this action should be dismissed with costs.