JUDGMENT OF THE COURT
OF 31 MARCH 1977 [1]

Compagnie Industrielle et Agricole du Comté de Loheac and Others v Council and Commission of the European Communities

Joined Cases 54 to 60/76

EEC — Non-contractual liability — Legislative measure constituting a measure taken in the sphere of economic policy
(EEC Treaty, second paragraph of Article 215)

A measure of a legislative nature constituting a measure taken in the sphere of economic policy cannot incur liability on the part of the Community under the provisions of the second paragraph of Article 215 unless a flagrant violation of a superior rule of law for the protection of the individual has occurred.

In Joined Cases:

(1) 54/76: COMPAGNIE INDUSTRIELLE ET AGRICOLE DU COMTÉ DE LOHEAC, having its registered office at Sainte-Rose (Guadeloupe), represented by its Managing Director, C. Simmonnet,

(2) 55/76: COMPAGNIE SUCRIÈRE ET RHUMIÈRE DE LA MARTINIQUE, having its registered office at Galion-Trinité (Martinique), represented by its General Manager, Mr de Laguarigur,

(3) 56/76: SOCIÉTÉ INDUSTRIELLE DE SUCRERIE, having its registered office at Paris 8e, represented by its General Manager, Mr de la Rochefoucauld,

(4) 57/76: DISTILLERIE SUCRERIE GROSSE-MONTAGNE, having its registered office at Lamentin (Guadeloupe), represented by its Manager, C. Simmonnet,

(5) 58/76: SOCIÉTÉ SUCRIÈRE DE LA GRAND TERRE, having its registered office at Gardel-Le-Moule (Guadeloupe), represented by its General Manager, A. Huygues-Despointes,

(6) 59/76: SOCIÉTÉ DES USINES DE BEAUPORT, having its registered office at Bordeaux, represented by its Chairman and General Manager, Mr Ardant,

(7) 60/76: SOCIÉTÉ D'EXPLOITATION SUCRIÈRE DE MARIE-GALANTE, having its registered office at Pointe-à-Pitre (Guadeloupe), represented by its Chairman and General Manager, Mr Huygues-Despointes,

1 — Language of the Case: French.

all assisted by Dominique Voillemot and Xavier de Roux, Advocates at the Cour d'Appel, Paris, 26, Cours Albert 1er — 75008 Paris, with an address for service in Luxembourg at the Chambers of Georges Reuter, 1 avenue de l'Arsenal,

applicants,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Daniel Vignes, Director in the Legal Department and Felix Van Craeyenest, member of that Department, acting as Agents, with an address for service in Luxembourg at the offices of J. N. Van den Houten, Director of the Legal Department of the European Investment Bank, 2, place de Metz,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Gilsdorf, acting as Agent, assisted by Jacques Delmoly, member of the Legal Service, with an address for service in Luxembourg at the offices of Mario Cervino, Legal Adviser to the Commission, Jean Monnet Building,

defendants,

Application for damages under the second paragraph of Article 215 of the EEC Treaty, in respect of damage allegedly suffered for the sugar marketing years from 1971 to 1975 by reason of the discrepancy between the harvesting period in Guadeloupe and Martinique and the fixing of the intervention price for sugar by the Community authorities,

THE COURT

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

Advocate-General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

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

I — Facts and procedure

The applicant companies are sugar producers in Guadeloupe and Martinique. Whereas in the European territory of the Community the harvesting and selling period for sugar runs from 1 July to 1 January each year, in the islands the sugar year runs from 1 January to 1 July. Until the end of 1974, the Community regulations did not take this peculiarity into account and the prices came into force only on 1 July, while the producers in the islands could benefit from them only during the month of May, that is, in the following calendar year.

On 19 December 1974, the Council of the EEC adopted Regulation No 3330/74 on the common organization of the market in sugar (OJ L 359 of 31. 12. 1974, p. 1); this new regulation repeals Regulation No 1009/67 of 18 December 1967 of the Council, under which the situation described above had developed. The second subparagraph of Article 3 (6) of the new regulation provides that:

'The derived prices fixed for any given marketing year for the French departments of Guadeloupe and Martinique shall apply to their sugar production during the calendar year in which that marketing year begins.'

On 29 June 1976, the applicant companies lodged applications against the Council and the Commission for an order that they should pay jointly sums intended to make good the damage allegedly suffered during the sugar years 1971/72, 1972/73, 1973/74 and 1974/75, on the basis of the difference between the prices obtained under Regulation No 1009/67 and subsequent regulations, and the prices which they could have obtained under the system in force as from the introduction of Regulation No 3330/74.

The procedure followed the normal course. By an order of 19 July 1976, the Court decided, after hearing the views of the Advocate-General, to join Cases 54 to 60/76 for the purposes of the procedure and the judgment.

By a decision of 14 December 1976, the Court decided, after hearing the views of the Advocate-General, to open the oral procedure without any preparatory enquiry.

II — Conclusions of the parties

All the *applicants* claim that the Court should;

'Grant their applications for compensation in respect of the non-contractual liability of the Community and order that the Council and the Commission, in accordance with the general principles common to the laws of the Member States, should make good the damage caused to them by both Regulation No 1009/67/EEC of the Council of 18 December 1967 on the common organization of the market in sugar, adopted on a proposal from the Commission, and a number of subsequent regulations.'

and are jointly and severally liable to pay sums amounting to

FF 671 536 (Case 54/76)
FF 395 234 (Case 55/76)
FF 7 992 279 (Case 56/76)
FF 2 037 895 (Case 57/76)
FF 3 606 000 (Case 58/76)
FF 3 783 000 (Case 59/76)
FF 2 639 000 (Case 60/76)

'in principal and interest calculated at the rate of 8 % from 1 July 1971 to 1 July 1976 (with the interests to be made up to the date of the delivery of the judgment of the Court), in compensation for the damage suffered by the applicant during the 1971/72, 1972/73, 1973/74 and 1974/75 sugar years.'

Furthermore, the applicants made the following claim in the course of their observations:

'That without prejudice to any of the other submissions the Court should rule that the Community regulations previous to Regulation No 3330/74 were manifestly vitiated by illegality and that they constituted in addition a wrongful act or omission on the part of the Community institutions and caused the applicants direct, special and abnormal damage.'

In its defence, the *Commission* contended that the Court should:

— 'Dismiss the applications as unfounded;
— Order the applicants to bear the costs.'

In its defence, the *Council* contended that the Court should:

'Declare all the claims of the applicants unfounded, dismiss them, and order the applicants to bear the costs.'

In their reply, the *applicants* maintained their initial conclusions.

In its rejoinder, the *Commission* maintained its contention that the Court should 'dismiss the applications as entirely unfounded,' while the *Council* contended that the Court should 'declare the applications ... inadmissible and at any event unfounded, dismiss them and order the applicants to bear all the costs.'

III — Summary of the submissions and arguments put forward by the parties during the written procedure

The *applicants* set out the facts of the case and point out that until the adoption of Regulation No 3330/74 of 19 December 1974, which proves that the Council realized that the previous regulations were causing them damage, they suffered a loss in each marketing year in respect of which a variation was recorded in the price of sugar in relation to the preceding marketing year, that is from the 1971/1972 marketing year.

In law, the regulations previous to Regulation No 3330/74 are manifestly vitiated by illegality and constitute a wrongful act or omission giving rise to direct, special and abnormal damage.

The illegality stems from a manifest infringement of superior rules of law, and in particular of the principle of the protection of the legitimate expectations of interested parties who are normally entitled to expect proper implementation of the rules of the Treaty and of secondary Community law. The principles to be observed in this case are laid down by Regulation No 1009/67, Article 39 of the EEC Treaty setting out the objectives of the common agricultural policy, and the second subparagraph of Article 40 (3) of the EEC Treaty which prohibits any discrimination between producers or consumers within the Community. To be precise, the sugar producers in the islands were unable to obtain 'fair remuneration', which caused discrimination by comparison with the

sugar producers in the European territory of the Community.

These unlawful and discriminatory regulations also constitute a wrongful act or omission because the Community institutions did not have regard for the interests of the sugar producers in the islands, in that they failed to take sufficiently into consideration the geographical characteristic of Guadeloupe and Martinique; moreover the institutions admitted this wrongful act or omission by belatedly enacting Regulation No 3330/74.

Finally, there is direct and special damage, in view of the 'limited and geographically identifiable number' of the companies concerned; the damage is of an abnormal nature by virtue of its seriousness and of the absence of any justification on grounds of public policy or general economic interest.

The applicants propose a method of calculating the damage suffered by them which consists of comparing the prices obtained under the regulations which they consider unlawful with the prices which they could have obtained on the basis of regulations similar to Regulation No 3330/74. Since there is no difference between the two prices for the 1968/69 and 1969/70 marketing years, no damage was suffered. On the other hand, for the marketing years from 1970 to 1974, the applicants have calculated the damage suffered by them on the basis of the abovementioned difference in prices and according to a method of calculation specified in a table annexed to the applications.

In its defence, the *Commission* first of all states that the applicants have made a mistake of fact in confusing the concepts of marketing year and calendar year, and in forgetting that the European sugar year straddles two calendar years; the applicants draw from this the contradictory conclusion that the producers in the islands 'receive in the year in which their marketing year falls only the market price for the preceding year'.

The Commission examines in turn the three 'submissions' put forward by the applicants as a basis for their applications for compensation under the second paragraph of Article 215 of the Treaty.

As regards the alleged unlawfulness of Regulation No 1009/67 of the Council, the Commission does not dispute the admissibility of this submission within the framework of extracontractual liability, although it observes 'with the greatest respect' that the reasons stated for the submission do not seem adequate for the purposes of law. On the other hand, it expresses certain doubts as to the admissibility of the 'argument' relating to the protection of legitimate expectations, having regard to Article 38 (1) (c) of the Rules of Procedure, as interpreted by the judgment delivered on 28 April 1971 in Case 4/69 Lütticke [1971] ECR 325, which requires that all the details necessary to establish the legal scope of the submissions on which the application is based must be stated. According to Mr Advocate-General Trabucchi (Opinion in Joined Cases 95 to 98/74, 15 and 100/75, [1975] ECR 1644), it is a question of a 'particular condition', an illustration of the principle of legal certainty, which must be assessed in each particular case and which supports principally the maintenance of an existing legal situation or a request for transitional measures designed to prevent losses likely to be suffered when transactions are carried out under amended or repealed regulations. Here, however, the applicants are demanding the retroactive application of new regulations to transactions concluded under the old ones.

Moreover, the 'legitimate expectation' which the applicants seek to rely upon is tantamount to ensuring fair remuneration which does not correspond to the meaning of that principle at the

Community or national level. In addition, is 'fair remuneration', as such, a superior rule of law for the protection of individuals? Article 39 of the Treaty speaks of the standard of living of farmers and makes no reference to the remuneration itself, a narrower and more technical concept, which it is important and sufficient to fix fairly.

The argument relating to discrimination should be examined in the light of the facts and in particular of the method of calculating the intervention prices for sugar from the islands. These prices are derived from the derived intervention price fixed for Italy less freight charges; after this first calculation has been made on the value of white sugar, it is corrected in order to be applicable on a flat-rate basis to unrefined sugar from the islands, which is deemed to have a rate of yield of 92 %. All the evidence shows that the method of calculation favours the producers in the islands, since it is based upon the price fixed for Italy, an area having a deficit in sugar, and resulted in an intervention price which is always higher that the prices in the rest of the Community. After pointing this out, the Commission stresses on the one hand, that owing to the discrepancy between the calendar year and the sugar year, the applicants were likely to benefit in respect of much of their sugar, refined last of all, from any tendency for the price on the European sugar market progressively to come into line with the new Community price applicable from 1 July, and on the other, that the applicants have never offered their sugar for intervention and were in a position in which they had freedom of contract and in which the price is fixed to a large extent by the action of supply and demand. Thus the general allusion to a possible discrimination does not stand up to serious examination.

With regard to the wrongful act or omission consisting, in the applicants' submission, of having failed to take account of geographical characteristics or of having done so belatedly by means of Regulation No 3330/74, the Commission refers to its arguments relating to lawfulness. Moreover it stresses that, although it did not itself propose Regulation No 3330/74 to the Council, it maintains that it is lawful, in view of the wide discretion governing the implementation of Article 39 of the Treaty and the possibility within that framework of taking new priorities into consideration. Finally, if there was any infringement of a rule of law, it is not specified and the reference to it is not sufficiently precise.

Finally, with regard to the damage, the Commission points out that the applicants make rather undiscriminating use of the criteria of French administrative law alone. The alleged loss resulting from the difference in price between two successive marketing years does not correspond to damage within the meaning of Article 215; first of all, it is not a loss but merely a failure to make a profit, a simple case of *lucrum cessans* and not of *damnum emergens;* then, there is no direct and certain causal connexion between any loss and the contested Community measures, since the applicants sold their sugar not to the intervention agency in return for money from the Guarantee Section of the European Agricultural Guidance and Guarantee Fund, but through the usual commercial channels, as emerges from the contracts appearing in the file, and, it seems in general above the intervention price, which is normal, since, even if it is sometimes used as a reference price, that price is a floor price.

In its defence, the *Council* of the European Communities recalls the facts of the case, and, as the Commission did, stresses the fact that the applicants did not offer their sugar for intervention, but delivered all their crop available between February and July to refiners in the parent country under freely negotiated contracts, the price obtained being generally 0·8 % higher than the

intervention price, and after 1 July, at a price fixed by reference to the intervention prices for the new marketing years.

In the first place, the Council stresses the absence of a causal connexion between the regulations and the alleged damage, which is calculated too simply, according to a rule of three, which enables the difference between what the applicants received and what they would have received if they had been paid on the basis of the system laid down in Regulation No 3330/74 to be established for the four marketing years in question. The Council emphasizes that the contracts were freely concluded on the basis of prices distinct from and higher than the intervention price, with the possibility where appropriate of a partial application of the price for the following marketing year. The absence of a causal connexion is sufficient ground to dismiss the applications.

After pointing out that what was to become the second subparagraph of Article 3 (6) of Regulation No 3330/74 did not appear in the proposal of the Commission and was added by the Council itself, the Council goes on to examine the three submissions of the applicants.

At first sight, the first submission relates rather to an application for annulment and, as such, is inadmissible as out of time and made by individuals against a general measure (a finding which would be inescapable if annulment was in fact being sought). However it can be considered as an attempt to prove a 'violation of superior rules of law' within the meaning of the case-law of the Court on liability for measures of economic policy. The first part of this submission refers to a breach of the principle of legitimate expectation of fair remuneration; according to the case-law of the Court, legitimate expectation can be invoked only in the event of unforeseen amendment to the Community regulations or of unsuccessful incitement of the administration to do so. Moreover, the right to fair remuneration does not correspond to the criterion either of legitimate expectation or of the superior rule of law protecting individuals. On this point, on the one hand, the reference to Article 39 (1) (b) relates to what is in fact merely one aspect which the institutions have to reconcile with others (5/67, *Beus* v *Hauptzollamt München;* 56 to 60/74, *Kampffmeyer* v *Commission and Council;* 63 to 69/72, *Werhahn* v *Council; 5/73, Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof);* on the other, the Treaty in fact speaks of 'a fair standard of living' for the agricultural community, which is completely different. It should also be pointed out that the applications seek to obtain insurance against the effects of currency depreciation, the fluctuations of which, as the Court has acknowledged, can never be altogether compensated for (43/72, *Merkur* v *Commission;* 7/76, *IRCA* v *Amministrazione delle Finanze dello Stato;* 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof;* 9 and 11/71, *Compagnie d'Approvisionnement* v *Commission);* what is the corresponding general principle common to the laws of the Member States? In this connexion, moreover, the difference in treatment between producers in continental Europe and in the islands amounts to a difference resulting from only two months of currency depreciation. Finally, the Council reiterates the argument of the Commission concerning the fact that the applicants did not offer their goods for intervention and that therefore that system cannot be invoked as an infringement of a superior rule of law, even if its price was used more or less as a reference price.

As to the second part of the first submission, referring to discrimination between sugar producers in the islands and those in continental Europe, the Council submits that it is open to

question upon the basis of a series of criteria (the number of months of currency depreciation to be borne, any compensatory measures, the level of the derived intervention price and the contractual framework of the sales transactions in sugar) whether the discrimination allegedly suffered corresponds to the requirements of the Court in this field (43/72, *Merkur* V *Commission;* 9 and 11/71, *Compagnie d'Approvisionnement* v *Commission).*

The second submission relating to the wrongful act or omission allegedly acknowledged by the belated enactment of Regulation No 3330/74 is nugatory and does not hold good in the light of the case-law of the Court which, for the purpose of expressing criticism of the legislative activity of the institutions, sets aside the concept of wrongful act or omission in favour of the concept of flagrant violation of a superior rule of law for the protection of individuals.

The third submission relating to direct, special and abnormal damage does not correspond to the criteria adopted by the Court in that field; moreover, any damage suffered within the framework of commercial contracts separate from the intervention system provided for by the regulations is not direct; finally, currency depreciation cannot be the cause of special and abnormal damage.

In their reply, the *applicants* develop the arguments set forth in their applications and answer the arguments developed in the defences on precise points:

— the price received when their production was marketed in fact corresponds to the prices fixed for the corresponding marketing year but is received too late;

— the argument of the defendants concerning the prices obtained in freely negotiated contracts leaves out of account the true function of the intervention price, which is a floor price with which market prices come into line in periods of sufficient or surplus production;

— the contracts produced during the hearing are proof of sale at the intervention price; in respect of the contracts under which a better price was obtained, the applicants do not seek any compensation but point out that they are either local contracts corresponding to 8 % of their total production and the price of which, slightly higher than the intervention price, is fixed by order of the Prefect because the function of distributor is fulfilled on the spot by the wholesalers and because of special marketing conditions, or contracts concluded with European refiners in the Community, at a price sometimes in fact 0·8 % above the intervention price, but providing for delivery of the goods to ports where losses in weight are considerable and bring the real price down to the intervention price.

As for the argument referring to alignment with the most favourable price in the Community, that is, the Italian price, the applicants point out that comparisons must be made between things which are comparable: the derived intervention prices fixed by the Community itself take into account different economic situations, and for the overseas departments of France are always lower than the European prices; moreover, the Commission is comparing prices of a different nature, ex works prices for the north of the Community and free-on-board prices for the overseas departments, the free-on-board prices including the costs of transport to the quayside and the costs of reloading:

— the argument that the marketing of the sugar grown in the islands always took place at a favourable period, while the new fixed price exerted an upward influence on prices, is defeated by the fact, proved by experience, that the applicants have never been able to sell except at the old intervention price; if that line of argument was valid, it is impossible to understand why the executive

enacted Regulation No 3330/74; finally, a delayed sale during the marketing year would have necessitated storage, which is particularly expensive in a country subject to cyclones.

As to the principle of regard for legitimate expectations, the applicants stress that the instances quoted by the Council in which this principle has been applied by the Court have never considered the case in which a completely original situation occurs. Here, reference must indeed be made to the statements of Mr Advocate-General Trabucchi concerning the particular condition and assessment in each particular case. In the statement of the grounds on which they are based, the contested regulations repeatedly refer to the fundamental principle laid down in Article 39, an illustration of legitimate expectation. Moreover, the fair standard of living for the agricultural community (and even certain 'guarantees of income') is a basic principle of the common agricultural policy, as the Court has stated in the judgments in Joined Cases 9 and 11/71, [1972] ECR 391, Case 43/72, [1973] ECR 1055, and Case 14/74, [1974] ECR 899, 908; therefore it is indeed a major and fundamental objective. That does not constitute a search for insurance against currency fluctuations but for the adaptation of the fair standard of living, recognized as necessary by the executive itself in its successive regulations.

The applicants also insist upon compliance with the principle of equality, which is common to the laws of the Member States. Thus in France the Conseil d'État has confirmed this principle of equality with regard to the economic regulations (Judgment in the *Ansar* Case, 29 October 1949, Recueil Le Bon 433, Judgment in the *Société Ciments Français* Case, 22 March 1950, Recueil Le Bon 175) except when the general interest outweighs any private consideration; in the present case, the adoption of Regulation No 3330/74 proves that this is not the case, as moreover it should always be in Community agricultural matters as the second subparagraph of Article 40 (3) of the EEC Treaty states. The wording of this subparagraph ('exclude any discrimination between producers *or* consumers within the Community') clearly shows that there should not be any discrimination between producers themselves in common agricultural matters within the Common Market as a whole and that consequently no distinction should be made between the regions or the territories of the Member States (Judgment in Case 153/73, [1974] ECR 675). The infringement of the principle of equality and the consequent discrimination are indisputable, the only justification for the adoption of Regulation No 3330/74 being the need to abolish them. The amount of the damage follows clearly from the same regulation and may be calculated by the difference between the old intervention price and the new, now received immediately.

The applicants take the view that the wrongful act or omission on the part of the Community results not only from the infringement of the superior rules of law (the principles of legitimate expectation and of equality) already invoked, but also from negligence characterized by the delay in adopting new regulations complying with the law; The Court has required the necessary diligence from the institutions in the adaptation of defective regulations (Judgment in the *Holtz* case, [1974] ECR 695). Moreover, even in the absence of any fault, the existence of direct, special and abnormal damage should involve compensation, as Mr Advocate-General Mayras seems to have accepted in his Opinion in Joined Cases 9 and 11/71 *(Compagnie d'Approvisionnement* v *Commission,* [1972] ECR 391).

In its rejoinder, the *Commission* takes up certain particular points from the reply:

— The allegedly 'very belated' receipt of the intervention price within the framework of Regulation No 1009/67 is explained by the 'principle of validity for periods of one year and the unity of the marketing year' common to all the agricultural policies and necessary for their good management. A system of regular adaptation of prices on the basis of the rise in the cost of living is conceivable, along the lines of a sort of 'sliding scale', but would upset the present structure of the market organizations, which are based upon validity for periods of one year. In the event of a discrepancy between harvests, the legislature can only 'link' the marginal production to the bulk of the total production, past or future. Thus, in relation to sugar, the system of the 'same marketing year' (Regulation No 1009/67) has given way to the anticipation system (Regulation No 3330/74); that was a lawful choice of economic policy. The Commission makes no secret of its preference for the first of these two systems, the continuation of which it proposed to the Council, which preferred to favour the sugar producers in the overseas departments, giving them earlier a price guarantee offered to the European producers only a few months later.

— The arguments advanced on the subject of the real function of the intervention price are unfounded. The Commission seems to doubt that the applicants could have obtained a better price only on the local market. But, in any event, in so far as the applicants sold on the European market, they did so at the corresponding market price and not at the intervention price fixed for the overseas departments which could not affect the price on the European market in any way, the European market price being at most a function of the European intervention price from which the applicants thus benefited automatically; moreover Regulation No 3330/74 has made no changes in this respect: it is obvious that the production of the overseas departments is sold in Europe only if the price obtained on that market is above the special intervention price for the overseas departments, unless traditional relationships explain trading patterns which cannot be explained by the laws of the market, which would put the discussion on a different level.

— The 'losses in weight' of sugar which allegedly justify the making of sales above the intervention price are not peculiar to cane sugar; the higher price is not the result of the generosity of the buyers but rather of the regional market in question.

— The figures provided by the Commission are the official figures and reproduce the prices fixed by the Council. Those prices, obtained by derivation, result from the application of objective criteria which are not in dispute. In any event, it is not clear why the applicants take up their position within the framework of intervention when in reality they never had recourse thereto.

— After pointing out that 'fair standard of living' does not mean 'fair income', the Commission asks whether it is open to an individual to invoke the guarantee of such a standard of living within the framework of an action for damages. Moreover it stresses that, voluntarily having placed themselves outside the Community scheme of insurance by having recourse to the usual commercial channels, the applicants should not refer to the principle which guided the setting up of the public intervention system.

— The rule of legitimate expectations, which is moreover exclusive of compliance with objective legal rules such as that stated in Article 39 of the Treaty, has been distinguished by the Court itself (Judgment of 14 May 1975 in Case 74/74, *CNTA* v *Commission,* [1975] ECR 549-550) which applies it only to a 'prudent trader' in the absence of 'an overriding matter of public interest'; such interest is adversely affected by calling in

question a complete system of common organization, the product of an economic choice which is the lawful prerogative of the Community legislature. In any event, a 'flagrant violation' of the protection of legitimate expectations is necessary, and such violation does not emerge from the general statements of the applicants. Finally, by virtue of what principle could the applicants have 'the expectation' of an automatic annual increase in agricultural prices?

— The Commission points out that the derived price for the overseas departments, derived from the highest derived price in Europe, was extremely favourable and higher than the corresponding price in most of the Community, which constitutes an almost preferential system. It also refers to the system of special aid and to its Regulation No 834/74 granting a price supplement to sellers of unrefined sugar grown in the overseas departments.

— The infringement of the principle of equality is not proved. The judgment in the *Holtz* case has no relevance here, since no 'deficiency' or 'defect' has been proved in the system set up by Regulation No 1009/67. The amendment of that regulation is not conclusive; on the contrary, it can be said that it handicaps the European producers. It is impossible to find either a wrongful act or omission or a flagrant violation of superior rules of law in the old system; at the most, it was adapted in the light of experience. Moreover, the applicants never complained of it before these proceedings. For that reason, the calculation of the damage which they claim to have suffered is purely abstract and does not correspond to any 'real loss of income'.

In its rejoinder, the *Council* examines first the problem of the grounds for complaint put forward, then of the legal evaluation of those grounds.

The complaints put forward are based upon a comparison between the systems successively applied and upon the discriminatory and unfair nature of the first of those systems. It is alleged that the fact that one system took the place of another shows that the Community legislature 'acknowledges' that the previous system was defective; otherwise, the new system *ipso facto* be 'deprived of any justification'. This adroit presentation of the facts would necessarily prevent any legislative amendment. According to the Council, it is not only unlawful situations which are amended. The two systems each had their justification. The Council explains the principle of validity for periods of one year as the Commission did, in the context of the world sugar market; in particular, it was natural to link the limited harvest of cane sugar to the much larger harvest of sugar beet. Then, in a period of currency depreciation and in order to favour the overseas countries, it was provided that the harvest in the Caribbean should receive the price for the subsequent marketing year in the parent country. That measure was the outcome of a choice motivated by political expediency, which brings it outside the context of the law. Therefore, such a step does not imply that the policy of the preceding years was unlawful.

The complaint of unfairness is contested by the Council in terms very similar to those used by the Commission; it contends that, in particular, Article 39 of the EEC Treaty does not constitute an 'obligation to attain a particular result'. Moreover, the system for fixing the derived price cannot be unfair while it is linked to the area having the biggest deficit. Moreover, fairness should be defined in relation to the reconciliation of various objectives. The correction of inflation comes rather under Regulation Nos 834/74 and 2496/76 which prove that the Community used its best endeavours to remedy the fall in prices to the benefit of all the producers.

The complaint of discrimination can relate only to comparable situations. But

climatic conditions alone prove that the situations are different.

The activity of the Community is alleged to be an infringement of legitimate expectations or a flagrant violation of a superior rule of law for the protection of the individual. The Commission has already answered this point exhaustively.

There has been no wrongful act or omission or negligence on the part of the Council, which on the contrary acted precisely in order to adjust prices upwards. In this connexion the Council also refers to the distinctions drawn in the judgments in Cases 7/76 (IRCA) and 43/72 (Merkur).

The Council also deals with the question of liability for risk mentioned by the Advocate-General in Joined Cases 9 and 11/71. On the one hand, the Court has never acknowledged it, and on the other, there is no direct damage since the applicants' loss of profit results not from the action of the Community, but from currency depreciation and generalized inflation.

Furthermore, the damage is not special since all the producers in the islands suffered or were given more favourable treatment than producers in the parent country.

Finally, the profit margin of 0·8 % in relation to the intervention price cannot be explained solely by the loss in weight of the sugar. No explanation was given on this point, and the Council points out that in respect of the 1974 harvest, when the discrepancy in prices was the greatest, two of the applicants experienced no loss, since they sold elsewhere and on better terms. Therefore the system remained flexible enough to avoid irreparable losses. Thus there is no causal connexion between the action of the Community and the damage alleged.

IV — Oral procedure

The hearing took place on 3 February 1977.

At the hearing, the *applicants* developed the arguments already set out in their written pleadings and claimed that the Court should order the defendants to bear the costs.

In answer to a question which was asked them by the Court, they stated that, during the years in dispute, they never sold any sugar on the Italian market.

The *Commission* stressed the fact that the approaches made formerly by the applicants involved the French authorities and not the institutions of the Community. Furthermore, it contended that any claim for damages relating to events occurring more than five years ago was time-barred.

The *Council* referred to the case-law of the Court with regard to extra-contractual liability, and in answer to a question asked by the Judge-Rapporteur stated that the change which had occurred in the regulations was partially explained by the fact that the Community sugar market, which had at first been in deficit, had come to show a surplus from 1973 when the three new Member States acceded.

The Advocate-General delivered his opinion at the hearing on 2 March 1977.

Law

1 The applications are for damages in respect of loss which the applicants, cane sugar producers in the French departments of Martinique and Guadeloupe, consider that they have suffered in respect of the sugar marketing years from

1971 to 1975 by reason of the fact that the Community institutions failed to take into consideration, for the purpose of fixing the intervention prices for sugar, the discrepancy between the harvesting and selling periods for this product in the European territory (1 July to 30 December) and the same periods in the departments of Guadeloupe and Martinique (1 January to 30 June).

Admissibility

2/4 In its rejoinder, the Council contends generally that the requests of the applicants are inadmissible. First, that conclusion is not accompanied by any reasoning or arguments, and secondly, having regard to Articles 40 and 42 of the Rules of Procedure, it was lodged out of time. Therefore, that conclusion must be dismissed.

Substance of the case

5 The applicants put forward three submissions in support of their claim:

1. They consider that the regulations previous to Council Regulation No 3330/74 of 19 December 1974 (OJ L 359, p. 1) on the common organization of the market in sugar were manifestly unlawful because they infringed Articles 39 and 40 (3) of the Treaty and the principle of the protection of the legitimate expectations of interested parties in the proper implementation of those regulations.

2. Next, they take the view that the regulations in question constituted a manifestly wrongful act or omission giving rise to liability on the part of the Community institutions in not having regard for their interests 'in that they failed to take into consideration the geographical characteristic of the departments of Guadeloupe and Martinique'.

3. Finally, they maintain that even 'if it is impossible to find that the Community institutions are guilty of any wrongful act or omission, the applicants have suffered direct, special and abnormal damage' which must be made good.

6 The purpose of these three submissions is the same in that they aim to impose non-contractual liability on the Community in respect of the damage which the implementation of Regulation No 1009/67/EEC of the Council of

18 December 1967 on the common organization of the market in sugar (OJ, English Special Edition 1967, p. 304) is alleged to have caused the applicants.

7 Therefore they can be examined at the same time.

8 Since the disputed measure is of a legislative nature and constitutes a measure taken in the sphere of economic policy, the Community cannot be liable for any damage suffered by producers as a consequence of that measure under the provisions of the second paragraph of Article 215, unless a flagrant violation of a superior rule of law for the protection of the individual has occurred.

9 Therefore it is necessary to enquire whether, in the present case, such a violation has been committed.

10 The objective of the rules enacted for the common organization of the market in beet and cane sugar, taking into account the situation of the world market in that product and the situation foreseeable in the medium term, was to strike a balance between the general interest of the proper management of the market so as to avoid fluctuations in prices over the sugar economy as a whole, and the maintenance of the guarantees necessary to ensure the producers of sugar beet and sugar cane of their employment and of a fair standard of living.

11 Thus, in the light of the complex problem of the world sugar market, the Council, acting on a proposal from the Commission, based the organization of the market upon the principles of the validity for periods of one year and of the unity of the marketing year, which are moreover, common to all the agricultural policies.

12 It took the view that it was fair, in a period of relative currency stability, to determine the intervention price for sugar from the departments of Martinique and Guadeloupe, 92 % of which was offered for sale on the European market, broadly by the prices prevailing on that market and to allow their production a price derived from the most advantageous price within the Community, namely the price fixed for Italy, an area having a deficit in sugar.

13 Bearing in mind the characteristics of this market, the Council established close cooperation between the Member States and the Commission within a Management Committee for the purpose of enabling the adoption of the appropriate measures should changes occur and should the need arise.

14 In the light of the new situation and of information obtained concerning negotiations relating to sugar from the African, Caribbean and Pacific States, and since a period of surplus production had been followed by a world shortage of sugar and an appreciable rise in prices, the Council decided in 1974 that: 'The derived prices fixed for any given marketing year for the French departments of Martinique and Guadeloupe shall apply to their sugar production during the calendar year in which that marketing year begins'.

15 It follows from all these factors that by opting in 1967 for the validity for periods of one year and the unity of the marketing year, and then in 1974 for another system for the market, the Council made a choice of economic policy coming within its discretionary powers, in accordance with the objectives of the common agricultural policy as defined by the Treaty and in particular by Article 39 thereof.

16 It appears from all these considerations that it is inappropriate for the applicants to plead an infringement of Article 40 (3), all the more so as they have never offered their sugar for intervention and have always chosen commercial outlets for their production on the open market outside the Community arrangements and have dealt at a price fixed by contract, a system which excludes all discrimination between producers.

17 Nor has it been proved, moreover, that the legitimate expectations of those concerned were disappointed, since no Community measure forecast the introduction of arrangements other than those fixed in 1967.

18 Consequently, the applicants' claim for the retroactive application of a new system to transactions freely concluded under old rules, which moreover protected them from the risks of the world market, cannot be taken into consideration.

19 Finally the complaint of having suffered direct, special and abnormal damage cannot be substantiated, particularly since the damage is alleged to result not

from a loss but from a failure to make a profit, the existence of which is difficult to prove within the framework of commercial contracts outside the sphere of the Community arrangements.

20 It follows from these considerations taken as a whole, that it is impossible to hold the Community liable for a flagrant violation of a superior rule of law for the protection of the individual.

21 Accordingly, the submissions put forward are unfounded.

Costs

22/23 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party shall be ordered to pay the costs. Since the applicants have failed in all their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications.**

2. **Orders the applicants to pay the costs.**

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 31 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President