2. Orders the applicant to pay the costs.

Mackenzie Stuart Galmot

Due Everling Kakouris

Delivered in open court in Luxembourg on 12 April 1984.

For the Registrar

H. A. Rühl

Principal Administrator

Y. Galmot

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 14 MARCH 1984 [1]

Mr President,
Members of the Court,

1. The Court is called upon to adjudicate on a claim for damages brought against the Council and the Commission by a French undertaking operating in the international cereals market. The origin of the dispute is a Commission regulation temporarily freezing the monetary compensatory amounts in spite of the fact that the lira had been devalued. According to the applicant, that freeze caused it financial loss because no proportional increase in the copensatory amounts accompanied the reduction in prices brought about by the devaluation. The question before the Court therefore is to decide whether, or within what limits the Commission may freeze the compensatory amounts when the exchange rates are subjected to variations which, normally, involve a more or less immediate adjustment.

Unifrex, a limited liability company, whose registered office is in France, exports agricultural products and in particular cereals to Italy. In the contracts concluded with Italian traders, the prices of those goods are agreed in lire. The compensatory amounts are paid direct to Unifrex by ONIC, the competent French body. It is in fact provided (Article 2a of Regulation No 974/71 of 12. 5. 1971, as amended by Regulation No 1112/73 of 30. 4. 1973)

1 — Translated from the Italian.

that, where a product exported from one Member State is imported into a Member State which has to grant a compensatory amount upon importation, the exporting Member State may, by agreement with the other, pay the sum which the latter owes.

On 23 March 1981, an adjustment of exchange rates took place in the framework of the European Monetary System whereby the lira was devalued by 6% in relation to the other currencies. The devaluation had the effect, on contracts in the course of performance between Unifrex and the Italian importers, of reducing in real terms the sums due to the former. The Community machinery designed to overcome these difficulties is the monetary compensatory amount, inasmuch as the devaluation of a currency should be followed by an equivalent increase in the amounts paid to the vendors in the exporting country. By Regulation No 801/81 of 27 March 1981, however, the Commission froze the compensatory amounts for the period from 23 March to 5 April 1981. Thus, for that period, Unifrex received lower prices, and compensatory amounts which, because unmodified, did not adequately compensate for the reduction in prices.

By an application of 21 October 1982, Unifrex brought the Commission and the Council before the Court of Justice, claiming compensation for damage suffered because of the freezing of the compensatory amounts. In its opinion, the measure in question was illegal as infringing the provisions governing such amounts, the principle of the protection of legitimate expectation and that of non-discrimination.

2. Let us examine first of all the Community rules applying to this case. The principal source is Regulation No 974/71 of the Council of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation of certain currencies. Article 2 provides that, for the products covered by intervention arrangements, the compensatory amounts are to be determined by applying a certain percentage value to the prices. In respect of States whose currencies are maintained within a spread in excess of 2.25%, that value is equal to the average of the percentage difference between two parameters: (a) the relationship between the conversion rate used under the common agricultural policy for the currency of the Member State concerned and the official parity of each of the currencies of the other States which fluctuate within the 2.25% spread; and (b) the spot-market rate for the currency of the same Member State in relation to each of the currencies fluctuating within the aforementioned limit.

The rule which interests us most, however, is contained in Article 3. This provides that, if the difference referred to in Article 2 changes by at least one point from the percentage taken as a basis for the determination of the compensatory amounts, the latter shall be altered by the Commission in line with the change in the difference. Finally, Article 6 provides (paragraph (1)) that the Commission is to adopt detailed rules for the application of the regulation according to the procedure laid down in another text: Regulation No 120/67 of the Council of 13 June

1967 on the common organization of the market in cereals. These detailed rules cover the fixing of the compensatory amounts when, as has been seen, the difference between the parameters referred to in Article 2 goes beyond certain values (paragraph (2)).

It should be added that the advent of the European Monetary System did not substantially alter the structure of the compensatory amounts. As the Court is aware, that system imposes on the Member States who participate in it an obligation to maintain their currencies within reduced margins of fluctuation: 2.25% in general and, in the case of Italy, 6%. For Italy, which enjoys a wider spread, for the United Kingdom and for Greece, which are outside the European Monetary System, the compensatory amounts are altered fairly regularly in line with the rates of exchange on the money markets. The reference period, in respect of which the fluctuations of the lira, the pound sterling and the drachma are taken into consideration to arrive at the alterations in the compensatory amounts, is determined by Regulation No 1380/75 of the Commission of 29 May 1975. Article 2 of that regulation provides that the period is of one week and runs from "a Wednesday to the following Tuesday".

3. According to the Commission, the application is inadmissible because the applicant has not respected the rule which requires that national means of redress be first exhausted. Unifrex, they claim, should have:

(a) applied to the French administrative courts for an order annulling the decision on the basis of which ONIC paid it unaltered compensatory amounts in spite of the devaluation of the lira; and,

(b) in the framework of such proceedings, secured the intervention of the Court of Justice by raising the question of the legality in Community law of the regulation freezing the amounts.

But the applicant did not do so and that renders inadmissible the claim for damages brought before the Court without the necessary preliminary steps having been adopted.

I do not share that view. To be a necessary preliminary to an action for damages before the Court of Justice, the national means of redress, it seems to me, must offer the party the same chance of obtaining the economic result which he might secure under Articles 178 and 215 of the Treaty. If it does not offer him that, his failure to try is certainly not an obstacle to a Community action. Let me say further that if the principle which requires that national means of redress be first exhausted is given the meaning claimed for it by the Commission, it will result in the suppression of another and far more solemn principle: that which allows parties to seek the protection of their rights in the courts. Of its very nature, in fact, an action to declare void an administrative measure which, in the opinion of the Commission, the parties concerned should have pursued before the national courts cannot give rise to compensation for the damage suffered.

The case-law of the Court confirms that argument. In the judgment of 17 December 1981, Joined Cases 197 to 200, 243, 245 and 247/80 *Ludwigshafener Walzmühle* v *Council and Commission* [1981] ECR 3211, the Court expressly held that the rule requiring previous exhaustion of national remedies was subject to one condition: the applicants must be able to obtain

protection of the same rights before the national court as would be protected by the Community Court (paragraph 9).

The Council also denies that the application is admissible. It does so however from a different angle, observing that the originating application does not indicate with sufficient clarity the subject-matter of the dispute and does not summarily state the grounds on which the application is based. Such failures amount to an infringement of Article 38 (1) of the Rules of Procedure, rendering the application inadmissible.

That objection is no better founded than the other. I recall that, according to the case-law of the Court, defects in an application give rise to inadmissibility only when they are such as to prevent the other party defending his interests or the Court from exercising its judicial review (see judgment of 14. 5. 1975, Case 74/74 *CNTA* [1975] ECR 533, paragraph 4). If only by reason of the full statement of the facts contained therein, however, this application has surely allowed the Council to defend itself effectively. It is sufficient to note that in its defence the institution before the Court has expressly contested, in terms which were not crystal clear but which were none the less neither ambiguous nor insufficient, the charge of not having adopted the necessary measures to bring the compensatory amounts into line with the devaluation of the lira. Thus, the condition upon which the Court insists if an application is to be regarded as incomplete within the meaning of Article 38 (1) has not been met.

4. I now turn to the substance. Unifrex rebukes the Community for not having adapted the compensatory amounts in good time to the devaluation of the lira on 23 March 1981. In particular, the Commission is liable for having unjustifiably frozen them from 23 March to 5 April 1981 and the Council for not having the measures necessary to prevent their being conrected only after some two weeks' delay. The Commission's *act* and the Council's *omission* are illegal from three points of view: they are contrary to the basic Regulation No 974/71; and they infringe the principles of the protection of legitimate expectation and non-discrimination.

As we already know, Article 3 of the aforementioned regulation provides that, if the difference between the parameters indicated in Article 2 "changes by at least one point from the percentage taken as a basis for the preceding determination", the compensatory amounts are to be altered in line with that change. According to the applicant, that rule imposes on the Commission an actual duty to adapt the compensatory amounts when any currency (lira, sterling, drachma) is devalued beyond a certain limit. In this case, the Commission did not carry out its duty and the Council did not intervene to ensure that it was carried out in good time. Both courses of conduct are thus contrary to Article 3 and give rise to non-contractual liability on the part of the Community for the damage suffered by the undertaking.

I am not convinced by that theory. I do not believe that the Commission is under a genuine duty arising from Article 3, or at least, it is not under a duty which deprives it of all discretion in deciding to bring the compensatory amounts up to date following upon changes in the

parities. Numerous factors point in that direction and above all the terms of the provision itself, the central part of which reads "shall be altered by the Commission". As will be noted, this does not contain words which directly evoke the idea of obligation (the French text uses the passive voice — "les montants ... sont modifiés par la Commission" — and makes one think therefore of a grant of powers). What is more important, it does not prescribe any period for the bringing into effect of the alterations.

In the third place, the purposes of Regulation No 974/71 are important. Looking at the preamble, and in particular the fourth recital, one may see that the compensatory amounts are presented there as measures designed to prevent monetary fluctuations from disrupting the intervention system and generating abnormal price movements such as to jeopardize "a normal trend of business in agriculture". It follows that when the variations in the rates of exchange do not provoke effects of that sort, for example because of their temporary character, the precondition for taking action with regard to the compensatory amounts does not exist and reasons counselling forbearance will prevail. In such cases, in fact, rather than ensuring a normal trend of business, the immediate correction of the amounts might give rise to speculative movements and distortions of the flow of trade.

Now to the practice. If the system were absolutely automatic, if the Commission had to adapt the compensatory amounts to the variations in the rates of exchange of currencies fluctuating outside the 2.25% with no margin of discretion, the alterations would have retroactive effect. On the other hand, the Commission claims, and Unifrex does not contradict it on that point, that it normally brings such alterations into effect on the Monday of the week following that in which a major devaluation within the meaning of Article 3 took place, and it explains that it uses that period to gather in the information necessary for its own decisions. In fact at least, therefore, the discretion exists. I would add that, taking account of that information, one cannot speak of a delay from 23 March to 5 April. In normal circumstances, the increase in the amounts would have taken effect only from 30 March and, from two weeks, the failure of which Unifrex complains would be reduced to six days.

Once again, the case-law of the Court supports my thesis. In more than one case, the Court has accepted that the Commission may legitimately freeze the compensatory amounts. Let me refer in particular to the judgment of 14 December 1978, in Case 35/78 *Schouten* [1978] ECR 2543. The Court acknowledged in that case that Article 3 of Regulation No 974/71 may be interpreted "as meaning that the exchange rates taken into account in order to establish the difference ..." to which the rule refers for the alteration of the amounts, must be "assessed on the basis of economically justified criteria", and that the Commission might leave out of account rates "which it considered to be unrepresentative" (paragraph 36).

I am convinced that in this case, by bringing the modified compensatory amounts into effect from 6 April, the Commission was exercising precisely that discretionary power which it had been granted for the purpose of avoiding speculative manoeuvres. On 6 April, the so-called "green" rates were to be aligned. Let us suppose that, rather than waiting for that date, the defendant institution had adjusted the amounts from 30 March; we should have had two modifications within one week, with obvious and fairly serious consequences for the security of commercial relations.

5. Can it be deduced from this that Regulation No 801/81 by which the Commission froze the compensatory amounts does not infringe the basic regulation? It seems to me that it can. It should in any case be noted that a mere failure to observe Community, rules will not suffice to make the institutions extra-contractually liable. The case-law of the Court shows that the breach must be sufficiently serious to affect general principles and that it must amount to a *manifest and grave* disregard for the limits on the exercise of the Community's powers (see judgment of 25. 5. 1978, Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL* [1978] ECR 1209, paragraph 6). It may thus be excluded without further consideration that the alleged fault of the Commission and the Council might be a fact capable of bringing Article 215 of the EEC Treaty into play. It is probably because it was aware of this that, as well as the infringement of Regulation No 974/71, the applicant has advanced the breach of two fundamental principles: the protection of legitimate expectation and non-discrimination.

Those criticisms are also without foundation. Legitimate expectation comes into consideration, it is claimed, because, on the basis of previous practice, traders were entitled to count on a constant and prompt adjustment of the compensatory amounts to variations in the rate of the lira, the pound sterling and drachma. It has been seen above that things were not really like that. Unifrex's thesis is in any case contrary to the case-law of the Court (see in particular the judgment of 14. 5. 1975, Case 74/74, *CNTA*, cited above) according to which the compensatory amounts are not a real guarantee of exchange rates and consequently do not free traders from all the risks connected with monetary fluctuations. I have also stated that the decision to freeze was designed to meet a particular need of general interest, and a need of that sort prevails over the interests of individuals. From this point of view also, therefore, legitimate expectation cannot be invoked.

As regards the principle of equality, the institutions are said to have breached it above all by not applying the equity clause in this case. Provided for under Commission Regulation No 926/80 of 15 April 1980, such a clause is in essence the payment, in certain cases, of *negative* compensatory amounts (that is, charged to traders) to "protect the operator against unavoidable disadvantages arising from the introduction of new monetary compensatory amounts or from an increase in such amounts following a

particular monetary measure affecting import or export operations carried out under contracts concluded prior to the monetary measure in question" (fourth recital). Thus it is a mechanism which, like the disputed freezing, is intended to protect the flow of trade from speculative manoeuvres, but which, apart from that, operates in a situation completely removed from that to which Regulation No 974/71 applies. I would add that exemption from negative compensatory amounts is essentially an exceptional instrument and, for that very reason, is of limited application. It cannot therefore be elevated into a criterion with which to evaluate the choices of the Commission in the various cases coming within the hypotheses envisaged in Regulation No 926/80.

However, Unifrex continues, the freezing of the amounts is contrary to the principle of equality from another point of view: the non-extension to intra-Community trade of advance-fixing of the compensatory amounts which Commission Regulation No 243/78 of 1 February 1978 allows in the case of trade with non-member countries. It is obvious that, if that possibility was allowed to them, traders would not suffer the negative consequences of monetary fluctuations.

As I have said, I disagree. The amounts are variable and this means that, in trade with non-member countries, they do not always correspond to the monetary relationships on which commercial contracts are based. It was to remedy that inconvenience that it was decided to fix them in advance (see the first recital in the preamble to Regulation No 243/78). That device was not extended to intra-Community trade because the risk of speculation is much greater there. Within the Community, traders could make use of the advance fixing of the compensatory amounts only for the possible monetary advantages connected with it: that is to say, independently of any other economic factor.

Putting intra- and extra-Community trade on the same plane to argue that the differences in the rules governing each of them amount to discrimination seems to me unjustified. Even if it is admitted that, in this case, the principle of equality has been infringed, the breach certainly does not have the characteristics, particularly the importance and the clarity, required by the Court if the conduct of the institutions is to be illegal. Naturally, the same must be said if the principle of the protection of legitimate expectation is considered to have been breached.

6. For all the preceding reasons, I propose that the Court dismiss the claim put forward by the company Unifrex against the Commission and the Council in the application lodged on 21 October 1982.

As regards the costs, I consider that they should be entirely borne by the applicant company, since it has failed in its submissions.