# JUDGMENT OF THE COURT (Fifth Chamber)
26 June 1990 *

In Case C-152/88

**Sofrimport SARL,** a company incorporated under French law, whose registered office is in Paris, represented by H. J. Bronkhorst, a lawyer with right of audience before the Hoge Raad (Supreme Court of the Netherlands), and E. H. Pijnacker Hordijk, of the Amsterdam Bar, with an address for service at Luxembourg at the Chambers of J. Loesch, 8 rue Zithe,

applicant,

v

**Commission of the European Communities,** represented by Peter Oliver, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Georgios Kremlis, a member of its Legal Department, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the annulment of Commission Regulations (EEC) Nos 962/88 and 984/88 of 12 and 14 April 1988 suspending the issue of import licences for dessert apples originating in Chile (Official Journal 1988, L 95, p. 10, and L 98, p. 37) and Commission Regulation (EEC) No 1040/88 of 20 April 1988 fixing quantities of imports of dessert apples originating in third countries and amending Regulation (EEC) No 962/88 suspending the issue of import licences for dessert apples originating in Chile (Official Journal 1988, L 102, p. 23) and for damages,

## THE COURT (Fifth Chamber)

composed of: Sir Gordon Slynn, President of Chamber, M. Zuleeg, R. Joliet, J. C. Moitinho de Almeida and G. C. Rodríguez Iglesias, Judges,

Advocate General: G. Tesauro
Registrar: B. Pastor, Administrator

* Language of the case: English.

having regard to the Report for the Hearing,

after hearing the submissions of the parties at the sitting on 28 September 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 22 November 1989,

gives the following

## Judgment

1 By an application lodged at the Court Registry on 26 May 1988 Sofrimport SARL, a company incorporated under French law, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Commission Regulations (EEC) Nos 962/88 and 984/88 of 12 and 14 April 1988 suspending the issue of import licences for dessert apples originating in Chile (Official Journal 1988, L 95, p. 10, and L 98, p. 37) and Commission Regulation (EEC) No 1040/88 of 20 April 1988 fixing quantities of imports of dessert apples originating in third countries and amending Regulation (EEC) No 962/88 (Official Journal 1988, L 102, p. 23). In the same application Sofrimport sought an order pursuant to the second paragraph of Article 215 of the EEC Treaty that the European Economic Community pay compensation for the loss suffered as a result of those regulations.

2 Regulations Nos 962/88, 984/88 and 1040/88 were adopted under the system of surveillance of imports of dessert apples from non-member countries established by Commission Regulation (EEC) No 346/88 of 3 February 1988 (Official Journal 1988, L 34, p. 21). That system made the release for free circulation of such fruit within the Community of Ten subject to the presentation of an import licence, whose period of validity was initially 30 days but was later, pursuant to Commission Regulation (EEC) No 871/88 of 30 March 1988 (Official Journal 1988, L 87, p. 73), increased to 40 days. By Regulations Nos 962/88 and 984/88 the Commission suspended from 15 to 22 April and from 18 to 29 April respectively, as a protective measure, the issue of import licences for dessert apples originating in Chile. By Regulation No 1040/88 the Commission extended until

31 August 1988 the suspension of the issue of import licences for dessert apples originating in Chile and set quantities for the importation of dessert apples originating in particular from the five producer countries in the Southern Hemisphere.

3 On 31 March 1988 Sofrimport, which is an importer and wholesaler of fresh fruit, shipped from San Antonio a cargo of 89 514 cartons of dessert apples originating in Chile for import into the Community. Prior to the arrival, on 20 April 1988, of the ship transporting that cargo at the port of Marseilles, it lodged an application on 12 April 1988 with the French intervention agency, Oniflhor, for import licences for those goods, in accordance with the requirements laid down by Commission Regulation No 346/88.

4 On 18 April 1988 Oniflhor refused to issue the licences, on the basis of Regulations Nos 962/88 and 984/88. Under Article 1(2) of Regulation No 962/88 applications for import licences pending on 18 April 1988 were to be rejected.

5 On 26 May 1988 Sofrimport submitted an application pursuant to Article 186 of the EEC Treaty and Article 83 of the Rules of Procedure of the Court for an order suspending the application of Commission Regulations Nos 962/88, 984/88 and 1040/88 with respect to the dessert apples shipped from San Antonio on 31 March 1988.

6 By an order of 10 June 1988 the President of the Court granted that application.

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

## The application for annulment

*Admissibility*

8 With regard to the admissibility of the application for annulment, it must be determined whether the contested measures are of direct and individual concern to the applicant within the meaning of the second paragraph of Article 173 of the Treaty.

9 The applicant is directly concerned by the contested measures because Regulation No 962/88 requires the national authorities to reject pending applications for import licences and thus leaves them no discretion.

10 With regard to the question whether the applicant is individually concerned, it must be determined whether the contested measures affect it by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons (see the judgment of 14 July 1983 in Case 231/82 *Spijker* v *Commission* [1983] ECR 2559, paragraph 8).

11 It should be observed first of all that the applicant is in the position referred to in Article 3(3) of Council Regulation (EEC) No 2707/72 of 19 December 1972 laying down the conditions for applying protective measures for fruit and vegetables (Official Journal, English Special Edition 1972 (28 to 30 December), p. 3) which requires the Commission, in adopting such measures, to take account of the special position of products in transit to the Community. Only importers of Chilean apples whose goods were in transit when Regulation No 962/88 was adopted are in that position. Those importers thus constitute a restricted group which is sufficiently well defined in relation to any other importer of Chilean apples and cannot be extended after the suspensory measures in question take effect.

12 Secondly, since Article 3 of Regulation No 2707/72 gives specific protection to those importers, they must therefore be able to enforce observance of that protection and bring legal proceedings for that purpose.

13 Importers whose goods were in transit when the contested regulations came into force must therefore be considered to be individually concerned by those regulations in so far as they concern those goods. The application for annulment is therefore admissible only in so far as it challenges the application of protective measures to products in transit.

*Substance*

14 Sofrimport bases its application for annulment on the following submissions:

(a) absence of any serious disturbances as referred to in Article 29 of Regulation (EEC) No 1035/72 of the Council of 18 May 1972 on the common organization of the market in fruit and vegetables (Official Journal, English Special Edition 1972 (II), p. 437), which is a pre-condition for the adoption of protective measures;

(b) misuse of powers, inasmuch as imports of dessert apples were suspended in order to carry out a review of the market, whereas the Commission has the power to suspend imports only in order to prevent serious disturbances of the market by reason of such imports, and breach of the principle of proportionality, inasmuch as the suspension was limited to imports of apples from Chile and was not extended to imports of apples from other non-member countries;

(c) breach of Article 3(3) of Regulation No 2707/72, inasmuch as the Commission failed to take account of the special position of products in transit to the Community;

(d) lack of authority on the part of the Commission to establish a quota system such as that introduced by Regulation No 1040/88.

15 Since the application for annulment is admissible only in so far as it concerns the position of products in transit, only the third of those submissions, the only one which challenges the application of protective measures to those products, should be examined.

16 Under the first subparagraph of Article 3(3) of Regulation No 2707/72, 'the measures provided for in paragraph 1 shall take account of the special position of products in transit to the Community'. The effect of that provision is to enable an importer whose goods are in transit to rely on a legitimate expectation that in the absence of an overriding public interest no suspensory measures will be applied against him.

17 The Commission submits first that it adequately protected traders whose goods were in transit by extending the period of validity of import licences from 30 to 40 days, by Regulation (EEC) No 871/88 of 30 March 1988 (Official Journal L 87, p. 73). That argument cannot be upheld. It is sufficient to observe that the specific protection provided by Article 3(3) of Regulation No 2707/72 mainly concerns goods not covered by a licence.

18 The Commission goes on to argue that a reasonably careful trader could have expected that it might at any time take protective measures once it had expressly reserved that possibility in Article 3(3) of Regulation No 346/88. Simply to inform traders of the possibility of protective measures cannot, however, be regarded as sufficient. In order to meet the requirements of the special protection provided for in Article 3(3) of Regulation No 2707/72, the measure should also have indicated the situations in which the public interest might justify the application of protective measures with regard to goods in transit.

19 It must be held that the Commission has not in this case demonstrated the existence of any overriding public interest justifying the application of suspensory measures with regard to goods in transit.

20 Consequently, the Commission has failed to fulfil its obligations under Article 3(3) of Regulation No 346/88.

21 Regulations Nos 962/88, 984/88 and 1040/88 must therefore be declared void in so far as they concern products in transit towards the Community; for the rest, the application for annulment must be dismissed.

**The application for damages**

22 Sofrimport also seeks an order that the Community pay compensation for the harm which it caused it to suffer by preventing it from marketing the dessert apples originating in Chile in the Community until 10 June 1988, the date of the order by which the President of the Court suspended the operation of those regulations with regard to the 89 514 cartons of dessert apples which were at that time stored in transit in the port of Marseilles. By adopting those regulations without taking account of the position of goods in transit, the Commission breached a superior rule of law and manifestly and gravely disregarded the limits on the exercise of its powers.

23 The Commission denies that the conditions required in order for the Community to incur non-contractual liability are met. The contested regulations are legislative measures which involve choices of economic policy, so that the Community can be liable in damages only in the circumstances set out by the judgments of the Court with regard to non-contractual liability. The contested measures did not exceed the Commission's powers, and in any event did not exceed them gravely and manifestly. Furthermore, the applicant did not suffer damage exceeding the normal risks inherent in the economic activities in issue.

24 Under the second paragraph of Article 215 of the Treaty, in the case of non-contractual liability the Community must, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions in the performance of their duties.

25 With regard to legislative measures, the Court has defined the scope of that provision in particular in its judgment of 25 May 1978 in Joined Cases 83/76 and 94/76 and 4/77, 15/77 and 40/77 *HNL* v *Council and Commission* [1978] ECR 1209, paragraphs 4 to 6; see also the judgments of 4 October 1979 in Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, paragraph 9, Joined Cases 241/78, 242/78 and 245/78 to 250/78 *DGV* v *Council and Commission* [1979] ECR 3017, paragraph 9 and Joined Cases 261/78 and 262/78 *Interquell* v *Council and Commission* [1979] ECR 3045, paragraph 12. According to those judgments, the Community does not incur liability on account of a legislative

measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred.

26 It should be observed first that the purpose of the first subparagraph of Article 3(3) of Regulation No 2707/72 is to protect traders who import goods covered by that regulation into the Community from the unfavourable consequences of protective measures which might be adopted by the Community institutions. That provision thus gives rise to a legitimate expectation the disregard of which constitutes a breach of that superior rule of law.

27 Secondly, it must be held that by failing completely to take account of the position of traders such as Sofrimport, without invoking any overriding public interest, the Commission committed a sufficiently serious breach of Article 3(3) of Regulation No 2707/72.

28 Thirdly, the damage alleged by Sofrimport goes beyond the limits of the economic risks inherent in the business in issue inasmuch as the purpose of that provision is precisely to limit those risks with regard to goods in transit.

29 Consequently, the Community must make good the damage caused to Sofrimport by the adoption of the contested regulations.

30 The parties should be requested to settle the amount of damages within a period of 12 months, subject to a subsequent decision of the Court, taking into account the prices actually obtained by Sofrimport on the sale of the apples after the order of the President of the Court, referred to above, and the prices which it could have obtained immediately after the arrival of the goods at the port of destination.

31 Sofrimport claims in addition that the Community should be ordered to pay interest at the annual rate of 9.5% from the date of submission of the reply in this case.

32 As the claim relates to the non-contractual liability of the Community under the second paragraph of Article 215, it must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. According to those principles a claim for interest is, as a general rule, permissible. On the basis of the criteria adopted by the Court in similar cases, the obligation to pay interest arises on the date of this judgment inasmuch as it establishes the obligation to make good the damage (see the judgments of 4 October 1979, referred to above, of 18 May 1983 in Case 256/81 *Pauls Agriculture* v *Council and Commission* [1983] ECR 1707, paragraph 17 and of 13 November 1984 in Joined Cases 256/80, 257/80, 265/80 and 267/80, 5/81 and 51/81 and 282/82 *Birra Wührer* v *Council and Commission* [1984] ECR 3693, paragraph 37). The rate of interest which it is proper to apply is 8%.

On those grounds,

THE COURT (Fifth Chamber),

as an interlocutory decision, hereby:

**(1) Declares Commission Regulations (EEC) Nos 962/88 and 984/88 of 12 and 14 April 1988 suspending the issue of import licences for dessert apples originating in Chile and Commission Regulation (EEC) No 1040/88 of 20 April 1988 fixing quantities of imports of dessert apples originating in third countries and amending Regulation (EEC) No 962/88 void in so far as those regulations concern products in transit to the Community;**

**(2) For the rest, dismisses the application for annulment;**

**(3) Orders the European Economic Community to make good the damage suffered by Sofrimport SARL as a result of the application of Regulations Nos 962/88, 984/88 and 1040/88;**

**(4) Orders that interest at the annual rate of 8% shall be paid on the amount payable as from the date of this judgment;**

**(5) Orders the parties to inform the Court within 12 months from the delivery of this judgment of the amounts of compensation arrived at by agreement;**

**(6) Orders that in the absence of agreement the parties shall transmit to the Court within 12 months from the delivery of this judgment a statement of their views with supporting figures;**

**(7) Reserves the costs.**

Slynn Zuleeg

Joliet Moitinho de Almeida Rodríguez Iglesias

Delivered in open court in Luxembourg on 26 June 1990.

J.-G. Giraud
Registrar

Gordon Slynn
President of the Fifth Chamber