JUDGMENT OF THE COURT (THIRD CHAMBER)
25 MARCH 1982 [1]

# Alexander Moksel Import-Export GmbH & Co. Handels KG v Commission of the European Communities

(Applications for advance fixing of export refunds)

**Case 45/81**

*Measures adopted by institutions — Regulation No 3318/80 — Legal nature*
*(EEC Treaty, Art. 189; Commission Regulation No 3318/80)*

It must be deduced from its purpose, from the framework of the regulations of which it forms part and also from its very nature that Regulation No 3318/80 temporarily suspending the advance fixing of export refunds for beef meat products is indeed a regulation which is of general application; the nature of such a measure as a regulation is not called in question by the sole fact that it may be possible to determine the number or even the identity of certain traders concerned.

In Case 45/81

ALEXANDER MOKSEL IMPORT-EXPORT GMBH & CO. HANDELS KG, Buchloe, Federal Republic of Germany, represented by P. Wendt, Rechtsanwalt, Hamburg, with an address for service in Luxembourg at the office of J. Jansen-Housse, 21 Rue Aldringen,

applicant,

supported by

TIAC HANDELMAATSCHAPPIJ BV, Apeldoorn, Netherlands, represented by David Vaughan QC, instructed by Messrs Clyde & Co., Solicitors, London, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34 Rue Philippe-II,

intervener,

1 — Language of the Case: German.

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Jörn Sack, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Oreste Montalto, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendant,

OBJECTION at the present stage of the proceedings that the action brought by the applicant under the second paragraph of Article 173 of the EEC Treaty is inadmissible,

THE COURT (Third Chamber)

composed of: A. Touffait, President of Chamber, Lord Mackenzie Stuart and U. Everling, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: J. A. Pompe, Deputy Registrar

gives the following

## JUDGMENT

## Facts and Issues

### I — Facts and procedure

The applicant, Moksel, is one of the largest exporters of beef and veal in the Community. Since it generally makes large export contracts providing for a time for delivery of three to four months on average, it regularly avails itself of the possibility which is open to it of having export refunds fixed in advance.

For this reason, on Friday 12 December 1980, it submitted to the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets] (hereinafter referred to as the "Federal Office"), the

federal intervention agency, several applications for advance fixing of export refunds on beef and veal. For such applications to be considered, the person concerned must also give security in favour of the Federal Office not later than 1 p.m. on the day on which the application for a certificate is lodged.

Since there was a delay on the part of the bank which was to notify the Federal Office of the applicant's security, the security did not reach the Federal Office until after 1 p.m. on Friday 12 December 1980. Although Article 5 (2) of Regulation No 193/75, replaced by Regulation No 3183/80 (Official Journal L 338, p. 1) authorized the Federal Office to refuse the application, the Federal Office did not do so but was obliged to consider the application as having been lodged on the first working day following the day on which it was received, in this case on Monday 15 December 1980.

In these circumstances, the export licences corresponding to applications for advance fixing certificates lodged on 15 December 1980 could not be issued until 20 December 1980, that is to say, the fifth working day following the day on which the applications were lodged, in accordance with Article 2 (1) of Commission Regulation No 2378/80 of 4 September 1980 (Official Journal L 241, p. 19) provided that no "special measures" had been taken during that period.

Such measures were however taken on 19 December 1980 by Commission Regulation No 3318/80 of 19 December 1980 (Official Journal L 345, p. 20) temporarily suspending the advance fixing of export refunds for beef meat products, and the Federal Office refused Moksel's application in a decision of 23 December 1980.

As the reason for its decision, the Federal Office referred to the measures taken by the Commission in Regulation No 3318/80 and also contained in the telex message which was sent to it by the Commission on 19 December 1980 to inform it of the adoption of the regulation and which states in the paragraph marked "N.B." that "These applications (which would have been accepted on 20 December or later) must be refused and the securities lodged must be released".

These are the two acts of the Commission which the applicant asks the Court to annul, on the grounds first that the telex message constitutes "a decision" inasmuch as it is capable of producing legal effects and is of direct and individual concern to the applicant, and secondly that, even if the only purpose of the telex message was to interpret Regulation No 3318/80, the action is nevertheless admissible because the regulation in fact constitutes "a decision" of direct and individual concern to the applicant.

By an application lodged at the Court Registry on 23 February 1981, the applicant brought this action under Article 173 of the EEC Treaty seeking a declaration that either Regulation No 3318/80 or the telex message which the Commission sent to the Federal Office, or both, are void.

By a telex message dated 26 June 1981, received at the Court Registry on the same day, TIAC applied to be allowed to intervene in the case in support of the applicant. Such intervention was allowed by order of 30 September 1981.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, by order of 30 September 1981, to assign

the case to the Third Chamber, pursuant to Article 95 (1) and (2) of the Rules of Procedure, and to open the oral procedure on the objection of inadmissibility without any preparatory inquiry. At the same time, it invited the Commission to make written observations before 5 November 1981 on the following question:

How many traders were covered by Regulation No 3318/80?

(a) How many had lodged their application during the period of suspension?

(b) How many had lodged their application before the period of suspension?

Were these traders identifiable?

## II — Conclusions of the parties

In its application, *Moksel* claims that the Court should:

"1. Declare void the decision of the defendant contained in Commission Regulation No 3318/80 of 19 December 1980 (Official Journal L 345, p. 20) and/or in the defendant's telex message of 19 December 1980 to the Bundesanstalt für landwirtschaftliche Marktordnung, Frankfurt am Main, rejecting applications already lodged for the advance fixing of export refunds for certain beef products in so far as it concerns the applicant, inasmuch as such applications ought to have been accepted on 20 December 1980 at the latest;

2. Order the defendant to pay the costs."

The *Commission* claims that the Court should "declare that the action is inadmissible and order the applicant to pay the costs".

In its observations on the objection of inadmissibility, the *applicant* claims that the Court should:

"1. Reserve the question of the admissibility of the action until the final judgment and declare in that judgment that the action is admissible;

2. *In the alternative,* dismiss the Commission's claim, order the latter to pay the costs and declare that the action is admissible."

The *intervener* claims that the Court should:

"1. Declare that the action brought by Moksel is admissible;

2. Whatever the decision as to admissibility, order the Commission to pay the costs incurred by Moksel and TIAC;

3. In any event, refuse to order TIAC to pay the costs incurred by the Commission."

## III — Submissions and arguments of the parties

### *A — Submissions and arguments of the Commission*

As to the facts, the *Commission* contends that it was the Federal Office which "officially and in the final analysis" took the decision on the application lodged by the applicant. Indeed it is clear from the Federal Office's decision of 23 December 1980 that the latter informed the applicant that it had a right to raise an objection to the decision within a limited period; this constitutes clear evidence that it was the Federal Office and not the Commission which took the decision on Moksel's applications.

Furthermore, the applicant did clearly avail itself of the opportunity to object to the decision of the Federal Office, since

the letter from the Office dated 30 January 1981 begins with the words "Objection to our decision of 23 December 1980". Thus the applicant has brought an appeal against the decision of the Federal Office in the German courts and is at the same time seeking to bring an action for annulment under Article 173 of the Treaty against the Commission for a declaration that the decision is void.

According to the Commission the action is wholly inadmissible, as neither the telex message in question nor Regulation No 3318/80 is capable of constituting a decision within the meaning of Article 189 of the Treaty.

1. The legal nature of the telex message of 19 December 1980

According to the Commission, this telex message cannot constitute a decision of the Commission first because, even if it contains a decision, it cannot be imputed to the Commission, for the message "is clearly a straightforward communication by a department of the Commission", in this case, the Directorate-General for Agriculture.

Secondly, according to the division of powers for the carrying out of the common agricultural policy in this sector, the Commission has no power to address special instructions to the Member States, which apply Community law upon their own responsibility. Far from exceeding its powers, the Commission has merely provided Member States with explanations and not with mandatory instructions, as may be seen from the fact that the observations have been added in the paragraph marked "N.B." and that they are designed not to give an instruction but to emphasize the legal position arising out of the law in force. Therefore the Commission's telex message is purely informative in nature.

Finally, the message may be explained by the speed with which the suspension of the advance fixing of export refunds for beef and veal was decided in the form of Regulation No 3318/80. When a regulation is to enter into force on the day of its publication in the Official Journal — as it was in this case — the "Commission's officers are accustomed to explain the legal position to the authorities of the Member States in the form of a telex message". The purpose of these messages is only to reinstate the legal position appearing in the provisions in force. Thus the messages are in no way legislative in character and in the application of the law the Member States are perfectly free to take account of them or not. Furthermore, in similar cases the Court has not considered telex messages of this kind from officers of the Commission to be decisions within the meaning of Article 173 of the EEC Treaty (see judgment of 17 July 1959 (Case 20/58 *Phoenix-Rheinrohr* [1959] ECR 75) and judgment of 27 March 1980 (Case 133/79 *Sucrimex* [1980] ECR 1299)).

2. The legal nature of Regulation No 3318/80

According to the Commission, the regulation in issue states in Article 1 a general and abstract legal effect and does not concern a strictly-defined group of people.

From the time at which the measure has been adopted, it is not only the applications received during the period of suspension which must be refused but also those lodged earlier on which there has not yet been a decision. This legal

consequence is the result not of Regulation No 3318/80 but of Regulation No 2378/80 of 4 September 1980 on additional special detailed rules governing the issue of export licences in the beef and veal sector (Official Journal L 241, p. 19) which, being applicable for an indeterminate period, does not in any way have the character of a decision. Therefore the regulation is certainly not of individual concern to the applicant.

Furthermore the group of people who had already lodged applications was not finally determined at the moment of the adoption of the regulation in question. Indeed, in view of the fact that an application is considered as having been lodged on a given day on condition that it arrives at the office of the intervention agency before 1 p.m. on the said day, the determination of the number of cases coming within the scope of Regulation No 3318/80 depends on decisions taken on each individual case by the national authorities, and the legality of these decisions may if necessary be challenged at law.

Finally, the solution which the Court applied in the judgment of 6 March 1979, (Case 92/78 *Simmenthal* [1979] ECR 177) cannot be adopted here for, in that case, the action related to the fixing of minimum selling prices by the Commission, not the authorities of the Member States. In that case the Member State merely communicated the decision of the Commission, whereas in this case it is for the authorities of the Member States to apply Regulation No 3318/80 upon their own responsibility. Furthermore, in *Simmenthal* all the tenders received were forwarded to the Commission and constituted the basis for the decision, and the Court emphasized that the Commission decided directly the fate, be it favourable or unfavourable, of each of the tenders submitted, whereas in this case the communications of the Member States on Mondays and Thursdays provide only an approximate statement of the situation, particularly as, between the time of the communication to the Commission and the adoption of a decision by the latter, the authorities of the Member States may receive other applications which will also be affected by the Commission's decision of suspension. Therefore, the Commission never has a complete knowledge of all the applications received at the time it adopts its decision and also it does not decide on these individual applications, which means that the applicant cannot rely on the judgment of 13 May 1971 (Joined Cases 41 to 44/70 *International Fruit Company* [1971] ECR 411).

In another connection, the regulation at issue is clearly to be regarded as a rule of law and cannot be considered as an individual decision "for the simple reason that the grant of advance fixing of refunds is itself governed by rules of law and therefore *a priori* constitutes a right" and there can be no derogation from these rules except by means of legislative measures of general application and not by means of individual decisions. It would be absurd to recognize Regulation No 3318/80 as being a rule of law in certain cases (future applications) and to consider it as a decision in others (applications already received). The Commission therefore takes the view that the application is clearly inadmissible and repeats that the legal rights of the individual are none the less fully protected since the applicant may challenge the decision of the Federal Office before the national court as it has already done. The applicant's action is indeed understandable, since, in

laying the matter directly before the Court, it is endeavouring to obtain a decision as quickly as possible. This consideration does not, however, justify a derogation from the procedures laid down in the Treaty or particularly from the division of jurisdiction between the national courts and the Court of Justice.

*B — Submissions and arguments of the applicant*

The *applicant* submits that this application is admissible since, in its view, the Commission's telex message constitutes a decision, and, even if it were decided that this message was intended merely to explain the legal position arising out of Regulations Nos 3318/80 and 2378/80, the application is still admissible on the ground that Regulation No 3318/80 in fact constitutes a decision.

1. The legal nature of the telex message

This message constitutes a decision first because it is capable of producing legal effects. Just as in the *Sucrimex* case the Court took the view that a telex message not producing legal effects did not constitute a decision, according to the applicant, *a contrario* a telex message capable of producing legal effects does constitute a decision.

It is certainly possible to agree that the first half of the message and also the first sentence of the paragraph marked "N.B." are only informatory, but there can be no doubt that the sentence "These applications must be refused" constitutes an order, "a mandatory instruction to the Federal Office". Such an instruction may not be interpreted by reference to the context, that is to say "in the Commission's opinion". An interpretation based on subjective factors cannot be permitted; whether or not this telex message constitutes a decision must be determined according to objective evidence. It is clear from the decision of the Federal Office that this message constitutes an instruction.

Moreover, in the telex message the Commission also says "... and the securities lodged must be released". This sentence provides further evidence of the fact that the message constitutes a decision, since the relevant rules contain no provision for the securities, and therefore a decision is required in this regard.

The fact that the paragraph is marked "N.B." does not necessarily lead to the conclusion that the sentence in question does not constitute a decision, since whether or not a declaration is a decision depends not on its title or description, but on its contents and wording.

In any case, this message also refers to Regulation No 2378/80, from which it follows that the derogative measures in question may be adopted only by the Commission, since it is the Commission which must be informed in order to adopt such measures. Furthermore, since the purpose of Regulation No 2378/80 is exclusively to deal with the applications already lodged, the measures adopted in application of this regulation in fact constitute decisions, as they deal with individual cases. Consequently, contrary to the allegations of the Commission, it was not the Federal Office but the Commission itself which in the final analysis took the decision, and therefore the telex message in question does constitute a decision.

This message is of direct and individual concern to the applicant. Indeed, according to the applicant, the Court's

reasoning in the case of *Simmenthal* is wholly applicable in this case, since in adopting Regulation No 3318/80, the Commission took into consideration Moksel's applications along with all the others and in a telex message to the Federal Office gave instructions on all of the applications including those of Moksel; therefore it was that message which directly refused Moksel's application.

Finally, the applicant answers two specific points made by the Commission:

(a) Although the telex message came from the Directorate-General for Agriculture, it is certain, in Moksel's opinion, that powers have been delegated to that Directorate-General permitting it to take a decision on the matter.

(b) The question whether the Federal Office adopted a measure capable of being challenged under national law is scarcely relevant to the determination of the existence of a decision which, though addressed to a Member State, is of direct and individual concern to an individual trader in the common market; (Moksel refers in this regard to the case of *Simmenthal*, cited above, *Töpfer* (judgment of 1 July 1965, Joined Cases 106 and 107/63 [1965] ECR 405) and *Werner A. Bock* (judgment of 23 November 1971, Case 62/70 [1971] ECR 897)).

2. The legal nature of Regulation No 3318/80

The applicant admits that the regulation in question would constitute a regulation within the meaning of Article 189 of the EEC Treaty if, in accordance with Article 5 (4) of Regulation No 885/68, it were confined to dealing with applications lodged during the period of suspension. Moreover, these applications are covered by the decision in *Calpak* (judgment of 17 June 1980, Joined Cases 789 and 790/79 [1980] ECR 1949). In relation to the applications lodged prior to the period of suspension however, this regulation constitutes a special measure and therefore has the character of a decision: in this case, it is, on the contrary, the rule laid down in the *International Fruit* case which applies, for the number of traders was known at the time when the regulation was adopted, and no new application could be added. In this case, therefore, the measure adopted, concerning a restricted and sufficiently identifiable group of traders, in fact constitutes a conglomeration of decisions, each of which separately affects the legal position of an applicant and therefore relates to the applicant individually.

The applicant further adds that a regulation claiming to have a quasi-retroactive effect indeed constitutes in law a regulation within the meaning of Article 189 of the EEC Treaty, but in this case, there is no question of such a regulation, for the third paragraph of Article 5 (4) of Regulation No 885/68, as amended, in fact prohibits quasi-retroactivity, since it refers only to applications lodged during the period of suspension. Therefore the provision made by the Commission in Article 2 (1) of Regulation No 2378/80 constitutes at best a skilful attempt to confer "on regulations on the suspension of advance fixing an effect equivalent to quasi-retroactivity which as regulations they do not and cannot produce".

The applicant also adds that there have already been measures suspending advance fixing of export refunds, but this is the first time that they have covered applications already lodged but not yet dealt with, exclusively on the basis of, and in relation to, Article 2 (1) of Regu-

lation No 2378/80. It is for this reason that the "measure" adopted under Article 2 (1) of Regulation No 2378/80, and not the regulation itself, is to be regarded as a decision. Indeed, the Commission is wrong to deny that this decision in fact covers a closed and sufficiently identifiable group of people. The only problem which might have arisen in relation to this list of traders would have been that of determining whether or not an old application might have been among the applications affected. This is only a "subsidiary question" the resolution of which by the national authorities issuing the licences is unconnected with the fact that, in the context of Regulation No 2378/80, it is the Commission's sole responsibility to determine the acceptance or refusal of existing applications for certificates, as has been found already by the Court in the case of *Simmenthal.* The applicant sees nothing to distinguish this case from that of *Simmenthal.* In its opinion, the Commission has disregarded the terms of Regulation No 2378/80, which provides that it is for the Commission, not the Member States, to adopt the measures in question. Finally, it is clear from the Commission's observations that the latter had knowledge of all the applications lodged at the time when it adopted Regulation No 3318/80.

On a more general level, the applicant emphasizes that it has a legally-protected interest in bringing an action, which in its submission follows from paragraphs 31 to 33 of the judgment in *Simmenthal.*

The applicant admits that it has lodged an objection with the Federal Office against the rejection of its application, but the Federal Office has suspended consideration of this complaint until the Court has determined the matter. However, the applicant maintains that that objection cannot be the basis of an objection in this action on the ground that the matter is *sub judice,* for in this case the claim for a declaration under Article 173 of the EEC Treaty that the decision is void constitutes the simplest and speediest procedure since, in its view, the Court would in any event have to be seised and, under Article 177 of the EEC Treaty, only the courts of last instance are obliged to refer a matter to the court. As such proceedings may go on for years, only Article 173 of the Treaty can ensure the effective legal protection of traders. Furthermore, it must be borne in mind that the applicant did not lodge its applications until 15 December 1980 and the Federal Office was unable to treat them as if they had already been lodged on 12 December 1980. Finally, in the applicant's opinion, the issue of the admissibility of the claim cannot effectively be separated from the substance of the action.

*C — Submissions and arguments of the intervener*

The *intervener TIAC* believes that, before examining whether Regulation No 3318/80 or the telex message of the Commission, or both of them, in fact constitute decisions capable of founding an action for a declaration that they are void, the Court should consider the origin of the rules governing the powers of the Commission in relation to the suspension of the advance fixing of export refunds for beef and veal.

(a) Origin of the rules governing the powers of the Commission in this area

According to the intervener, the Commission obtains its powers from Regulation No 885/68, as amended by

Regulation No 1504/76. It is authorized to act alone only in cases of extreme urgency and provided that it takes a decision finding, on the one hand, that there are or may occur difficulties on the market, and, on the other hand, that there is a situation of extreme urgency. In these circumstances, the Commission has the right to order the suspension of advance fixing for three days, and all the applications lodged during that period are to be rejected. The intervener draws an initial inference from this text: there is no provision relating to the applications lodged prior to the decision to suspend advance fixing, which means that the Commission has no powers in relation to those applications.

Regulation No 2378/80 on additional special detailed rules governing the issue of export licences was designed to enable the Commission to be better informed, and the period of five working days introduced by that regulation was intended to enable the Commission to assess the market situation and to take "appropriate measures relating to the application in question". According to the intervener, this regulation makes changes in this regard as compared with Regulation No 301/80. Furthermore, Regulation No 2378/80 provides, in Article 2 (1), that the licences shall be issued "unless special measures have been taken during that period", according to the intervener, this provision cannot, however, derogate from the express terms of Regulation No 1504/78. Moreover, the preamble shows that such measures can be taken only in relation to the application in question, with the result that the Commission must assess the applications one by one and will therefore not necessarily decide to reject them all.

From this analysis, the intervener draws the following conclusions:

1. The Commission has only a power limited to the possibility of refusing the applications lodged during the period of suspension. It is, therefore, unable to refuse those lodged before that period.

2. Even if it is possible, the rejection of these earlier applications may only be as a last resort effected by means of a special decision relating to each individual case.

(b) As regards the Commission's submissions

First, the intervener emphasizes the fact that the Commission's assertion that what is involved is a decision of the Federal Office is mistaken, for the Federal Office merely notified the applicants of a decision already taken by the Commission. The telex message leaves no doubt in this respect, since its wording permitted the Federal Office no power of personal appraisal of the situation. Furthermore, only the Commission, entrusted with assessing the market situation, was able to take this decision, since it alone has been expressly authorized to do so; therefore, paragraph 16 of the judgment in the *Sucrimex* case does not apply here.

*1. The legal nature of Regulation No 3318/80*

In so far as this regulation in fact covers only applications lodged during the period of suspension, Moksel and TIAC are not entitled to challenge it, for in this case it is not of direct concern to them. In this instance it is the solution adopted by the Court in the case of *Société pour l'Exportation des Sucres* (judgment of

31 March 1977, Case 88/76 [1977] ECR 709) which applies — which none the less means that the costs should be paid by the Commission. On the other hand, in so far as Regulation No 3318/80 also affects applications lodged prior to the period of suspension, it may in fact be regarded as two regulations:

(i) The first deciding to suspend advance fixing in accordance with Regulation No 1504/76 and therefore necessitating the rejection of applications lodged during the period of suspension;

(ii) The second adopted under Regulation No 2378/80 refusing applications lodged prior to the period of suspension.

This "second regulation" constitutes a decision since it follows from the preamble to Regulation No 2378/80 that the Commission must determine each case individually and also since all of the applications lodged were known to the Commission as they were capable of being identified in the appendix to the report submitted by the Commission.

In order to show that this regulation in fact constitutes a decision, the intervener develops a line of argument identical to that of Moksel, but adds a new argument to the effect that it is only because the statement of the reasons on which Regulation No 3318/80 is based is inadequate that the Commission is able to maintain that it is in fact a regulation, whereas a sufficient statement would have revealed that the regulation constitutes, in part at least, a decision refusing the applications lodged prior to the period of suspension.

*2. The legal nature of the telex message*

The intervener puts forward first a line of argument fairly close to that of Moksel, in order to demonstrate that this message, particularly the two sentences contained in the paragraph marked "N.B." already mentioned by the applicant, in fact constitutes mandatory instructions to the national authorities.

According to the intervener, however, the problem of the interpretation of the message also depends on the interpretation of the effects of Regulation No 3318/80:

(i) If Regulation No 3318/80 does not cover applications lodged prior to the period of suspension, then the message is to be regarded either as a decision refusing the applications or as a non-existent legal measure, not affecting Moksel and TIAC;

(ii) On the other hand, if Regulation No 3318/80 covers these earlier applications, the telex message must be regarded as a non-existent legal measure.

Therefore it is necessary to examine the message only to the extent to which Regulation No 3318/80 does not concern these earlier applications.

Finally, the intervener takes the view first that the telex message certainly constitutes an act of the Commission, even if it came from the Directorate-General for Agriculture, for there is certainly some delegation in this special area, and secondly that the Federal Office, contrary to the Commission's assertion, was unable to ignore the message, since as a result of its actual wording, the Federal Office considered that it contained mandatory instructions.

IV — Commission's reply to the question put by the Court

The *Commission* states that it "does not know" how many traders were covered by Regulation No 3318/80.

It does not even have any information concerning the number of traders who had lodged an application for advance fixing of refunds before such fixing was suspended. Indeed, the communications of the Member States, sent to the Commission on Thursday 18 December 1980 before 4 p.m., only concerned the products, quantities and countries of destination for which applications for advance fixing of refunds had been lodged. These communications did not, therefore state the number or the identity of the traders who had lodged such applications.

The Commission once again draws the Court's attention to the fact that the new applications might have been lodged between Thursday 18 December 1980 at 1 p.m. and 20 December 1980, the date on which Regulation No 3318/80 was adopted.

Therefore, when the Commission adopts a decision to suspend the advance fixing of refunds, it does not have a complete view of the products, quantities and the countries of destination affected. It is only by means of the subsequent periodic communication of the Member States that these facts become known to the Commission.

V — Oral procedure

At the sitting on 26 November 1981 oral argument was presented by the following: Jörn Sack, acting as Agent, for the Commission of the European Communities; Hans-E. Heyn, Rechtsanwalt, Hamburg, for the applicant; and David Vaughan, QC, for the intervener.

The Advocate General delivered his opinion at the sitting on 4 February 1982.

## Decision

1 By an application lodged at the Court Registry on 23 February 1981, an undertaking trading in beef and veal, Alexander Moksel Import-Export GmbH & Co. Handels KG, a company incorporated under German law, supported by TIAC Handelmaatschappij BV, intervener, a company incorporated under Netherlands law, brought an action under Article 173 of the EEC Treaty seeking a declaration that either Regulation No 3318/80 of 19 December 1980 temporarily suspending the advance fixing of export refunds for beef meat products (Official Journal 1980, L 345, p. 20) in so far as it concerns the applicant, or the telex message which the Commission sent to the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office

for the Organization of Agricultural Markets], (hereinafter referred to as "the Federal Office") on 19 December 1980, or both, are void.

2 In the course of its activities the applicant regularly, with regard to its contracts for the export of beef and veal, avails itself of the opportunity of having export refunds fixed in advance as provided for by Article 5 (3) and (4) of Regulation No 885/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on beef and veal and criteria for fixing the amount of such refunds (Official Journal, English Special Edition, 1968 (I), p. 237), as supplemented by Council Regulation No 1504/76 of 21 June 1976 as regards the general rules for advance fixing of export refunds for beef and veal (Official Journal 1976, L 168, p. 7).

3 Under those provisions, on Friday 12 December 1980 the applicant submitted to the Federal Office applications for advance fixing of export refunds. Owing to a delay in giving notice of the bank's security, the Federal Office, in accordance with Article 14 of Commission Regulation No 3183/80 of 3 December 1980 laying down common detailed rules for the application of the system of import and export licences and advance fixing of certificates for agricultural products (Official Journal 1980, L 338, p. 1), considered the applications as having been lodged on the first working day following the day on which they were received, in this case on Monday 15 December 1980.

4 According to Article 2 (1) of Commission Regulation No 2378/80 of 4 September 1980 on additional special detailed rules governing the issue of export licences in the beef and veal sector (Official Journal 1980, L 241, p. 19), the export licences corresponding to those applications could not be issued until the fifth working day following the day on which the applications were lodged, that is to say, in this case Monday 22 December 1980, provided that no special measures had been taken during that period.

5 Since such measures were taken on 19 December 1980 by Regulation No 3318/80, the Federal Office refused the applicant's applications in a decision of 23 December 1980, in which it referred both to that regulation and to a

telex message which had been sent to it by the Commission on 19 December 1980 to inform it of the adoption of the said regulation and which in particular stated in a paragraph marked "N.B." that "those applications — which would have been accepted on 20 December 1980 or later — are no longer applicable and must be refused and the securities lodged must be released".

6 The applicant brought an application for a declaration that those measures were void under the second paragraph of Article 173 of the EEC Treaty.

7 The Commission raised an objection of inadmissibility under Article 91 (1) of the Rules of Procedure. In that regard, after emphasizing that the decision concerning the applications submitted by the applicant was in fact taken by the Federal Office, it submits that the application is inadmissible on the ground that neither the telex message of 12 December 1980 nor Regulation No 3318/80 constitutes a decision within the meaning of the second paragraph of Article 173 of the EEC Treaty.

8 The applicant, on the other hand, contends that those measures are of direct and individual concern to it.

9 In those circumstances, the Court decided to determine the admissibility of this application for a declaration of nullity without going into the substance of the case.

10 It is therefore appropriate to examine first the legal nature of Regulation No 3318/80 and then that of the Commission's telex message of 19 December 1980.

## The legal nature of Regulation No 3318/80

11 The Commission considers first that it follows from Regulation No 2378/80 that the regulation in question covers not only applications lodged during the period of suspension but also those lodged earlier on which there had not yet been a decision. Next it submits that the number of traders covered thereby

was not known to it and, finally, that the contested regulation clearly has the character of a rule of law and cannot be considered as an individual decision, on the ground that advance fixing constitutes a right from which there may be no derogation except by means of legislative measures of general application and that it is difficult to regard Regulation No 3318/80 as having the character of a decision when it applies to applications lodged earlier.

12 The applicant, on the other hand, alleges that Regulation No 3318/80, to the extent to which it applies to applications lodged prior to its entry into force, has the character of a decision. Indeed, in its view, the number of applications for advance fixing certificates which were received over the last five working days, within the meaning of Article 2 (1) of Regulation No 2378/80, and which might be concerned by Regulation No 3318/80 was already known to the Commission at the time at which the latter regulation was adopted. To that extent the contested regulation constitutes a conglomeration of individual decisions taken by the Commission in the form of a regulation, and not a measure of general application within the meaning of the second paragraph of Article 189 of the EEC Treaty.

13 The intervener puts forward similar arguments and adds that it follows from the origin of the regulations that the Commission is not empowered to refuse the applications lodged earlier and that if Regulation No 3318/80 in fact covered only applications lodged during the period of suspension, neither the applicant nor the intervener would be entitled to challenge it, for it would not be of individual concern to them.

14 In view of those different arguments it is necessary to determine whether, having regard to the facts of the case, the contested regulation is of general application or only appears to be so, being in reality only a decision which is of direct and individual concern to the applicant.

15 The sole recital in the preamble to Regulation No 3318/80 justifies the measures suspending the advance fixing of export refunds for beef meat

products by the fact that as that market was at that time "characterized by an uncertainty as regards the price", the "current refunds applicable to these products could lead to speculative advance fixing of the refunds".

16 Two conclusions may be inferred from the references in the preamble to that regulation, from the statement of the reasons on which it is based and from the clear wording of Article 1 thereof. On the one hand the regulation is adopted in the framework of general rules, and in particular of Article 5 of Regulation No 885/68 of the Council, as supplemented by Regulation No 1504/76, which authorizes the Commission to suspend the advance fixing of export refunds, for the periods strictly necessary, where examination of the market situation shows that there are difficulties due to the application of the provisions concerning the advance fixing of the refund. On the other hand, it clearly covers not only all the applications for advance fixing which were to be lodged as from 20 December 1980, but also all those still pending on that date, since otherwise the true object of the provision in question would not be achieved.

17 As the basic Regulation No 1504/76 constitutes a measure of general application and confers a right to advance fixing of refunds in the sector in question, it appears that such a right may be totally suspended only by means of another legislative measure. Since Article 1 of Regulation No 3318/80 concerns both earlier applications and those lodged during the period of suspension, the nature of the contested measure as a regulation is not called in question merely by the fact that it may be possible to determine the number or even the identity of certain traders concerned, especially where such a possibility by definition did not exist for other traders also covered by Regulation No 3318/80.

18 A single provision cannot at one and the same time have the character of a measure of general application and of an individual measure.

19 Consequently it must be deduced from the purpose of the contested measure, from the framework of the regulations of which it forms part, and also from its very nature that it is indeed a regulation which is of general application; it follows that the objection raised by the Commission must be accepted in so far as it concerns the application that Regulation No 3318/80 should be declared void.

## The legal nature of the telex message

20 The applicant submits that the telex message of 19 December 1980 constitutes a decision because it is capable of producing legal effects and is of direct and individual concern to the applicant.

21 The Commission contends that the content of that message from the Directorate-General for Agriculture is only informative since, on the one hand, the Commission has no power to address special instructions to the Member States in the sphere in question and, on the other, it is customary in circumstances such as those in the present case — the entry into force of a regulation on the same day as its publication in the Official Journal — for the Commission to explain the legal position to the authorities in the Member States by means of a telex message.

22 It is common ground that the applicant refers only to the part of the message marked "N.B.".

23 That text clearly seeks only to give a summary of the legal effects arising directly out of the application of Regulation No 3318/80.

24 Since that regulation was not of individual concern to the applicant, the Commission's telex message of 19 December 1980 which sets out the results for the national intervention agencies itself does not relate to the applicant individually either.

25 As a result, it must be stated that the objection raised by the Commission must also be accepted in so far as it relates to the application for a declaration that the telex message of 19 December 1980 is void.

## Costs

26 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs; since the applicant has failed in its action, it is necessary to order it to pay the costs except those arising out of the intervention, and to leave the intervener to pay its own costs and those incurred by the Commission as a result of its intervention.

On those grounds,

THE COURT (Third Chamber),

hereby rules:

1. **The application is dismissed as inadmissible;**

2. **The applicant is ordered to pay the costs, except those arising from the intervention;**

3. **The intervener is ordered to bear its own costs and those incurred by the Commission as a result of the intervention.**

Touffait Mackenzie Stuart Everling

Delivered in open court in Luxembourg on 25 March 1982.

P. Heim
Registrar

A. Touffait
President of the Third Chamber