On those grounds,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**

2. **Orders the applicant to pay the costs of the proceedings.**

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 10 May 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL MAYRAS DELIVERED ON 26 APRIL 1978 [1]

Mr President,
Members of the Court,

On 18 and 19 March 1975 the applicant sugar *exporting* company, with its registered office in Antwerp, entered into two contracts of purchase, one with a dealer and the other with a manufacturer, for the supply, respectively, of 1 000 tonnes of French sugar to be delivered between October and December 1975 and for 5 000 tonnes to be delivered between October 1975 and May 1976.

At that time exports of sugar were subject on leaving France to the imposition of compensatory amounts due to the fluctuation of the French franc since it had left the "monetary snake" on 19 January 1974, whereas exports of sugar from Belgium to third countries benefited from the grant of such amounts.

It seems that the sugar, the subject of those transactions, was ultimately intended for export to third countries

1 — Translated from the French.

with the benefit of the refunds and the compensatory amounts granted on leaving a Member State with a "green" rate which had been revalued in relation to the "green" rate of the French franc.

Meanwhile, in May 1975 the French franc returned to the "snake": this monetary event led to the abolition of the imposition of the compensatory amounts and the first deliveries intended for the applicant were therefore not subject to the payment of such amounts on leaving France.

The return to the "snake", however, was not to last very long; on 15 March 1976 the French franc once again left it and its floating brought about the re-introduction of compensatory amounts as from 25 March 1976. The Court will still have in mind these facts which were at the origin of Joined Cases 12, 18 and 21/77, *Debayser and Others*, on which it gave judgment on 2 March last.

From February 1976 the applicant had entered into forward currency contracts for the purchase of the French francs necessary for the payment of the sugar remaining to be delivered.

In reliance on the currency cover thus made and the fact that its price was then definitely fixed, the applicant requested the French Intervention Agency (the Fonds d'Intervention et de Régularisation du Marché du Sucre) that the regulation to ensure natural justice, Regulation No 1608/74 of the Commission of 26 June 1974, should be applied to it in respect of the amounts of sugar remaining to be imported and cited Article 4 of that regulation; in the applicant's view the currency contracts gave it an acquired right to exemption from the compensatory amounts in respect of such deliveries.

It is right to observe that it is not the French seller who is complaining of the imposition in France of compensatory amounts; he succeeded in obtaining indemnity from his purchaser for the payment of such amounts under a clause in the agreement. The applicant admits itself bound by that undertaking. However, as I shall make clear later, I shall query the relevance of such a clause for the purposes of the present proceedings. It seems to me that the French sellers would have been better placed than the Belgian buyer to challenge the levying of those amounts, and the fact that a French exporter did not himself start by making an approach to the national authorities led the Court in the cases of *Debayser and Others* to declare inadmissible an application for damages brought directly against the Commission. I scarcely see how the fact that the burden of the compensatory amounts has been displaced in the present case onto the Belgian buyer can render its application admissible when, as we shall see, the French authorities have not given it their support.

On 25 August 1977 the French Intervention Agency replied to the applicant, with confirmation on 30 September 1977, that:

1. The Commission had stated to the French authorities with regard to the "intention to grant exemptions" notified at the beginning of 1977 by the French Government, that contracts in general entered into before May 1975 when the system of compensatory amounts was in force in France did not justify the application of the provisions of Regulation No 1608/74.
2. It had not been possible, "in view of this attitude of the Commission", to grant exemption from the compensatory amounts in respect of the deliveries of sugar which had been made to the applicant under its contracts Nos S 125 and S 172 entered into in March 1975.

In turn the Director General for Agriculture of the Commission, in reply to a letter from the applicant, informed it on 7 October 1977 that it should apply

directly and in the first place to the French authorities in order that they might, "if necessary, give a statement of reasons for the decision taken". In addition he "*confirmed*" that the "reasons given by the French Intervention Agency closely reflect *the views* of the Commission".

In the present application the applicant is asking the Court in the first place to annul the alleged "decision" of the Commission taken under Article 4 (2) of Regulation No 1608/74 and alternatively to order the Community to pay it as compensation 134 736.60 together with interest.

I — The claim that the "decision" taken by the Commission should be annulled.

Although the applicant does not specify the decision in question, it might well have been thought *prima facie* that it was the letter from the Commission dated 7 October 1977. This is not so, for the contested measure is "undoubtedly" the notification contained in the telex message sent by the Commission on 25 February 1977 to the French Permanent Representation, mentioned by the Commission in its objection of inadmissibility and produced by it at the request of the Court. The passage is worded as follows:

"2. The five following cases do not justify the application of Regulation No 1608/74:

P 30 A W contract of 23 July 1974

P 30 B B contract of 5 March 1974

P 42 A contract of 25 March 1975

P 45 B contract of 4 April 1975

P 58 K contract of 1 August 1974

In all these cases the contracts were entered into at a time when those concerned had to take account of the application of monetary compensatory amounts. On the dates in question monetary compensatory amounts applied in France and their abolition did not occur until May 1975. Accordingly there appears to be no justification for exempting the exports in question from the monetary compensatory amounts applicable as from 25 March 1976.

3. The French Government is requested to withdraw the cases referred to at point 2".

The applicant claims that a reading of that document shows that there was indeed a "measure" in which the Commission objected to the "intention" of the French authorities to exempt certain contracts from the monetary compensatory amounts.

I agree with the Commission in thinking these claims inadmissible.

According to the applicant itself the said measure reveals the Commission's objection to the "intention" notified by the French authorities to exempt from monetary compensatory amounts certain contracts "*other* than those concerned in the present case" (observations of the applicant, p. 11). They relate in fact to contracts for *processed cereals.*

As a result:

1. The French authorities did not manifest or, within the meaning of Article 4 (1) of Regulation No 1608/74, inform the Commission of their intention to exempt the two *sugar* contracts specifically in question from compensatory amounts, "indicating the reasons therefor and the proof furnished".
2. The Commission's "opinion" does not specifically refer to those two contracts.

As the applicant, with reference to the third and fourth recitals of the preamble to the regulation, observes, the latter is intended to protect traders from the damaging consequences which might result from the application of monetary

compensatory amounts not on the basis of abstract assumptions but "in the particular circumstances of the case in point".

It therefore appears to me that in the present case the French authorities rightly or wrongly declined to make use of the procedure provided for in Article 4, either because they thought that such a request was devoid of purpose or because they thought, as the applicant alleges, that the question was not of vital importance to them.

To agree that the opinion in question "comes within the scope of the procedure of Article 4 of Regulation No 1608/74" does not mean that it constitutes a measure of direct and individual concern to the applicant. On the contrary, even if that opinion is evidence of an unfavourable attitude to the applicant's views, it was nevertheless necessary for the French authorities to manifest in some way their intention to exempt the contracts in question. The wording of Article 4 required the French Government to inform the Commission of its intention specifically to exempt *those* contracts; that is the condition subject to which the Management Committee procedure, provided for by that article, can if necessary be implemented.

So long as the French Government has not officially asked the Commission to give its views according to the procedure provided for in the regulation, it has not exhausted the preliminary powers which are its exclusive preserve and which are referred to in the Court's judgment of 2 March 1978, that being one of the conditions necessary for any application of the regulation to ensure natural justice.

It is not a question of considering whether the "opinion" attributed to the Commission is lawful; even if the "principle" that Regulation No 1608/74 does not apply to contracts entered into before May 1975 appears to be effective for all contracts entered into before that date, it was never in fact *applied* to the two contracts in question in the correspondence exchanged between the Commission and the French authorities; "application by analogy" is not sufficient. It therefore does not seem to me possible to regard as admissible an application against a "measure" of the Commission ratifying an "implied application" to the applicant of a principle which the French Government rightly or wrongly considered to be correct. It would have been necessary "to inform the Commission of its intention" to exempt the contracts in question, for it would then have clearly established who was responsible for the refusal to give exemption.

The applicant's advocate, who is very familiar with the case-law of the Court, relies on the judgment of 1 July 1965 *Töpfer* ([1965] ECR 405). But that was a quite different case, namely that of a decision of the Commission which came into force immediately maintaining protective measures taken by a Member State, which decision was addressed to that Member State and published in the Official Journal.

On the other hand, no mention has been made of the judgment of 17 July 1959 *Phoenix-Rheinruhr* ([1959] ECR 75). In that case, contrary to the opinion of Mr Advocate General Lagrange, the Court ruled that when the High Authority sends a letter to an auxiliary agency entrusted by it with the execution of certain precise functions, informing it of certain general principles, that letter may constitute a mere internal office directive, even if it was published in the Journal Officiel and if it refers to measures which the agency must take in regard to undertakings in the Community. In any event, this is true if it emerges from the letter that the High Authority did not intend to take a decision. That case-law appears to me, *a fortiori*, applicable to the present case.

Just as the Commission did not ask the opinion of the French Government before replying to the applicant, the latter did not ask the Commission for a formal statement of its views. It is the lawfulness of the imposition of the monetary compensatory amounts by the French customs authorities that the applicant or his sellers ought to have questioned before the French courts and not the lawfulness of the alleged "measure" by which the Commission objected to an "intention" to grant exemption which had not even been formulated.

II — Allow me to say, however, that the claim for compensation appears to me on the other hand *prima facie* admissible, though in my view obviously unfounded.

On the one hand, it is not possible to *deem* the Community liable for damage which, even assuming that it exists and is of such a nature as could give rise to any liability on the part of the Community, was caused primarily by the fact that the national authorities did not support the applicant's argument. According to the Court's case-law in Joined Cases 5, 7 and 14 to 24/66 *Kampffmeyer and Others* ([1967] ECR 245) the applicant should have exhausted all methods of recourse, both administrative and judicial, to obtain satisfaction from the French Government, even though the latter might well rely on the authority of the Commission.

Further, the fact giving rise to the imposition of the compensatory amounts in the present case was the completion of the customs formalities on export from France; the direct *cause* of the damage claimed by the applicant seems to me, however, to be the undertaking which it took upon itself to carry the burden of the compensatory amounts which must be (and normally are) paid by the seller. This, however, is a contractual term which cannot render the Community liable. Where the applicant has voluntarily put itself in that position it cannot rely on that fact to question the lawfulness of the refusal to grant exemption from the compensatory amounts or, assuming that it is shown that the Community is liable, to claim compensation against it for the alleged damage. There is no causal link between the action of the Community and the alleged damage.

My opinion is that the application should be dismissed and that the applicant company be ordered to bear the costs.