

**JUDGMENT OF THE COURT
OF 29 SEPTEMBER 1977 ¹**

**Compagnie Cargill
v Office National Interprofessionnel des Céréales (ONIC)
(preliminary ruling requested
by the Tribunal Administratif de Paris)**

'Monetary compensatory amounts'

Case 27/77

In Case 27/77

Reference to the Court under Article 177 of the EEC Treaty by the Tribunal Administratif de Paris for a preliminary ruling in the action pending before that court between

COMPAGNIE CARGILL, Paris,

and

OFFICE NATIONAL INTERPROFESSIONNEL DES CÉRÉALES (ONIC)

on the validity of Regulation (EEC) No 2042/73 of the Commission of 27 July 1973 making transitional provisions consequential upon the application on 4 June 1973 of the new system of monetary compensatory amounts,

THE COURT

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

Advocate-General: J.-P. Warner

Registrar: A. Van Houtte

gives the following

¹ - Language of the Case: French.

JUDGMENT

Facts and issues

The facts, the procedure and the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

A system of monetary compensatory amounts on imports and exports was instituted by Regulation (EEC) No 974/71 of the Council of 12 May 1971 (OJ English Special Edition, 1971 (I) p. 257). This system was intended to correct fluctuations in excess of those permitted by international rules. Detailed rules for the application of the system were to be laid down by Commission regulations.

Regulation (EEC) No 1112/73 of the Council of 30 April 1973 (OJ L 114, p. 4) amended and simplified the previous system by establishing, in the terms of the third recital in the preamble, that 'it should be a principle of the new system, when calculating compensatory amounts for the currencies of Member States which they maintain among themselves within a maximum spread of 2.25 %, to take into consideration the variation between the conversion rate applied under the common agricultural policy and the central rate; ... in the case of the other currencies the basis should be their relation to the aforementioned currencies'.

Thus any correction in respect of the relationship with the currencies of third states, in particular the United States dollar, is excluded. However, compensatory amounts are maintained on the one hand for intra-Community

trade and on the other for trade with third countries in order to avoid discrimination between Member States. By virtue of the exact alignment of the official rate for the franc as against the unit of account and the actual rate within the 2.25 % limit, in France monetary compensatory amounts are applicable neither on exports nor on imports.

In accordance with Article 3 of Regulation (EEC) No 1112/73 that regulation only became applicable on 4 June 1973 as is provided by the implementing Regulation No 1463/73 of the Commission of 30 May 1973 (OJ L 146, p. 1). The new system obliges traders to cover exchange risks themselves whereas under the former system they could reckon on a compensatory amount. In order to mitigate these prejudicial effects the Commission, by means of Regulation No 2042/73, which is at issue in the main proceedings, decided to extend the benefit of the former system to traders who had obtained the issue of export certificates before 4 June 1973, subject to the reservation that the rates of the compensatory amounts should be those in force on 3 June 1973.

Regulation No 2042/73 has already been the subject of discussions before the Court in actions for damages in Joined Cases 95 to 98/74, 15 and 100/75 (*Coopératives Agricoles de Céréales and Others v Commission and Council* [1975] ECR 1615) where one of the charges made against the Commission by the plaintiffs was that it had failed to adopt sufficient transitional measures.

On 5 April 1973 Cargill obtained advance fixings for exports of cereals to various countries. The exports took place

during the period from 4 June to 31 July. Subsequently the plaintiff in the main action submitted to the ONIC an application for the payment of compensatory amounts of FF 1 244 407-13. By a decision of 13 December 1973 the defendant in the main action in application of Regulation No 2042/73 restricted the amount of the sums payable to Cargill to FF 467 583-21.

Cargill appealed to the Tribunal Administratif de Paris (Paris Administrative Court), seeking an order that the ONIC should pay Cargill the amount which in Cargill's opinion remained due to it together with interest at the legal rate.

Pursuant to that application, by judgment dated 9 February 1977, the Tribunal Administratif de Paris decided to stay proceedings until the Court of Justice had delivered a preliminary ruling under Article 177 of the EEC Treaty on the following questions:

1. Is Community Regulation No 2042/73 dated 27 July 1973 vitiated by illegality for having practised discrimination between exporters in contravention of the rules against discrimination laid down by Articles 7 and 40 of the Treaty of Rome, such illegality allegedly having had the effect of placing traders who had fixed refunds in advance before 4 June 1973 in a different situation depending on whether the exports were made before 4 June 1973 or after that date, the former attracting the whole of the compensatory payments and the others being affected by the obligation on the part of the traders to cover themselves against exchange risks and suffering the effects of the devaluation of the dollar?
2. Is the same Community Regulation No 2042/73 affected by illegality in that it confers a retroactive effect on Regulation No 1112/73 adopted by the Council of the European Communities on 30 April 1973 and thus interferes with vested rights?

3. Would the legislation applicable in the present case be more favourable to the company if the Court were to hold that Regulation No 2042/73 was illegal?

The order for reference was received at the Court of Justice on 23 February 1977.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without holding a preparatory enquiry.

II — Summary of the written observations submitted to the Court under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *plaintiff in the main action* first points out that although the conditions and formal effects of the Court's decision are not the same where it is called upon to adjudicate by way of preliminary ruling upon the validity of a measure adopted by an institution of the Community as where the Court gives a decision on the basis of Article 173, in both instances from the point of view of substance it is the conformity of the measure under examination with the rule of law, its validity (or its legality), which is in question. Consequently apart from the differences of form between the two procedures it is possible to speak of proceedings concerning validity (or legality). In each case the annulment of a measure contrary to the law or the nullification of its effects is at issue. On the other hand proceedings concerning liability seek pecuniary compensation for damage which can be assessed economically.

The independence of the two types of action is clearly recognized by Community law. It is to be found in respect of Article 40 of the ECSC Treaty

in Joined Cases 9 and 12/60 (*Vloeberghe v High Authority*, Rec. 1961, p. 393), and in respect of Article 215 of the EEC Treaty in Case 4/69 (*Lütticke v Commission* [1971] ECR 325), Case 5/71 (*Aktien-Zuckerfabrik Schöppenstedt v Council* [1971] ECR 975) and Joined Cases 9 and 11/71 (*Compagnie d'Approvisionnement v Commission* [1972] ECR 391). The action for damages was established as an independent action which has a particular function within the system of legal remedies and the exercise of which is subject to conditions established having regard to its specific object; it is differentiated from the action for annulment in that it does not entail the annulment of a particular measure but the compensation of damage caused by an institution in the exercise of its powers.

The arguments relied on before the Court in the aforementioned Joined Cases 95 to 98/74, 15 and 100/75 and in the main action are not identical and their logical basis is fundamentally different. In the main action the essential argument relied on is that of discrimination; the objection relating to the illegality of Regulation No 2042/73 prejudicing vested rights is not independent in its scope. The fact that in its judgment of 10 December 1975 the Court denied the existence of unlawful damage on which the plaintiffs could rely has no effect on the main action in this case. Finally, with regard to admissibility it is sufficient to state that from the mere fact that Regulation No 2042/73 had been applied to Cargill that company had an interest in challenging the legality of the regulation but that does not necessarily imply that the regulation caused it damage such as to satisfy all the conditions for damage for which compensation may be claimed on the ground that liability exists.

As to the discussion of the substance of the case, Cargill recalls one of the objectives of the common agricultural policy, namely the uniformity of prices

ensured until the end of the sixties by complex mechanisms laid down for the common organization of the markets in the principal agricultural products by Community regulations. The abandonment by the USA of the Bretton Woods parity led to the adoption of immediate correcting factors which were capable of ensuring the actual uniformity of agricultural prices in the Community. The subsequent vicissitudes of the dollar necessitated the modification of the system set up by Regulation No 974/71 and any reference to the American currency was definitively abandoned.

Under the system laid down by Regulation No 974/71 the rate of export refunds was fixed taking account of the exchange shortfall guarantee which the compensatory amounts in fact constituted; after the abolition of the compensatory amounts the rate of refunds should have increased automatically in relation to the effective devaluation of the other currencies (cf. Article 16 of Regulation No 120/67). In these circumstances traders who before the change of system had concluded forward contracts intended to be performed under the new system were penalized in three ways: first they could no longer benefit from the compensatory amounts; secondly they were subject to a devaluation of the dollar which was more marked than that which took place before 4 June 1973; finally they were only able to obtain the refund for which provision had been made, calculated on the basis of fixed exchange rates, without any set-off in the way of compensatory amounts.

In its judgment of 10 December 1975 the Court found that the new provisions did not infringe vested rights and, solely as regards the cases examined, did not prejudice legitimate expectation. On the other hand it has not yet had the opportunity to examine the possible violation of the fundamental principle of non-discrimination in respect of an analogous question; (cf. Case 74/74,

Comptoir National Technique Agricole (CNTA) v Commission [1975] ECR 533) it recognized that there had been a violation of the principle of legitimate expectation.

The adoption of appropriate transitional measures was included among the implementing measures which, under Article 6 of Regulation No 974/71 and Article 26 of Regulation No 120/67, the Council delegated to the Commission, although with the assistance of the Management Committee.

Even if it is lawful as a whole Regulation No 2042/73 should be regarded as being invalid from the following point of view in particular: it provides a favourable solution to the problem in the interests of those exporters who had performed their contracts before 4 June 1973 but it leaves a considerable discrimination to the detriment of those who were only able to obtain the performance of their contracts later. In fact it restricts the exchange shortfall guarantees to contracts performed up to 3 June 1973 in spite of the subsequent very marked devaluation of the dollar which occurred precisely in the months of June and July. On the other hand the Commission regulation was not adopted to coincide with the date of entry into force of the new scheme but almost two months later (27 July 1973) when the subsequent considerable devaluation of the dollar had already occurred. The presumption of knowledge and the actual opportunity to seek other remedies could only have existed for exporters after 4 June 1973 as it was not easy to react in the correct manner before knowing details relating to the application of the system.

The plaintiff in the main action objects not that the Commission failed to adopt any transitional measures but that it adopted transitional measures which were insufficient and clearly discriminatory. The very fact that it recognized the need to adopt such

measures and yet adopted inadequate and discriminatory provisions is an aggravating circumstance. A mere reading of the preamble to Regulation No 2042/73 made it possible to expect the announcement of a transitional provision ensuring an exchange shortfall guarantee for all export certificates subject to advance fixing issued before 30 April and used even after 4 June but before the expiry of the validity of the advance fixing or any extension thereof. On the contrary with obvious illogicality and without any explanation the fourth recital of the preamble and Article 1 of the regulation restrict the transitional application of the compensatory amount to the date of 3 June 1973. This is sufficient to show the flagrant discrimination entailed.

As regards the infringement of vested rights and the principle of legitimate expectation, in contrast to Cases 95 to 98/74, 15 and 100/75 it is merely objected that the Commission, which laid down the transitional measures which it considered it fair to adopt, introduced inappropriate measures which served not only to cause discrimination but which also infringed vested rights and the principle of legitimate expectation, the necessity of safeguarding which the Commission itself had recognized.

In respect of the consequences of the Court's decision the plaintiff in the main action points out that Regulation No 2042/73 is not to be declared invalid either as to its principle or in its entirety but solely 'in so far as' it entails discrimination. The matter at issue, the correction of which will be sufficient to remove all illegality is the ill-advised fixing of the final date as 3 June 1973. The force of *res judicata* arising from the judgment of the Court of Justice should therefore cause the competent authorities not to refuse to apply the contested regulation but to take all necessary measures to enable it to be applied without discriminatory effects.

The *Commission* first sets out some of the characteristics of the system of monetary compensatory amounts and of the amendments made in 1973 which are of particular importance for the main action.

In reality the abandonment of the US dollar as the reference currency for the calculation of those amounts and its replacement in Regulation No 1112/73 by the 'Community snake' merely represented adaptation to the new international monetary conditions.

In the Community rules prior to Regulation No 2042/73 there is nowhere any reference to an exchange shortfall guarantee against a downward fluctuation of the dollar (the basic Regulation No 974/71 sought to prevent 'a disruption of the intervention system' and 'abnormal movements of prices jeopardizing a normal trend of business in agriculture'). The objective of providing compensation which is inherent in this system and which was conceived in the abstract and on a flat-rate basis without taking account of the individual conditions of commercial transactions received the approval of the Court (cf. Case 5/73, *Balkan Import-Export v Hauptzollamt Berlin-Packhof* [1973] ECR 1091).

Monetary compensatory amounts were never conceived as being fixed in advance even under the system of fixed parities. On the other hand refunds are fixed in advance and to change an amount fixed in advance would constitute an infringement of the vested rights of the trader.

The 'transitional' Regulation No 2042/73 admits that importers or exporters might sustain loss owing to 'variations in the value of the dollar at the time of the transition from one system to the other' but this does not mean that the loss would be imputable to the Community. The relatively limited derogation chosen as a measure of fairness is explained by the lack of certainty existing up to 4

June 1973 (the date of the entry into force of the new system) in the method of calculating the compensatory amounts. The maintenance as a transitional measure of the amount applicable on 3 June 1973 preserved to the benefit of exporters and at their request the amount calculated according to the variations in the rate of exchange of the dollar up to 3 June. From that date exporters of agricultural products were in an unprivileged situation which was comparable, for example, to that of exporters and importers of industrial products.

A more generous solution was unacceptable for two reasons. First the experience of the Commission with other transitional measures revealed the existence of fraudulent practices and fictitious contracts: for example the fact that an exporter had obtained an advance fixing on 30 March 1973 by no means implies that he had already concluded a contract by that date. Further, the implementation of such a transitional scheme would entail very complex administrative machinery, allowing two systems of monetary compensation to exist side by side for several months.

In addition to the provisions of Regulation No 2042/73 there were available to exporters the possibilities set out in Regulation No 837/72 of the Commission of 24 April 1972 laying down special provisions in respect of levies and refunds fixed in advance for cereals (OJ, English Special Edition 1972 (II), p. 345). The latter regulation provides for two possibilities in the event of the rules for the calculation of monetary compensatory amounts being altered: either the application of the monetary compensatory amount applicable on the date of the advance fixing of the levy or refund (in any event less than the amount resulting from the application of Regulation No 2042/73) or, at the request of the interested party, the cancellation of the advance fixing and consequently the determination of the

monetary compensatory amount and the refund (or the levy) by reference to the day of exportation (or importation). As the refund was calculated after 4 June taking account of the actual (lower) rate of the dollar it was possible for exporters in certain cases to obtain a higher refund; the plaintiff in the main action could therefore have released itself from the compulsion to accept a refund fixed in advance which did not reflect the variations in the rate of the dollar whereas from 4 June onwards refunds did reflect such variations.

As regards the argument based on Article 7 of the Treaty Regulation No 2042/73 is applicable 'at the request of the party concerned' and contains no restriction as to the nationality of the parties involved.

With regard to the alleged infringement of Article 40 (3) of the Treaty the Commission doubts whether that provision is applicable to a case in which, by means of an amendment made to an existing system, the legislature treats in a different way traders who are subject to the former rules and those who come within the framework of the new scheme. Secondly that provision is not of an absolute nature since it should also be examined in the light of the other objectives laid down by Article 39 of the Treaty and moreover the Court has recognized that the Community legislature possesses a wide discretionary power in this respect (cf. Case 5/73 referred to above and the abovementioned Joined Cases 9 and 11/71).

As to the question of vested rights the answer has been given in Joined Cases 95 to 98/74, 15 and 100/75 referred to above where the Court recognized that 'the right to benefit from a compensatory amount or the obligation to pay it only arises by the export's taking place and only as from the time when it takes place'.

However in reality the objection relates rather to the breach of the principle of legitimate expectation. Such expectation

should be based on a promise made by a Community authority. However from the very nature of the scheme of compensatory amounts it is clear that it is a scheme laid down in the public interest taking account of certain circumstances and which can by no means be analysed as containing a guarantee as to the duration of its validity.

Moreover the change in the method of calculating monetary compensatory amounts was foreseeable from before 30 April 1973, the date of the adoption of Regulation No 1112/73 in which there was no question of exceptional measures — which Cargill had therefore no right to expect — for prior contracts. An exporter who had thus been given notice of the new system should have taken the appropriate commercial steps. The frequent variations in the rates of exchange between the currencies of the Member States *inter se* and between those currencies and the dollar and the specific provisions of Regulation No 974/71 which obliged the Commission to lay down compensatory amounts only in so far as the monetary situation 'would lead to disturbances in trade in agricultural products' provided other grounds for uncertainty which should have caused traders not to make their calculations in reliance on any automatic system of compensatory amounts.

The court making the order for reference is aware of the fact that the illegality of Regulation No 2042/73 would render applicable not the former system of the calculation of compensatory amounts but the new system without any transitional rules *ex hypothesi* less favourable to Cargill which sought the application of the regulation while contesting its validity. In the submissions made to the court making the order for reference it is argued that if Regulation No 2042/73 is declared invalid the court must be released from the obligation to apply it and must accede to Cargill's request. Such an argument would be still less convincing if it were relied on in support

of monetary compensatory amounts calculated under the former system but granted to exports made after the date laid down by the legislature for the application of the new system.

The Court put certain questions to the parties to which they replied in writing.

At the hearing on 28 June 1977 the plaintiff in the main proceedings

represented by Nicola Catalano, Advocate of the Rome Bar, and by Georges Vedel, Dean and Professor of Law at the University of Paris II, and the Commission of the European Communities, represented by its Agent, J. H. J. Bourgeois, presented oral argument.

The Advocate-General delivered his opinion at the hearing on 13 July 1977.

Decision

- 1 By order of 9 February 1977 which was received at the Court Registry on 23 February the Tribunal Administratif de Paris referred to the Court, pursuant to Article 177 of the EEC Treaty, several questions relating to the validity of Regulation (EEC) No 2042/73 of the Commission of 27 July 1973 making transitional provisions consequential upon the application on 4 June 1973 of the new system of monetary compensatory amounts (OJ L 207, p. 34).
- 2 These questions were raised in the course of proceedings relating to the calculation of monetary compensatory amounts for exports of cereals carried out by the Cargill company, the plaintiff in the main action, between 4 June and 31 July 1973 and in respect of which the latter company had obtained on 5 April 1973 certificates in which the refunds had been fixed in advance.
- 3 Cargill made an application to the Office National Interprofessionnel des Céréales for the payment of compensatory amounts of FF 1 244 407·13 but the latter office, in application of Regulation (EEC) No 2042/73, reduced to FF 467 583·21 the sum payable to the plaintiff in the main action.
- 4 The first question asks: 'Is Community Regulation No 2042/73 dated 27 July 1973 vitiated by illegality for having practised discrimination between exporters in contravention of the rules against discrimination laid down by Articles 7 and 40 of the Treaty of Rome, such illegality allegedly having had the effect of placing traders who had fixed refunds in advance before 4 June 1973 in a different situation depending on whether the exports were made before 4 June 1973 or after that date, the former attracting the whole of the

compensatory payments and the others being affected by the obligation on the part of the traders to cover themselves against exchange risks and suffering the effects of the devaluation of the dollar?'

- 5 The second question asks: 'Is the same Community Regulation No 2042/73 affected by illegality in that it confers a retroactive effect on Regulation No 1112/73 adopted by the Council of the European Communities on 30 April 1973 and thus interferes with vested rights?'
- 6 The last question asks: 'Would the legislation applicable in the present case be more favourable to the company if the Court were to hold that Regulation No 2042/73 was illegal?'
- 7 It is appropriate to consider the various questions together.
- 8 Since the establishment of the system of compensatory amounts those amounts have been calculated by reference to the difference between the parity of the national currency of the Member State in question declared to the International Monetary Fund on the one hand and the spot market rate of that currency as against the United States dollar on the other.
- 9 By reason of the continued pressure on the United States dollar at the beginning of 1973, in spite of the devaluation of that currency in February, the Council decided to set up a system whereby the currencies of six of the Member States would float in respect of other currencies while maintaining *inter se* certain flexibility margins (the 'snake') and asked the Commission to submit to it proposals for a reform of the system of monetary compensatory amounts to take account of the new situation.
- 10 The proposals of the Commission resulted in the adoption by the Council on 30 April 1973 of Regulation No 1112/73 whereby Article 2 (1) of Regulation No 974/71 was amended so that compensatory amounts were no longer calculated by reference to the United States dollar but by reference to the central rates of currencies in the 'snake'.
- 11 In the words of Article 3 of Regulation No 1112/73 that regulation was to apply 'from the date on which the detailed rules required for its application ... enter into force'.

- 12 The detailed rules for its application were laid down by the Commission in Regulation No 1463/73 of 30 May 1973.
- 13 By virtue of Article 19 of that regulation the rules took effect only on 4 June 1973.
- 14 During the period when the compensatory amounts were calculated by reference to the dollar, export refunds were calculated by reference to the world prices expressed in dollars converted at par which might have had the consequence of reducing the refunds but that risk was counterbalanced by the fact that the compensatory amounts themselves were calculated by reference to the official rate of the dollar.
- 15 In the view of the plaintiff in the main action Regulation No 2042/73 is invalid by virtue of the difference of treatment it accords to exporters who performed their contracts before 4 June 1973 in comparison with those who could only obtain the performance of their contracts after that date.
- 16 The combined effect of Regulations No 1112/73 and No 1463/73 was to abolish the payment of monetary compensatory amounts on exports coming from France after 4 June 1973.
- 17 Regulation No 2042/73 does not affect exports prior to 4 June which clearly continue to be governed by the rules applicable until that date but it constitutes a transitional measure benefiting traders who carry out exports from 4 June and who obtained advance fixing prior to that date by granting to them, on request, the monetary compensatory amounts applicable on 3 June.
- 18 Consequently such a transitional measure cannot be regarded as giving favourable treatment to exporters who performed their contracts before 4 June 1973 and as being discriminatory as is alleged by the plaintiff in the main action.
- 19 Moreover the latter chose to rely on those rules and not on the provisions of Regulation No 837/72 which makes available two possibilities where the rules for the calculation of monetary compensatory amounts are altered: either the application of the amount applicable on the date of the advance fixing of the refund or, at the request of the interested party, the cancellation of the

advance fixing with the consequence that the monetary compensatory amount and the refund are determined by reference to the day of export.

- 20 Consequently consideration of the questions raised by the Tribunal Administratif de Paris has disclosed no factor of such a kind as to affect the validity of Regulation No 2042/73.

Costs

- 21 The costs incurred by the Commission of the European Communities which submitted observations to the Court are not recoverable.
- 22 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Tribunal Administratif de Paris by order of 9 February 1977, hereby rules:

Consideration of the questions raised by the Tribunal Administratif de Paris has disclosed no factor of such a kind as to affect the validity of Regulation No 2042/73.

Kutscher	Donner	Pescatore	Mertens de Wilmars	Sørensen
Mackenzie Stuart	O'Keefe	Bosco	Touffait	

Delivered in open court in Luxembourg on 29 September 1977.

A. Van Houtte
Registrar

H. Kutscher
President