JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
15 September 1998 *

In Case T-54/96,

Oleifici Italiani SpA, a company incorporated under Italian law, established at Ostuni, Italy,

Fratelli Rubino Industrie Olearie SpA, a company incorporated under Italian law, established at Bari, Italy,

represented by Antonio Tizzano, Gian Michele Roberti and Francesco Sciaudone, of the Naples Bar, 36 Place du Grand Sablon, Brussels,

applicants,

v

Commission of the European Communities, represented by Eugenio de March, Legal Adviser, acting as Agent, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, first, for annulment of the letter of 7 February 1996 from the Commission to *inter alia* the Italian authorities and the Azienda di Stato per gli

* Language of the case: Italian.

Interventi nel Mercato Agricolo, the Italian intervention agency, allegedly ordering the blocking of any payment due for the storage of olive oil for the 1991/1992 and 1992/1993 marketing years, pending verification of its wax content, and, second, for compensation for the damage allegedly suffered by the applicants as a result of the Commission's conduct,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A. Kalogeropoulos, President, C. W. Bellamy and J. Pirrung, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 10 June 1998,

gives the following

Judgment

Legal background

The financing of intervention measures in the olive oil sector

1 Regulation No 136/66/EEC of the Council of 22 September 1966 on the establishment of a common organisation of the market in oils and fats (OJ, English Special Edition, (1965-1966) p. 221, hereinafter 'the basic regulation') provides, *inter alia*, for Community financial support for olive oil production (fourth recital in the preamble). To that end, it sets up a mechanism whereby, in every olive oil produc-

ing Member State, the intervention agency designated for that purpose buys, at the intervention price, the olive oil of Community origin offered to it. The intervention price varies in accordance with the quality of the oil as described and defined in the annex to the basic regulation. That annex contains the following descriptions and definitions, in descending order of quality:

1. Virgin olive oil ...

   (a) extra ...

   (b) fine ...

   (c) ordinary ...

   (d) lampante (lamp-oil) ...

2. ...

3. ...

4. Olive-residue oil ...

5. ...

6. ...

7. ...

2 Article 3(1) of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218) provides that intervention intended to stabilise the agricultural markets, undertaken according to Community rules within the framework of the common organisation of agricultural markets, is to be financed by the European Agricultural Guidance and Guarantee Fund (hereinafter 'the EAGGF') under Article 1(2)(b).

3 Under Article 4 of that regulation, Member States are to designate the authorities and bodies which they empower to effect the expenditure arising from that intervention (paragraph 1), and the Commission is to make available to Member States the necessary credits so that the designated bodies may, in accordance with Community rules and national legislation, make those payments (paragraph 2).

4 Under Article 5(2) of the same regulation, the Commission is to (a) decide, at the beginning of the year, on an advance payment for the designated bodies and, during the year, on additional payments intended to cover expenditure to be borne by those bodies and (b), before the end of the following year, make up the accounts of the said bodies.

5 On the basis of Regulation No 729/70, the Council adopted Regulation (EEC) No 1883/78 of 2 August 1978 laying down general rules for the financing of interventions by the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ 1978 L 216, p. 1), which provides, for the olive oil sector, that the buying-in and consequent transactions carried out by an intervention agency and, in particular, storage contracts and necessary operations connected with the storage of intervention products are eligible for financing under Regulation No 729/70.

Monitoring of the quality of olive oil offered to intervention

6 Article 8(1) of Regulation No 729/70 provides that the Member States in accordance with national provisions laid down by law, regulation or administrative action are to take the measures necessary to satisfy themselves that transactions financed by the EAGGF are actually carried out and are executed correctly and to prevent and deal with irregularities. Under Article 9(1) thereof Member States are to make available to the Commission all information required for the proper working of the EAGGF and are to take all suitable measures to facilitate the monitoring which the Commission may consider it necessary to undertake within the framework of the management of Community financing.

7 The Commission, in Regulation (EEC) No 3472/85 of 10 December 1985 (OJ 1985 L 333, p. 5), laid down the rules for the buying-in and storage of olive oil by the intervention agencies. Article 1 of that regulation, as amended by Commission Regulation (EEC) No 1859/88 of 30 June 1988 (OJ 1988 L 166, p. 13), restricts intervention *inter alia* to olive oil as defined at point 1 of the annex to the basic regulation, that is to say virgin olive oil (extra, fine, ordinary, lampante) the water, impurity or acid content of which is not more than a certain percentage.

8 Under Article 2(4) of Regulation No 3472/85, an offer of olive oil is not to be accepted until the intervention agency has checked by means of Community testing methods that the oil offered does not contain certain specified substances. The tests must be carried out by independent laboratories. Where the intervention agency finds that oil offered for intervention is not of the quality specified, the offer to purchase may be withdrawn. In such cases, any costs of entry into store, storage and withdrawal of the oil so offered are to be borne by the person offering such oil (Article 2(6)).

9 On 11 July 1991 the Commission adopted Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis (OJ 1991 L 248, p. 1). That regulation is intended to differentiate more clearly between the different types of oil set out in the annex to the basic regula-

tion and to guarantee the purity and quality of the products concerned (second recital in the preamble). Its Article 1 provides that only oils the characteristics of which comply with those set out in Annex I, are to be deemed to be virgin olive oil within the meaning of the annex to the basic regulation. Under Article 2 those characteristics are to be determined in accordance with the methods of analysis set out in its various annexes. Originally Regulation No 2568/91 made no provision for determining the wax content of oils. It did, however, make provision for the determination of aliphatic alcohols, according to the method set out in Annex IV.

10 Subsequently, on 29 January 1993, the Commission adopted Regulation (EEC) No 183/93 of 29 January 1993 amending Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis (OJ 1993 L 22, p. 58), the second recital in the preamble to which states that 'in view of experience gained, the methods of analysis need to be adapted or set out with greater precision'. The criterion relating to aliphatic alcohol was replaced by one relating to the determination of wax content, with an indiction that this method 'may be used in particular to distinguish between olive oil obtained by pressing and that obtained by extraction (olive-pomace oil)'. Under its Article 2, Regulation No 183/93 was to enter into force on 20 February 1993. However, the new method for determining wax content was to 'apply from 1 July 1993 to olive oil packaged from that date'.

11 Finally, to ensure improved monitoring of the quality of the oil offered for intervention and to supplement the analytical methods used to this end, the Commission adapted Regulation No 3472/85 by adopting, on 29 June 1994, Regulation (EC) No 1509/94 amending Regulation No 3472/85 (OJ 1994 L 162, p. 31) to the effect that checks on the oil must be carried out *inter alia* using the method for determining wax content.

Factual background

12 The applicant companies are two of the private undertakings which the Azienda di Stato per gli Interventi nel Mercato Agricolo (the Italian intervention agency, hereinafter 'AIMA') entrusts with storage and, in general, carrying out intervention operations on the Italian olive oil market.

13 During the 1991/1992 and 1992/1993 marketing years, the applicants stored several thousand tonnes of olive oil. They state, and the Commission does not dispute, that:

— the oils in question were put into storage before the adoption of Regulation No 1509/94 and, in some cases, of Regulation No 183/93,

— after carrying out the checks and analyses, AIMA declared that the oils offered conformed fully with the requirements and itself made the usual payments of the relevant amounts to the owners of the oils,

— the results of the analyses and checks were notified to the Commission, which, at the time, raised no objections.

14 In November 1993 the EAGGF opened an inquiry under Article 9 of Regulation No 729/70 into the quantity and quality of olive oil put into intervention in Italy. In the course of that inquiry samples of oil were taken, in the presence of representatives of the national authorities, from the stocks held by one of the applicants, Oleifici Italiani SpA, one of which was sent to a Spanish State laboratory for analysis.

15 Following analyses carried out in January 1994 *inter alia* on the basis of the method for determining wax content, the laboratory reported a 'wax content higher than that permitted' and the 'presence of olive-residue oil', although the oil thus checked otherwise met the criteria laid down by the Community legislation in force.

16 The Commission drew the conclusion that, contrary to the declaration made, 31.5% of the oils sampled were not virgin olive oil, 46% were lampante virgin olive oil and not extra virgin olive oil as declared, and 15.2% were virgin olive oil but of a lower quality than that declared initially; only 4.8% of the oils sampled were classified as being of the quality declared. Those results were notified to the Italian authorities in a letter of 1 March 1994 from the Commission's Directorate-General VI for Agriculture (DG VI). Pointing to the 'unacceptable failures in the whole of the [Italian] system of monitoring public intervention of olive oil', the Commission stated that it 'was forced to refuse financing for all the expenditure relating to the entire quantity bought in by AIMA apart from the small quantities which the results showed were of the quality declared.'

17 However, following an exchange of letters and a meeting with AIMA between March 1994 and January 1995, by letter of 27 February 1995 the Commission granted the request made by AIMA to commission a second analysis by an Italian laboratory.

18 However, the analysis planned for April 1995 was not carried out because, at the end of March 1995, the Italian judicial authorities opened an inquiry into the oils concerned and the Commission took the view that it ought to make the samples taken by the EAGGF available to those authorities.

19 Moreover, in June 1995, Oleifici Italiani on its own initiative commissioned an analysis by the abovementioned Spanish laboratory of samples of olive oils which the applicants claim to be the same oils as those examined in January 1994. The conclusion emerging from the analysis was that they were 'lampante virgin oils untainted by any fraudulent additions, the high wax content being due to the fact that they were old oils'.

20 The expert's report drawn up on 30 October 1995 as part of the inquiry opened by the Italian judicial authorities essentially reached the same conclusion, establishing that:

— if there was a finding of an excessively high content of wax only and not of the other substances, as was the case with these oils, the changes could be attributed to natural chemical reactions and not to mixing; and

— the analytical values obtained had revealed nothing to suggest substitution or mixing of the oils.

21 Having been informed by Oleifici Italiani in September 1995 of the second analysis made by the Spanish laboratory, the Commission sent a letter to AIMA on 2 October 1995, taking note of the report to the effect that the excessive wax content was not attributable to any sort of fraudulent mixing but could be explained by the aging of the oils. It drew the conclusion that 'in the circumstances the view can hardly be taken that the oils which have undergone a second analysis should be refused intervention' and asked AIMA to 'notify [it] of the quantities and locations of oils with similar analysis results so that they can be offered for sale as soon as possible'.

22 By letter of 23 November 1995 to AIMA, the Commission also referred to the expert's report drawn up on 30 October as part of the inquiry opened by the Italian judicial authorities, according to which, in the case of Oleifici Italiani, none of the evidence examined suggested there had been any substitution of the oils analysed. The Commission requested AIMA 'therefore, to send [it] as soon as possible the reports concerning all the consignments examined, to lift the administrative decision blocking payment and immediately pay out all compensation due to all successful bidders in respect of whom the reports contain the same conclusions as those regarding Oleifici Italiani'.

23 AIMA responded to the Commission's request by letter of 30 November 1995 attaching the report of 30 October 1995 drawn up as part of the Italian judicial inquiry. AIMA also stated that, unless the Commission raised any objection, it would immediately pay out the compensation due to the successful bidders in respect of a total quantity of 17 639.291 tonnes of oil for which there was no evidence of substitution.

24 In reply to that letter, by fax of 7 December 1995 (VI/046436), the Commission stated that it had no objection to the immediate reimbursement of storage costs for the 17 639.291 tonnes declared by AIMA. Before the Court of First Instance the Commission explained its stance by the fact that it believed that the analyses in question had been carried out in accordance with the Community rules in force and that they could be relied upon. However, having seen the report drawn up as part of the judicial inquiry and forwarded by letter from AIMA of 30 November 1995, it had noted that the report did not indicate the wax content of the oil samples analysed.

25 In order to verify the reliability of the second analysis which Oleifici Italiani had requested the Spanish laboratory to undertake, the Commission also asked that laboratory, by letter of 6 February 1996, to specify the origin of the oil analysed (depot, owner) and the way in which the samples were presented (container, label-

ling) and to state whether the applicant had asked for a full analysis or merely the determination of certain characteristics of the oils.

26 By letter of the same date, the Commission also asked Oleifici Italiani to provide certain details concerning the samples sent to the laboratory and the scope of the analyses requested.

27 In reply to the Commission's questions, the Spanish laboratory, by letter of 8 February 1996, stated that it was unable to identify the origin of the samples as they were supplied in a glass bottle with a plastic screw top and not sealed or labelled; consequently the results of the analysis could clearly only be used for personal information. It was also stated that the request for an analysis concerned principally the wax content and that no examination of acidity levels was requested.

28 In its reply of 9 February 1996 Oleifici Italiani, however, stressed that the samples analysed by the Spanish laboratory were those taken in November 1993. It added that, in any event, it was less important to check the identity of the samples than to note that the laboratory considered that it could not state with certainty that the oil had been mixed with olive residue oil solely on the basis of an abnormal wax content, in the absence of abnormal indices for other analytical parameters.

29 Before receiving the above two replies, the Director-General of DG VI sent a letter, on 7 February 1996, to the Italian Permanent Representation to the European

Union — with copies to several Italian ministerial and judicial authorities and to AIMA — which reads as follows:

'Following the lengthy correspondence on this subject, I have set out below my proposals for settling the dispute which has arisen following the Community inquiry.

In our letter VI/009568 of 27 February 1995 we proposed a second analysis of the samples in our possession to the parties concerned. This was about to be carried out when the Guardia di Finanza impounded the oils in issue. It was therefore considered appropriate to suspend the administrative procedure and rely on the analyses which the Public Prosecutor of Naples had entrusted to an expert of his choosing.

That expert concluded that the oils were virgin oils and thus could be admitted to intervention.

Closer examination of the circumstances revealed that the expert appointed by the Naples Court had not seen fit to carry out an analysis of wax content on all the samples in issue, stating that this was not decisive in establishing the actual quality of the oils analysed, contrary to the requirements of the Community Regulations. In support of his argument the expert cites the result of analyses carried out on behalf of Oleifici Italiani by the Laboratorio Arbitral de Madrid on three unspecified samples, which reached the conclusion that, despite the high wax content, the oil analysed was virgin oil.

The Commission's services consider that the confusion which has arisen over the proliferation of analyses is unacceptable and that the matter should be taken up again at the point when the oils were impounded in April 1995.

Leaving aside the legal aspects which are a matter exclusively for the Member State, a decision should be made as to whether the oils concerned can be admitted to intervention. The proposal of the Commission's services is once more that the national authorities should make the necessary arrangements to have a second analysis carried out on the samples in the possession of the EAGGF by an independent laboratory to be selected jointly, to determine the actual quality of the oils in issue. The Member State is therefore requested to arrange the analyses, inform the parties concerned and, in the meantime, block any security and/or payment in respect of those oils.

The Commission proposes the laboratory for analysis of fats in Clichy (France) to carry out this control analysis which should concentrate on wax content and its development over time.'

30 In reply to that letter AIMA informed the Commission on 16 February 1996 that, following the judicial inquiry carried out in Italy, on 15 November 1995 the criminal judicial authority had ordered the release of the oil and the delivery of the consignments to those entitled. From that time onward, any unjustified delay by AIMA in meeting its obligations could lead to the prosecution of its officials. Furthermore, the Italian Council of State, by order of 2 February 1996, had dismissed the appeal brought by AIMA regarding the refusal to reimburse compensation for handling costs on the ground that the above judicial inquiry had not revealed any evidence that there had been any substitution or adulteration of the oils by oil of lesser quality. AIMA concluded that, in the circumstances, it could not but pay the sums due to the remaining parties entitled.

31 On 19 February 1996, the applicants called on the Commission to withdraw the letter of 7 February 1996 and confirm their right to payment of the sums due for the oils in question. No reply was received from the Commission.

Procedure and events following the commencement of proceedings before the Court of First Instance

32 It is against that background that, by application lodged at the Registry of the Court of First Instance on 17 April 1996, the applicants brought this action.

33 After the application had been lodged, the Director-General of DG VI again wrote to AIMA, by letter of 23 April 1996, on the subject of the olive oil delivered into intervention during the 1991/1992 and 1992/1993 marketing years concerning which the EAGGF had initiated the inquiry of November 1993. In that letter the Commission

— confirmed the contents of its letter of 1 March 1994 regarding the accuracy of the first analyses carried out by the Spanish laboratory, which implied that AIMA had to recover the sums incorrectly paid in respect of the purchases in question;

— stated that the quantity of oil concerned had to be regarded as ineligible for intervention and thus as not having been put into intervention storage; from that moment on the oils were at the disposal of AIMA which was free to decide to sell them;

— referred to the decision of the Italian Council of State of 2 February 1996, stating 'I do not withdraw my letter of 7.2.95' [this should read 7.12.95] 'ref VI/046436 authorising payment of storage costs for the olive oil in question up to the date of this letter'; AIMA was also asked to cease payment on behalf of the EAGGF of storage costs from that date, since the olive oils concerned were at the disposal of AIMA.

34 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure without any preparatory measures of inquiry. It did, however, adopt measures of organisation of procedure

pursuant to Article 64 of the Rules of Procedure, asking the parties to reply in writing, before the date of the hearing, to certain questions, a request which was duly complied with.

35 The parties presented oral argument and their replies to the Court's questions at the hearing on 10 June 1998.

Forms of order sought

36 The applicants claim that the Court should:

— annul the Commission's decision, contained in the letter from Mr Legras, Director-General of the Directorate-General for Agriculture (DG VI) — Directorate G, European Agricultural Guidance and Guarantee Fund (EAGGF) — of 7 February 1996 (Case No VI/000513) which provided for the blocking of all payment owed for the warehousing of olive oil in the 1991/92 and 1992/93 marketing years;

— order the Commission to make good the harm suffered by the applicants as a consequence of its unlawful conduct;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the application;

— order the applicants to bear the costs.

Admissibility of the claim for annulment

Arguments of the parties

38 The Commission argues, first, that the letter of 7 February 1996 cannot be the subject of an action for annulment under Article 173 of the EC Treaty since it did not have legal effects which were binding on the applicants and capable of affecting their interests (order in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143, paragraph 26, and order in Cases T-492/93 and T-492/93 R *Nutral* v *Commission* [1993] ECR II-1023, paragraph 24). The letter was an instrument of cooperation between the Commission and the Italian authorities responsible for applying Community regulations. It was in fact merely one of the preparatory measures leading to the decision to clear the EAGGF accounts and definitively establishing the expenditure to be borne by that body. The Court of Justice has expressly held that before the annual accounts are cleared the Commission may not validly take a view on intervention carried out by the Member States in connection with the activities of the EAGGF (Case C-55/91 *Italy* v *Commission* [1993] ECR I-4813, paragraph 36).

39 The Commission adds that the contested measure does not, in itself, give rise to any obligation for the Member State concerned, nor *a fortiori* for the applicants. The obligation on the Italian authorities to block undue payments derives directly from Article 8 of Regulation No 729/70. Moreover, it is for the Member States to ensure that Community regulations concerning the common agricultural policy are implemented within their territory (Case C-476/93 P *Nutral* v *Commission* [1995] ECR I-4125, paragraph 21, and order in *Nutral* v *Commission*, cited above, paragraph 26). Consequently, it is only the measures taken by the national authorities which produce binding legal effects capable of prejudicing the interests of the applicants (order in *Nutral* v *Commission*, cited above, paragraph 28).

40 The Commission submits, second, that the contested measure in the present case is not of direct concern to the applicants within the meaning of the fourth paragraph

of Article 173 of the Treaty. In fact, only the domestic legal measure by which the national authorities blocked compensation for storage costs could be regarded as having caused them damage. In that connection the Commission points out that the Community rules relating to the common agricultural policy provide for strict separation both between the Commission and the Member States and between the Member States and traders. It is therefore for the national authorities to take the necessary measures to prevent irregularities by blocking, where appropriate, undue payments.

41 The Commission submits, finally, that the contested measure no longer had any legal effects after its letter of 23 April 1996. Even if one were to accept the argument of the applicants that the Commission's various letters to AIMA constitute decisions of direct and individual concern to them, *quod non*, the letter of 23 April invalidated the contested letter of 7 February 1996.

42 The applicants counter that the Commission's letter of 7 February 1996 produced legal effects which affected their interests directly and individually. The fact that Regulations Nos 729/70 and 3472/85 make provision for the possibility for Member States to prevent and penalise irregularities as regards EAGGF resources does not preclude measures taken by the Commission in that area from having direct effects on individuals in legal terms. In the present case, the Commission, rather than confining itself to providing the national intervention agency with mere guidelines, adopted binding measures specifically affecting the applicants' position.

43 In that connection, the applicants refer, in particular, to the letters of 2 October and of 23 November 1995 in which the Commission ordered AIMA to make the payments in question, and to the letter of 7 February 1996, in which it called on AIMA to block all payments in respect of the oils in question. In the opinion of

the applicants, it is thus clear that, as regards the payment relating to storage of the oils in question, AIMA had no discretion but had to abide by the instructions given to it by the Commission.

44 The applicants therefore argue that the case-law cited by the Commission cannot be applied by analogy in this case. For instance, the judgment in *Nutral* v *Commission* only ruled on measures taken by the national authorities who were free to follow the guidelines provided by the Commission or not. Similarly, the order in *Emerald Meats* v *Commission*, cited above, concerned a communication from the Commission which merely announced its intention to adopt certain measures and that intention could not be considered to be a binding decision. In the present case, on the other hand, the situation was quite different, as the contested measure left no room for manoeuvre to the national authorities as regards the payments concerned.

45 Whilst the Commission submits that AIMA's independent right to take decisions is proved by the fact that it did not give effect to the Commission's requests of 23 November 1995, the applicants take the view that mere delay in carrying out a decision in no way means that the national authority is free to decide to carry it out or not. Moreover, the fact that, despite the letter of 23 November 1995, AIMA did not make immediate and full payment was, in all probability, attributable precisely to the climate of extreme uncertainty due to procrastination by the Commission.

46 Inasmuch as the Commission argues that, following its letter of 23 April 1996, the dispute is now without purpose, the applicants note that, at this stage, the Commission is insisting that this last letter must be regarded as final and as resolving the whole matter. However, in view of the fact that the Commission has already changed its mind several times on the subject of the disputed payments, the applicants stress that they are still in a position of extreme uncertainty. In connection with their action for damages, the applicants point out that the letter of

23 April 1996 appears to indicate that the EAGGF will only bear the costs of storage up to that date. That letter is therefore liable to give rise to other disputes over the allocation of responsibility for the cost of prolonging storage.

47 On that last point, the Commission points out, in its rejoinder, that the limitation in question is justified by the fact that, on the basis of the data at its disposal, there was no longer any doubt that the oil concerned had to be excluded from intervention stocks as of 23 April 1996.

Findings of the Court

48 It must first be considered whether the letter of 7 February 1996 in issue is a measure challengeable by an action for annulment under Article 173 of the Treaty. As the Court of Justice has consistently held, it must be examined whether this letter — which was formally addressed to the Italian Permanent Representation to the European Union and copies of which were sent to several Italian authorities including AIMA, but not to the applicants — has produced binding legal effects such as to affect directly the latters' interests by changing their legal position significantly (see, in particular, the order in *Emerald Meats* v *Commission*, cited above, paragraph 26, the judgment in *Nutral* v *Commission*, cited above, paragraph 28, and the judgment in Case C-395/95 P *Geotronics* v *Commission* [1997] ECR I-2271, paragraph 10).

49 In that connection, the wording of the letter must be interpreted in the light of the factual and legal context in which it was drafted and notified to the Italian authorities. It is important to establish the objective significance the letter could reasonably have had, at the time it was sent, for a conscientious and prudent trader acting on behalf of a national intervention agency in the olive oil sector.

50 The letter in issue was signed by Mr Legras, a Director-General at the Commission, and is expressly limited to the expression of the opinion of the services of Directorate-General VI only. For example, it reads 'the Commission's *services* consider that the confusion ... which has arisen is unacceptable' and 'that the matter should be taken up again at the point when the oils were impounded in April 1995.' Moreover, the letter contains only '*proposals* for settling the dispute which has arisen', and 'the *proposal* of the Commission's *services* is *once more* that the national authorities should make the necessary arrangements.' It is against that background that the Member State is called upon to block '*in the meantime*' any payment in respect of the oils in question. The language used in the letter is thus not that of a binding measure requiring the Italian authorities to close the file definitively and thus affecting the legal position of the applicants.

51 The non-decisional nature of the letter in issue is confirmed by the legal context in which it was written. According to the general principles which govern the relations between the Community and the Member States, it is for the Member States, in the absence of any contrary provision of Community law, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory (Joined Cases 89/86 and 91/86 *Étoile Commerciale and CNTA* v *Commission* [1987] ECR 3005, paragraph 11). More specifically, the application of Community provisions on common market organisations is a matter for the national bodies appointed for this purpose. The Commission's services have no power to take decisions applying those regulations but may only express their opinion, which is not binding upon the national authorities, the expression of such opinions being part of internal cooperation between the Commission and the national bodies responsible for applying Community rules (see, to that effect, in particular Case 133/79 *Sucrimex and Westzucker* v *Commission* [1980] ECR 1299, paragraphs 16 and 22, Case 217/81 *Interagra* v *Commission* [1982] ECR 2233, paragraph 8, and Case 109/83 *Eurico* v *Commission* [1984] ECR 3581, paragraph 20).

52 The same applies with regard to the financing mechanism specifically set up by Articles 4 and 5 of Regulation No 729/70. The Member States themselves must make available the funds necessary for the financing of the common agricultural policy, on the basis of their own financial resources and in accordance with the

needs of their disbursing authorities, while the Commission refunds that expenditure by granting flat-rate advances and additional payments (see, in that connection, the clarifications introduced by the fifth recital in the preamble to Council Regulation (EEC) No 3183/87 of 19 October 1987 introducing special rules for the financing of the common agricultural policy (OJ 1987 L 304, p. 1), the first recital in the preamble to Council Regulation (EEC) No 2048/88 of 24 June 1988 amending Regulation (EEC) No 729/70 on the financing of the common agricultural policy (OJ 1988 L 185, p. 1), the first recital in the preamble to Commission Regulation (EEC) No 2776/88 of 7 September 1988 on data to be sent in by the Member States with a view to the booking of expenditure financed under the Guarantee Section of the Agricultural Guidance and Guarantee Fund (EAGGF) (OJ 1988 L 249, p. 9) and by Article 4(5) of Regulation No 729/70 as amended by Council Regulation (EC) No 1287/95 of 22 May 1995 (OJ 1995 L 125, p. 1)).

53 Under that financing mechanism, it is only by the decision to clear the annual accounts pursuant to Article 5(2)(b) of Regulation No 729/70 that the Commission adopts, vis-à-vis the Member States alone, its final and conclusive position on the payment by the EAGGF of the expenses incurred by the State intervention agencies under the common agricultural policy (see Case C-61/95 *Greece* v *Commission* [1998] ECR I-207, paragraph 39). As the Court held in *Italy* v *Commission*, cited above, at paragraph 36, before the annual accounts are cleared the Commission may not validly take a view on such financing.

54 Consequently, as the Commission has rightly pointed out, the correspondence which is the subject of this dispute, including the letter in issue, took place in a context of internal and informal cooperation, with no element of decision involved, for the purpose of facilitating the day-to-day management of financial accounts and preparing the final establishment of the expenditure to be borne by the EAGGF. The Court considers that, in the light of that regulatory context, the applicants, as prudent and well-informed traders entrusted by AIMA with intervention operations in this sector, could not be unaware of the legal nature of this correspondence or, in particular, of the letter in issue.

55 The applicants maintain none the less that the letter concerns them directly because AIMA had no discretion but had to follow the instructions of the Commission to block the payments in question. At the hearing, they cited, on that point, the judgment of the Court of Justice in Case C-386/96 P *Dreyfus* v *Commission* [1998] ECR I-2309.

56 In that connection, the Court of Justice has held that, for a person to be directly concerned by a Community measure, that measure must directly affect the legal situation of the individual and leave no discretion to its addressees entrusted with the task of implementing it, such implementation being purely automatic and resulting from Community rules without the application of other intermediate rules (*Dreyfus* v *Commission*, cited above, paragraph 43, and the case-law cited). The same applies where the possibility for addressees not to give effect to the Community measure is purely theoretical and their intention to act in conformity with it is not in doubt (same judgment, paragraph 44, and the case-law cited).

57 As established above, the letter in issue, which was merely an informal opinion, did not produce any binding legal effect as regards AIMA, which, faced with a proposal that it block the payments in issue, was therefore free to ignore the opinion of the Commission's services, make those payments and later claim to be refunded by the EAGGF, or to pay the applicants on the basis of its contractual obligations alone without claiming to be refunded at Community level, or to make no payment until such time as the applicants took the action they deemed appropriate. As AIMA chose the last-mentioned course of action, its considered and autonomous conduct cannot thus be attributed to the Commission.

58 The fact that the letter in issue had no direct influence on the conduct of AIMA is confirmed by the fact that it had no immediate consequence as regards day-to-day financial relations between the EAGGF and AIMA. As the Commission confirmed at the hearing, without being challenged by the applicants, until May 1996 the EAGGF continued to pay, in response to monthly requests from AIMA,

monthly advances on costs of storage of the olive oils in issue, payment of those advances having only been stopped following the letter of 23 April 1996 (see above, paragraph 33). Nor did AIMA consider itself bound by other letters from the Commission's services asking it to make the payments in issue and agreeing to bear the attendant costs, that is to say, the letters of 2 October, 23 November and 7 December 1995, as well as that of 23 April 1996.

59 Moreover, it must be noted that, in its judgment in *Étoile Commerciale and CNTA* v *Commission*, cited above, at paragraphs 9, 13 and 14, the Court of Justice declared inadmissible the actions for annulment brought by private individuals against the decision of the Commission fixing the amount recognised as chargeable to the EAGGF in the clearance of the accounts submitted by the French Republic for the 1981 financial year and refusing to recognise as chargeable to the EAGGF the aid requested by those individuals. In that case the national intervention agency had decided, on the basis of that Commission decision, to make use of the possibility it had reserved when the aid was granted to request repayment. The Court took the view that the decision related only to financial relations between the Commission and the Member State in question, and that the recovery of sums already paid, whilst it happened in consideration of that decision, was not a direct consequence thereof but derived from the fact that the intervention agency had made the definitive grant of the sums in question conditional upon their finally being charged to the EAGGF. The Court reasoned as a result that the contested decision did not directly affect the legal position of the applicant undertakings. In this Court's view, that case-law must *a fortiori* be applied to mere opinions issued by the Commission's services to national authorities during the informal stage prior to the clearance of accounts which are merely preparatory to the Commission's final decision.

60 It should be borne in mind, finally, that in the *Dreyfus* case, cited above, concerning urgent assistance from the Community to the States of the former Soviet Union to finance the importation of certain products, the Commission had refused to finance a supply contract for wheat between the applicant undertaking and a Russian public body, against which refusal the undertaking had brought an action for annulment. Whilst the Court of Justice did consider that the decision in issue,

addressed only to the Russian public body, had direct effects on the legal position of the applicant undertaking, the grounds for that judgment were that, in the specific socio-economic context of the case, payment for the supply could only be made with Community financing, with the result that the very existence of the supply contract was dependent on the granting of Community aid (paragraphs 49 to 53 of the judgment). Suffice it to note that those conditions do not obtain in the present case.

61 It follows from all the foregoing arguments that the contested letter of 7 February 1996 did not produce binding legal effects such as to affect the applicants' interests directly. Accordingly, the claim for annulment must be rejected as inadmissible.

The claim for damages

62 First of all, according to case-law, the action for damages provided for by Article 178 and the second paragraph of Article 215 of the Treaty was meant to be an autonomous form of action with a particular purpose to fulfil within the system of remedies provided for. It follows that, in principle, the above ruling of inadmissibility of the claim for annulment of the letter of 7 February 1996 cannot, on its own, entail the inadmissibility of this claim for reparation of the damage allegedly suffered by the applicants through the unlawful conduct of the Commission towards them from the start (see, to that effect, Case T-68/96 *Polyvios* v *Commission* [1998] ECR II-153, paragraph 32).

63 The Court notes, second, that the applicants put the damage allegedly resulting from the blocking of the payments in issue respectively at LIT 3 792 703 336 and LIT 1 851 456 540 in capital in their application, and LIT 4 653 624 967 and LIT 2 166 553 836 in capital in their reply. They also claim interest on sums overdue at an annual rate of 10%, statutory interest at 10% to take account of monetary erosion and various sums on the grounds of loss of earnings according to the different dates on which the respective capital sums were due.

64 Subsequently, in reply to a written question from the Court, the applicants stated that in August 1997 Oleifici Italiani had received the whole of the capital sum of compensation claimed for storage of the oils in question. At the hearing they also stated that Fratelli Rubino Industrie Olearie had in the meantime received an initial sum on account of capital and confirmation from AIMA that the final balance would be paid in full in the very near future. The applicants concluded that the damage to them was thereby reduced with the result that, in fact, their claim was only for a sum to make good the financial loss caused by the delay in making the payments due.

65 The Court takes the view that this reduction of the claim for damages during the course of proceedings is a modification which is admissible in that it merely takes account of changes in the extent of the damage cited by the applicants.

66 It must none the less be borne in mind that, according to consistent case-law, if the Community is to incur non-contractual liability, it is necessary to prove that a number of conditions regarding the illegality of the conduct of which the Community institutions are accused are met, that the alleged damage is real and that there is a causal link between that conduct and the alleged damage (Case T-184/95 *Dorsch Consult* v *Council and Commission* [1998] ECR II-667, paragraphs 59 and 60, and the case-law cited; Case T-168/94 *Blackspur and Others* [1995] ECR II-2627, paragraphs 38 and 40, and the case-law cited; and Joined Cases 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79 *Dumortier Frères and Others* v *Council* [1979] ECR 3091, paragraph 21), the burden of proving that such conditions are in fact met being borne by the applicants (Case T-185/94 *Geotronics* v *Commission* [1995] ECR II-2795, paragraph 39).

67 In this case, as regards the existence of a direct causal link between the conduct of the Commission complained of and the alleged damage, it should be pointed out that the failure to reimburse storage costs could not be attributed to the conduct of the Commission's services in their informal cooperation with the Italian authorities but was due to a deliberate and independent choice by those authorities (see above, paragraphs 54 and 57). In the circumstances the damage alleged by the

applicants can be imputed to the national authorities and thus cannot be considered to have been directly caused by the conduct of the Commission in issue. As the Court of Justice held in *Étoile Commerciale and CNTA* v *Commission*, cited above, at paragraphs 16 to 21, the Community judicature has no jurisdiction to award compensation for such damage on the basis of Article 178 and the second paragraph of Article 215 of the Treaty.

68 As regards the actual nature of the damage caused to the applicants by the delay in making the payments claimed, it must be noted, first, that they failed to put a figure on their claim for damages as modified during the course of proceedings.

69 Second, and in any event, it is only by its decision to clear the accounts for 1991, 1992 and 1993 that the Commission will adopt its final position as to whether and in what amount the EAGGF was to bear the storage costs in issue (see above, paragraph 53). Consequently, the real and certain nature of the damage alleged by the applicants can only be determined in the light of that decision. As the Commission has stated in reply to a written question from the Court of First Instance, the discussions conducted with the Italian authorities on the accounts relating to the consignments of oil in issue are not yet concluded, with the result that there have still been no decisions on the clearance of those particular accounts. It follows that, at present, it is premature to assert that damage has been caused by the conduct of the Commission. Accordingly, there can be no question of real and certain damage already having been suffered by the applicants.

70 Accordingly, the claim for damages must also be rejected.

71 It follows from all the foregoing that the application must be dismissed in its entirety.

Costs

72 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay their own costs and to bear those incurred by the Commission jointly and severally.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicants to pay their own costs and to bear those incurred by the Commission jointly and severally.

Kalogeropoulos Bellamy Pirrung

Delivered in open court in Luxembourg on 15 September 1998.

H. Jung A. Kalogeropoulos

Registrar President