JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

11 July 1997 *

In Case T-267/94,

Oleifici Italiani SpA, a company incorporated under the laws of Italy, established in Ostuni (Italy), represented by Piero A. M. Ferrari and Massimo Merola, of the Rome Bar, and by Antonio Tizzano, of the Naples Bar, with an address for service in Luxembourg at the Chambers of Alain Lorang, 51 Rue Albert 1er,

applicant,

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,

* Language of the case: Italian.

APPLICATION for compensation for the loss allegedly suffered by the applicant owing to the absence of any transitional measure in Commission Regulation (EEC) No 1429/92 of 26 May 1992 amending Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis (OJ 1992 L 150, p. 17),

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

composed of: R. García-Valdecasas, President, J. Azizi and M. Jaeger, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and following the oral procedure on 4 February 1997,

gives the following

Judgment

Legislative background

1 By Regulation No 136/66/EEC of 22 September 1966, as amended on several occasions, the Council established a common organization of the market in oils and fats (OJ, English Special Edition 1965-1966, p. 221). Article 35a thereof, inserted by Council Regulation (EEC) No 1915/87 of 2 July 1987 (OJ 1987 L 183, p. 7), provides that products referred to in Article 1, which include oils, may be marketed in the Community only under certain conditions.

2 Article 1(2) of Commission Regulation (EEC) No 2568/91 of 11 July 1991 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis (OJ 1991 L 248, p.1) defines the characteristics of lampante virgin olive oil. That regulation expressly excluded from its scope olive oil packaged before the date of its entry into force, that is 6 September 1991, and marketed up to 31 October 1992.

3 The regulation at issue is Commission Regulation (EEC) No 1429/92 of 26 May 1992 amending Regulation (EEC) No 2568/91 on the characteristics of olive oil and olive-residue oil and on the relevant methods of analysis (OJ 1992 L 150, p. 17), which entered into force on 5 June 1992. The Commission thereby amended the annexes to Regulation No 2568/91 defining the characteristics of the various types of olive oil, especially the maximum content of trans-isomers. With effect from the entry into force of Regulation No 1429/92, oil whose trans-isomer content exceeded that ceiling could no longer be marketed in the Community. Nevertheless, 'in order not to harm trade', the Commission made provision for oil packaged prior to the entry into force of that regulation to be disposed of during a limited period (second recital in the preamble to Regulation No 1429/92). It did so by making that regulation inapplicable to olive oil packaged before its entry into force, that is, 5 June 1992, and marketed up to 31 October 1992 (second paragraph of Article 2 of Regulation No 1429/92).

Facts and procedure

4 In July 1991 the applicant imported 6 500 tonnes of lampante virgin olive oil from Tunisia. In order to qualify for the inward processing procedure, it had the oil in question temporarily imported, as from 29 October 1991, in several lots with a view to refining it. Since it found itself unable to sell the product quickly, it placed a certain tonnage of bulk refined oil in customs warehousing as from 1 April 1992. 920 tonnes were subsequently re-exported to non-member countries.

5 With effect from the entry into force of Regulation No 1429/92, the remaining oil in customs warehousing could no longer be marketed — as such — on the Community market because it did not satisfy the new criteria introduced by Regulation No 1429/92.

6 By letter dated 21 December 1993, the applicant requested the defendant to take a decision to compensate it for the loss which it had sustained as a result of Regulation No 1429/92. It also stated that it would bring an action for failure to act in the event that no solution could be found.

7 Thereupon the defendant drew up and communicated to the applicant a draft regulation retroactively amending Regulation No 1429/92 in such a way that it would not be applicable to quantities of olive oil held under suspensory customs arrangements, provided that those arrangements were 'regularized' before 31 December 1994.

8 By letter dated 20 January 1994, the applicant informed the defendant that it would not bring an action provided that the proposed measures entered into force within a reasonable period.

9 On 29 April 1994 the draft regulation had still not been put on the agenda of the Management Committee. By letter of the same date the applicant formally requested the defendant, pursuant to Article 175 of the EC Treaty, to take measures to compensate it for the loss which it claimed it had sustained as a result of the adoption of Regulation No 1429/92.

10 By letter dated 5 May 1994, the defendant informed the applicant that it did 'not accept any liability for the alleged losses' and that 'disposal of the oil in question had to be carried out in compliance with the existing rules.'

11 On 18 July 1994 the applicant lodged the application originating these proceedings.

12 By letter dated 13 February 1995, the defendant informed the Italian Ministry of Finance that it was for the national authorities to decide whether or not to authorize the sale of the olive oil in question.

13 After the Italian authorities had given such authorization, the applicant exported the bulk of the olive oil held in customs warehousing to countries outside the Community in 1995 and 1996.

14 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure and to adopt measures of organization of procedure, pursuant to Article 64 of the Rules of Procedure, consisting of a request to the parties to reply in writing to certain questions before the date of the hearing.

15 Oral argument was heard from the representatives of the parties at the hearing on 4 February 1997, when they replied to oral questions put by the Court.

Forms of order sought

16 In its application, the applicant claims that the Court should:

— declare, pursuant to Article 175 of the Treaty, that the defendant has failed to act, inasmuch as it omitted to adopt specific measures to compensate the applicant for the loss it allegedly sustained as a result of Regulation No 1429/92;

— order the defendant, under Articles 178 and 215 of the Treaty, to compensate the applicant for the loss suffered by it owing to the fact that Regulation No 1429/92 does not provide for transitional arrangements for bulk olive oil placed in customs warehousing, such loss being estimated at LIT 18 473 million, equivalent to the purchase price of the olive oil in question, together with interest and storage, insurance and refinery costs (LIT 16 083 million), together also with loss of earnings resulting from the fact that it was impossible to sell on the oil (LIT 2 359 million);

— order the defendant to pay the costs.

17 By letter dated 16 September 1996, the applicant reduced its claim for compensation to LIT 7 345, corresponding to storage costs, interest on those costs and costs incurred in respect of securities lodged.

18 At the hearing the applicant abandoned its claim for a declaration that the Commission had failed to act.

19 The defendant contends that the Court should:

— dismiss the action brought under Articles 178 and 215 of the Treaty;

— order the applicant to pay the costs.

The compensation claim

20 It should be recalled at the outset that, in accordance with settled case-law, for the Community to incur liability, the applicant must prove the unlawfulness of the conduct alleged against the institution concerned, the fact of damage and the existence of a causal link between that conduct and the damaged complained of (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16; Joined Cases T-481/93 and T-484/93 *Exporteurs in Levende Varkens and Others* v *Commission* [1995] ECR II-2941, paragraph 80; T-175/94 *International Procurement Services* v *Commission* [1996] ECR II-729, paragraph 44, and Case T-336/94 *Efisol* v *Commission* [1996] ECR II-1343, paragraph 30).

21 Where the conduct alleged is an omission on the part of a Community institution, it may render the Community liable only if the institution concerned has infringed a legal obligation to act under a provision of Community law (see, for example, Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 58).

22 Where the alleged illegality concerns a legislative act, liability on the part of the Community is dependent upon a finding that there has been a breach of a superior rule of law for the protection of individuals. Finally, if the institution adopted the

legislative act in the exercise of a wide discretion, the Community cannot be rendered liable unless the breach is explicit, that is to say, it is of a manifest and serious nature (see Case 5/71 *Schöppenstedt* v *Council* [1971] ECR 975, paragraph 11; Joined Cases 83/76 and 94/76, 4/77, 15/77 and 40/77 *HNL and Others* v *Council and Commission* [1978] ECR 1209, paragraph 6; Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061, paragraph 12; Case T-572/93 *Odigitria* v *Council and Commission* [1995] ECR II-2025, paragraph 34, and *Exporteurs in Levende Varkens*, cited above, paragraph 81).

23 The Court will first examine whether the applicant has proved the existence of unlawful conduct on the part of the defendant.

The alleged unlawful conduct

24 First, the applicant doubts whether Regulation No 1429/92 may be classified as a legislative act involving a choice of economic policy, but maintains that, in any event, the criteria laid down by the Community judicature in the case-law on the liability of the Community for the adoption of a legislative act are met in the present case (see paragraph 22 of this judgment).

25 It maintains that, by failing to provide in the contested regulation for any transitional period for bulk olive oil placed in customs warehousing, the defendant infringed the principles of non-discrimination, proportionality, protection of legitimate expectations and respect for acquired rights.

1. Infringement of the principle of the protection of legitimate expectations

Arguments of the parties

26 The applicant alleges that the defendant infringed the principle of protection of legitimate expectations on the following two grounds. First, Regulation No 1429/92, which makes no provision for a transitional period, is based on Article 35a of Council Regulation No 136/66, as inserted by Council Regulation No 1915/87. However, Regulation No 1915/87 entered into force four months after its adoption. Similarly, the other Commission regulations expressly referring to Article 35a also contained transitional provisions for the various types of olive oil, on the lines of Regulation No 1915/87, with the exception of those dealing with measures concerning the retail trade, such as Commission Regulation (EEC) No 1860/88 of 30 June 1988 establishing special marketing standards for olive oil and amending Regulation (EEC) No 938/88 laying down special provisions on the marketing of olive oil containing undesirable substances (OJ 1988 L 166, p. 16). Inasmuch as it does not provide for any transitional arrangements for bulk oil, Regulation No 1429/92 differs from the other regulations quoted and hence infringes the principle of protection of legitimate expectations.

27 Secondly, according to the case-law, the principle of protection of legitimate expectations requires steps to be taken to avoid the economic interests of traders who have made major investments and have definitively undertaken, *vis-à-vis* the public authorities, to carry out particular operations, being injured as a result of the entry into force of rules whose adoption was not foreseeable. It follows that, in such cases, the institutions concerned are under an obligation to adopt transitional arrangements in order to protect the interests of such traders, unless an overriding interest precludes the adoption of such arrangements (Case 90/77 *Stimming* v *Commission* [1978] ECR 995, paragraph 6, Case 84/78 *Tomadini* [1979] ECR 1801, paragraph 20, and Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 21). In the present case, not only did the applicant make an investment in order to purchase the oil and refine it, but it also entered into irrevocable commitments

vis-à-vis the public authorities by subjecting itself to customs requirements. Yet the defendant has invoked no overriding public interest which precluded it from providing for transitional arrangements. In fact, the presence of trans-isomers is not necessarily an indication of fraudulent operations, but could also result from lawful refinery operations. Moreover, the oil in question was constantly monitored by the customs authorities from the time of its importation.

28 The defendant stresses the fundamental difference between Regulation No 1915/87 and Regulation No 1429/92. The former amended basic Regulation No 136/66, in particular by inserting Article 35a. In contrast, Regulation No 1429/92 merely contains measures implementing the basic regulation. Like Regulation No 1429/92, implementing Regulation No 2568/91, which was in force when the applicant imported the oil, was also not accompanied by transitional arrangements for non-packaged oil.

29 Moreover, it contends that the applicant had known since July 1991 that the Commission was intending to adopt Regulation No 1429/92, which did not enter into force until 5 June 1992.

30 Furthermore, the introduction of a transitional period for bulk oil would have jeopardized the principal objective of Regulation No 1429/92, namely safeguarding the purity of the oil. Had it been possible to market bulk oil not complying with the purity requirements laid down in Regulation No 1429/92 for a period after it had entered into force, this would have increased the risks of adulteration which the regulation was specifically intended to prevent.

31 Besides, since the tariff nomenclature adapted to suit Regulation No 1429/92 did not enter into force until 19 February 1993 as regards oil in transit to non-Member States, Regulation No 1429/92 was applicable only as from that date, thus allowing

the applicant complete freedom to re-export the oil in question up to that date as refined oil.

Findings of the Court

32 Whilst protection of legitimate expectations is one of the fundamental principles of the Community, traders cannot have a legitimate expectation that an existing situation which is capable of being altered by the Community institutions in the exercise of their discretionary power will be maintained; this is particularly true in an area such as the common organization of the markets whose purpose involves constant adjustments to meet changes in the economic situation (see, in particular, Joined Cases 133/85 to 136/85 *Rau and Others* [1987] ECR 2289, paragraph 18, and Joined Cases C-133/93, C-300/93 and C-362/93 *Crispoltoni* [1994] ECR I-4863, paragraph 57). Nor can an economic operator claim an acquired right or even a legitimate expectation that an existing situation which is capable of being altered by decisions taken by the Community institutions within the limits of their discretionary power will be maintained (Case C-280/93 *Germany* v *Council* [1994] ECR I-4973, paragraph 80).

33 It is necessary to consider, in light of those principles, whether the applicant could have had a justified expectation in this case that a transitional period would be introduced for bulk olive oil.

34 First, the applicant cannot base its claim on the fact that Regulation No 1915/87 contained a provision providing that it would enter into force some four months after it was published. Whereas the purpose of Regulation No 1915/87 was to adjust the descriptions and definitions of olive oil in order to facilitate the marketing thereof, the purpose of Regulation No 1429/92 is to amend, by way of measures implementing the basic regulation, the characteristics of olive oils in order better to ensure their purity.

35 Within the framework of the wide discretion which it enjoys in the field of the common agricultural policy, the Community legislature is to give precedence to the objective of better ensuring the purity of a given product, together with, by implication, that of consumer protection, as opposed to the objective, which it may have pursued in a previous regulation, of facilitating the marketing of that product.

36 As regards a possible transitional period, the contested regulation must be assessed in relation to Regulation No 2568/91, which it amends and is therefore of the same legal nature. Yet, the latter regulation, in common with Regulation No 1429/92, provided for a transitional period only for packaged olive oil.

37 Moreover, as a trader in the sector, the applicant could not have been unaware, between the date when the oil in question was imported and the date when Regulation No 1429/92 entered into force, that it was probable that that regulation would be adopted. Besides, it acknowledged at the hearing that it was aware that the technical standards contained in Regulation No 1429/92 had previously been negotiated and adopted at international level by the International Olive Oil Council (IOOC) before they were adopted by the defendant.

38 Second, the case-law relied on by the applicant is irrelevant. It begins by citing Case C-152/88 *Sofrimport* v *Commission* [1990] ECR I-2477, in which the Court of Justice held that the institution concerned had infringed the principle of protection of legitimate expectations on the ground that it had adopted a safeguard measure whilst totally omitting, without having regard to any overriding public interest, to take into consideration the situation of traders, such as Sofrimport, which had goods in transit, even though a specific provision required it to do so. In contrast, the relevant rules in this case include no specific provision requiring the defendant to take account of the specific situation of traders who had bulk olive oil in customs warehousing when Regulation No 1429/92 was adopted.

39 The applicant goes on to cite Case 74/74 *CNTA* v *Commission* [1975] ECR 533, paragraphs 28 to 44, and *Tomadini*, cited above, paragraph 20. In the *CNTA* case, the Court of Justice held that CNTA, which had obtained export certificates fixing the amount of export refunds in advance, had a legitimate expectation that, in the case of transactions to which it had irrevocably committed itself, no unforeseen change would be made such as to cause it to incur unavoidable losses. In *Tomadini*, the Court of Justice elucidated the principle of protection of legitimate expectations in cases where those are specific rules enabling traders to safeguard themselves — as regards transactions to which they are definitively committed — against the effects of changes in the detailed rules for implementing a common organization. In such a case, that principle debars Community institutions from amending those rules without at the same time providing for transitional arrangements in so far as no overriding public interest precludes them from doing so.

40 In the present case, the applicant cannot claim that it was irrevocably committed to certain transactions, since placing goods in customs warehousing is merely a stage prior to marketing them. Since there is no obligation to keep in customs warehousing goods previously placed there, this cannot be held to be in the nature of an 'irrevocable commitment', as the applicant claims.

41 Since the applicant has not proved the existence of circumstances capable of giving rise to a legitimate expectation, the claim that that principle was infringed must be rejected.

2. Infringement of the principle of non-discrimination

Arguments of the parties

42 According to the applicant, by providing for a transitional period for packaged olive oil but not for bulk olive oil the defendant treated holders of bulk oil less favourably than holders of packaged oil without any objective justification for so doing. It maintains, in any event, that the objective of fraud prevention does not justify that difference in treatment.

43 Furthermore, the applicant alleges, the defendant was guilty of unjustified discrimination in so far as it treated holders of bulk olive oil in free circulation identically to holders of such oil in customs warehousing. In fact, according to the applicant, the latter oil could not be the subject of fraudulent operations owing to the supervision exercised by the customs authorities.

44 The defendant considers that different treatment of packaged olive oil and bulk olive oil was objectively justified by the aim of Regulation No 1429/92 of ensuring the purity of olive oil. A high trans-isomer content makes it easier to mix the oil with oil of inferior quality. In its answer to a written question put by the Court on 15 January 1997 and also at the hearing, the defendant justified that difference in treatment by asserting that there are fewer risks of adulteration in the case of packaged oil than there are in the case of bulk olive oil. If the defendant had made provision for bulk oil to be disposed of during a transitional period, that oil would have been exposed to the risk of adulteration for a longer period. That was not so in the case of packaged oil, since the packaging precludes any fraudulent adulteration.

Findings of the Court

45 It is settled case-law that the principle of non-discrimination is one of the fundamental principles of Community law (*Germany* v *Council*, cited above, paragraph 67; Case T-521/93 *Atlanta and Others* v *European Community* [1996] ECR I-1707, paragraph 46). That principle requires that comparable situations should not be treated in a different manner unless the difference is objectively justified.

46 In addition, it should be borne in mind that, in matters concerning the common agricultural policy, the Community legislature has a wide discretion which corresponds to the political responsibilities imposed on it by Articles 40 and 43 of the Treaty (Joined Cases C-133/93, C-300/94 and C-362/93 *Crispoltoni*, cited above, paragraph 42; Joined Cases T-466/93, T-469/93, T-473/93, T-474/93 and T-477/93 *O'Dwyer and Others* v *Council* [1995] ECR II-2071, paragraphs 107 and 113). Consequently, the legality of a measure adopted in this sphere can be affected only if it is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue (*O'Dwyer and Others* v *Council*, paragraph 107).

47 The contested regulation comes under the common agricultural policy. In order to establish discrimination, it must therefore be examined whether it treated comparable situations differently and, if so, whether the difference in treatment is objectively justified, regard being had, in that respect, to the wide discretion enjoyed by the defendant as regards the objective justification of any different treatment.

48 Article 2(2) of the regulation at issue treats bulk olive oil and packaged olive oil differently in so far as it provides for a transitional period only for the latter. The main aim of the contested regulation, as indicated in the preamble thereto, is to guarantee the purity of olive oil. However, it appears from the documents before the Court that if olive oil has been overheated it obtains a high percentage of trans-isomers, which enables it to be mixed with other oil of inferior quality. This risk of adulteration, which, in theory, does not exist in the case of packaged olive oil, by virtue of the fact that it is packaged, cannot be ruled out in the case of bulk olive oil, even if it is stored in customs warehousing.

49 The defendant would have been obliged to provide for a derogation from the contested regulation only if storage in national customs warehousing afforded a guarantee that it was impossible to adulterate bulk products so stored. In fact, in view of its wide discretion, the defendant would have been under a duty to provide for such a derogation only if it were proven that it was impossible to adulterate bulk olive oil stored in any Customs warehouse in the Community. However, in the light of their objectives, which are chiefly customs-related, the Community rules applicable to bonded warehouses are not such as to preclude all possibility of fraud or manipulation, except for customs purposes.

50 Since it has not been ruled out that the oil in bulk was open to the risk of adulteration, notwithstanding the fact that it may have been stored in customs warehousing, the Court considers that, within the framework of its wide discretion in the sphere of agricultural policy, the defendant was entitled to adopt appropriate measures so as better to ensure the purity of the oil. To that end, it was entitled not to grant holders of bulk olive oil stored in customs warehousing an additional period in which to sell it.

51 It follows that the complaint as to infringement of the principle of non-discrimination must be rejected as unfounded.

3. Infringement of the principle of proportionality

Arguments of the parties

52 Referring to the judgment of the Court of Justice in Case 265/87 *Schräder* v *Hauptzollamt Gronau* [1989] ECR 2237, paragraph 21, the applicant considers

that, by failing to provide for a transitional period for bulk olive oil, the defendant introduced a barrier to trade disproportionate to the objective of ensuring the purity of the oil whilst having as little effect as possible on trade. In any event, oil under customs supervision could not have been adulterated and the requirements of fraud prevention cannot therefore justify the absence of a transitional scheme as far as it is concerned.

53 The defendant maintains that the need to prevent fraud precluded any possibility of any transitional measure for bulk oil. Unlike the facts in the *Schräder* case, no financial charge was imposed on the applicant in this case.

Findings of the Court

54 According to the case-law of the Court of Justice, in order to establish whether a provision of Community law complies with the principle of proportionality, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it (Joined Cases 279/84, 280/84, 285/84 and 286/84 *Rau and Others* v *Commission* [1987] ECR 1069, paragraph 34, and Case C-426/93 *Germany* v *Council* [1995] ECR I-3723, paragraph 42).

55 As stated above, in matters concerning the common agricultural policy, only the fact that a measure is manifestly inappropriate having regard to the objective assigned to it by the competent institution can affect its legality.

56 In this case, the applicant's complaint amounts to a criticism of the priority given by the defendant to the objective of ensuring the purity of the oil, as emphasized in the second recital in the preamble to the contested regulation, over the objective of not harming trade, mentioned in the third recital in the preamble to the contested regulation.

57 In that connection, the Court of Justice has held that in pursuing the objectives of the common agricultural policy the Community institutions must secure the permanent harmonization made necessary by any conflicts between those objectives taken individually and, where necessary, give any one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made (Case 203/86 *Spain* v *Council* [1988] ECR 4563, paragraph 10, and Case C-311/90 *Hierl* v *Hautzollamt Regensburg* [1992] ECR I-2061, paragraph 13).

58 It follows that, in this case, the defendant was entitled to weigh the interests at stake and give priority to the objective of purity, which aims primarily to protect the consumer. In that connection, the applicant has not shown that the defendant's reasoning was manifestly erroneous or that it exceeded the limits of its discretion in the matter. Nor has it established that the measures adopted by the defendant amounted to a barrier to trade or, in any event, that they were disproportionate to the objective pursued.

59 It should be added that, even if the Commission must ensure, in exercising its powers, that the burdens imposed on traders are no greater than is required to achieve the aim which it is to accomplish, it does not however follow that that obligation must be measured in relation to the individual situation of any one trader or group of traders (see Case 5/73 *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhoff* [1973] ECR 1091, paragraph 22, and Case T-489/93 *Unifruit Hellas* v *Commission* [1994] ECR II-1201, paragraph 74).

60 It follows from the whole of the foregoing that the applicant has not proved that the defendant infringed the principle of proportionality in adopting Regulation No 1429/92.

4. Infringement of acquired rights

Arguments of the parties

61 The applicant takes the view that, by placing the oil in question in customs warehousing, it wished to switch from the temporary importation procedure to the procedure for goods intended for export. The goods ought then to have been regarded as having already formally left the territory of the Community. The applicant also says that it acquired the right to export the goods outside the Community without authorization, in accordance with the rules in force at the time when it placed the oil in question in customs warehousing. The defendant infringed that right by adopting Regulation No 1429/92 without at the same time providing for adequate transitional arrangements.

62 The existence of an acquired right, the applicant maintains, may also be inferred from Article 121(1) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), which provides that account is to be taken of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of these goods under the inward processing procedure, no account being taken of any subsequent changes. The applicant considers that, since this criterion is applicable to determination of customs debt, it must also be applicable to the exercise of the right to export the goods subject to that debt.

63 In the defendant's view, the applicant did not acquire a right to have unlimited benefit of the rules in force at the time when it placed its oil in customs warehousing. It retained its right to export those goods, subject to observance of the new requirements. According to the case-law (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 119), no-one may claim an acquired right to the maintenance of an advantage enjoyed at a given point in time. Finally, Article 121(1) of Regulation No 2913/92 does not apply where the product intended to be re-exported does not satisfy the applicable rules.

Findings of the Court

64 There is no provision which confers on the holder of goods placed in customs warehousing a personal right to dispose of them under the legislation in force at the time when they were placed in such warehousing. Moreover, by providing that imported goods may undergo handling intended to preserve them, improve their appearance or quality or prepare for distribution or resale, Article 109 of Regulation No 2913/92 enables holders of such goods to adapt them so as to comply with any new rules which may be adopted. Consequently, the traders concerned cannot rely on the rules applicable at the time when the goods were placed in customs warehousing being maintained in force.

65 No more may the applicant infer an acquired right from Article 121(1) of Regulation No 2913/92. That article provides that '[s]ubject to Article 122, where a customs debt is incurred, the amount of such debt shall be determined on the basis of the taxation elements appropriate to the import goods at the time of acceptance of the declaration of placing of these goods under the inward processing procedure.'

66 In the first place, Regulation No 1429/92 does not alter the amount of the customs debt, as determined in accordance with Article 121(1) of Regulation No 2913/92. Secondly, no right to the maintenance in force of the rules determining the requisite characteristics of olive oil marketed may be inferred from the applicant's right to have the amount of its customs debt determined in accordance with the said Article 121. Thirdly, Article 121 is totally irrelevant to this case inasmuch as the applicant had already processed the goods under the inward processing procedure prior to placing them in customs warehousing.

67 It follows from the foregoing that the complaint alleging infringement of acquired rights must be rejected.

5. Claim concerning the condition of unlawful conduct

68 It follows from the whole of the foregoing that the applicant has not proven that the defendant was guilty of unlawful conduct. Consequently, there is no need to examine whether the contested act is or is not legislative in nature or whether the alleged breaches are serious.

69 Even though, if only for this reason, the claim for compensation cannot be upheld, the Court considers it useful, in view of the particular circumstances of the case, to consider the question of the alleged damage.

The alleged damage

Arguments of the parties

70 The applicant maintains that it suffered a loss of LIT 7 345 million in respect of storage costs, interest on those costs, and costs of providing security. Initially, the loss allegedly amounted to LIT 18 473 million, but it was reduced as a result of the sale of the oil in question during these proceedings, after the defendant had abandoned its objection to the issue by the Italian customs authorities of authorization to sell that oil.

71 In the defendant's view, since the applicant sold the oil in question in 1995 and 1996, taking advantage of the increase in olive oil prices on the world market, it suffered no loss by reason of the fact that it was blocked in customs warehousing but, on the contrary, made a profit of LIT 10 929 648 626. In any event, any loss which might have been caused by the regulation could not have exceeded the difference between the price of the goods in question on non-Member State markets immediately before Regulation No 1429/92 entered into force and the price of those goods immediately after it entered into force. The applicant has not, however, proven that there was such a difference.

72 At the hearing the applicant responded by arguing that, if it had been in a position to reinvest the whole of the proceeds of sale of the 4 788 809 tonnes of oil at an earlier date, it would have made a much greater profit than the figure given by the defendant.

Findings of the Court

73 The applicant does not deny that it did in fact sell the olive oil in question in 1995 and 1996 or that the olive oil price on the world market increased over that period, which enabled it to sell the oil in question at a higher price than it would have obtained if it had sold the oil in 1992 and so to make a profit in excess of the final amount of the compensation claim. The argument that the applicant would have made a much bigger profit if it had been able to reinvest the whole of the proceeds of the sale of the oil in question at an earlier date cannot avail it, since it did not seek compensation for loss of profit and, secondly, damage caused by the fact that it was not possible to reinvest the proceeds of sale at an earlier date is not only completely hypothetical but also indeterminate.

74 It follows that the fact of the damage for which compensation is claimed has not been made out.

75 Accordingly, the applicant has not proved that he sustained the alleged damage.

Conclusion

76 Since the applicant has not proved the existence of an illegality or the fact of the damage, the application must be dismissed in its entirety.

Costs

77 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if they have been asked for in the successful party's pleadings. Since the defendant has applied for costs and the applicant has been unsuccessful, the latter must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

García-Valdecasas Azizi Jaeger

Delivered in open court in Luxembourg on 11 July 1997.

H. Jung R. García-Valdecasas

Registrar President