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# European Community Law And The Doctrine Of Legitimate Expectations: How Legitimate, And For Whom?

*Eleanor Sharpston\**

## I. INTRODUCTION

This article aims to provide a fairly succinct,<sup>1</sup> practical analysis of the way in which the Court of Justice of the European Communities (the "supreme court" for all questions of interpretation arising under the EEC, ECSC and Euratom Treaties) has developed one particular fundamental principle of Community law, the doctrine of "legitimate expectations". The emphasis throughout is not only on the exact legal formulation of the doctrine, but also on whether or not the doctrine can be said to match up to expectations that, economically, might be regarded as "legitimate". Before embarking on the substance, it may be useful to set out briefly, for those who are perhaps unfamiliar with the way in which the judicial machinery of the European Community<sup>2</sup> operates, a description of how cases in which this principle has been pleaded come to arise and how they reach the Court.

The three Treaties establishing the European Communities are fairly

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<sup>1</sup> For a much more lengthy analysis, also along economic/legal lines, see E. Sharpston, *Legitimate expectations and economic reality*, 15 EUROPEAN LAW REVIEW 103-160 (1990).

<sup>2</sup> Throughout this article, reference is made to "the European Community" as though there were one single European Community. In fact, there are three legally separate communities: the European Economic Community, the European Coal and Steel Community and the European Atomic Energy Community, established respectively by the EEC Treaty, the ECSC Treaty and the Euratom Treaty. Unless otherwise stated, all references are to EEC Treaty articles and EEC secondary legislation.

specific about who does what in the general scheme of operations. Thus, the Council of Ministers is the Communities' chief political and legislative authority. The Commission's functions include detailed management of certain sectors of the economy (the various agricultural markets, and steel production, for example) and acting as a supervisory watchdog to enforce compliance with certain Treaty rules (for example, the competition rules of the EEC Treaty). The European Parliament provides political input and has an increasingly important advisory capacity. The role of the Court of Justice of the European Communities (here referred to as "the European Court")<sup>3</sup> is to see to it that, in the interpretation and application of the EEC, ECSC and Euratom Treaties, "the law is observed".<sup>4</sup> Indeed, it is well established that, where the Council and Commission have to appraise complex economic matters, they enjoy a great deal of discretion; and the European Court's review of that discretion is a limited one.<sup>5</sup> In the words of the European Court's own assessment of its role, "... the Commission enjoys a significant freedom of evaluation both as regards the taking into account of possible factors of disturbance and in choosing the means of dealing with them . . . . When examining the lawfulness of the exercise of such freedom, the courts cannot substitute their own evaluation of the matter for that of the competent authority, but must restrict themselves to examining whether the evaluation . . . contains a patent error or constitutes a misuse of power".<sup>6</sup>

Where the process of judicial review of the validity of a Community act or decision begins will depend, to a considerable extent, on what sort of measure and what market sectors are involved. Thus, the individual

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<sup>3</sup> At the risk of stating the obvious, it may be helpful to recall that there are three courts in Western Europe that are very frequently confused: the Court of Justice of the European Communities in Luxembourg, with whose caselaw this article is concerned; the European Court of human Rights in Strasbourg, France, which interprets the European Convention on Human Rights; and the International Court of Justice in The Hague, The Netherlands, which is the principal judicial organ of the United Nations.

<sup>4</sup> Article 164 EEC, Article 31 ECSC, Article 136 Euratom. The ECSC text is fuller than the EEC and Euratom texts, inasmuch as it contains the additional words "and of rules laid down for the implementation thereof". The absence of those words in the EEC and Euratom Treaties has caused no difficulty in practice—indeed, the European Court spends a considerable proportion of its time interpreting regulations enacted in implementation of the EEC Treaty.

<sup>5</sup> See Case 42/84 *Remia and Others v. Commission* 1985 E. Comm. Ct. J. Rep. 2545 at paragraph 34 of the judgment and Case 258/84 *Nippon Seiko KK v. Council* 1987 E. Comm. Ct. J. Rep. 1923, at paragraph 21 of the judgment, respectively.

<sup>6</sup> Case 78/74 *Deuka v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* 1975 E. Comm. Ct. J. Rep. 421 (relating to regulatory control of agricultural markets), at paragraphs 8 and 9 of the judgment. Cf. slightly different formulations in Case 98/78 *Racke v. HZA Mainz* 1979 E. Comm. Ct. J. Rep. 69 (at paragraph 5) and Case 42/84 *Remia, supra* (at paragraph 34). (Here, as elsewhere in this article, the frequently-recurring "Hauptzollamt" (a main German customs office) is abbreviated to "HZA".)

trader or enterprise usually encounters measures of agricultural market management (such as those governing the grant of export refunds for certain products) at the national level, since the implementation of such Community measures is normally delegated to the appropriate national administrative authorities in the various Member States. In contrast, in such matters as the allocation and monitoring of a steel quota, or an anti-dumping undertaking, the enterprise will be dealing directly with the Commission in its supervisory/watchdog role. It follows (fairly naturally) that there are two main routes by which a case in which the principle of legitimate expectations is invoked by an individual trader or enterprise will get to the European Court. If dealings have been directly with the Commission and have resulted in an administrative decision which the trader or enterprise wishes to challenge, a direct action will be brought under Article 173 EEC,<sup>7</sup> seeking the annulment of the decision or the reduction or annulment of the fine. If the trader or enterprise has met with opposition from a national administrative authority, it will normally bring proceedings against that authority in the Member State's national courts and will then seek to persuade the national judge to suspend those proceedings and request a preliminary ruling on one or more points of interpretation of Community law from the European Court—the “reference for a preliminary ruling” under Article 177 EEC.<sup>8</sup>

By whichever route the case reaches it, the European Court will then examine the validity of the Community measure at issue with regard, not only to the relevant express Treaty provisions and the interpretation already given to these in existing caselaw, but also in the light of certain “fundamental principles” that it has itself developed, drawing on the legal traditions of the different Member States. Occasionally, the European Court will hold that Community legislation or decisions are invalid because one of these fundamental principles such as legitimate expectation, proportionality, and the principle of nondiscrimination—have been violated. The doctrine of legitimate expectations is “undeniably part of Community law”.<sup>9</sup> The question is then, how and in what circumstances is it used? What behavior will create a legitimate expectation on which the economic agent can rely? On the one hand, economic activity takes place against a background of uncertainty—should one regard all changes in the regulatory framework as just one further hazard? On the other hand, economic agents have to be able to place some reli-

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<sup>7</sup> Or Article 33 ECSC in coal and steel matters, or Article 146 Euratom, as the case may be.

<sup>8</sup> Or Article 41 ECSC, or Article 150 Euratom, as appropriate.

<sup>9</sup> Advocate General Lenz in Joined Cases 63 and 147/84 *Finsider v. Commission* 1985 E. Comm. Ct. J. Rep. 2857 at p. 2865.

ance on something if continuing economic relationships are to be sustained. Certainly, insurance can often be used to pass on the loss—should it occur—to someone else; but over-insurance represents a misallocation of resources. For both legal reasons (an estoppel-type argument) and economic reasons (sometimes the economic agent should be able to rely on the administration not changing the rules in the middle of the game), a doctrine of legitimate expectations is attractive.

## II. AGRICULTURE

The majority of the cases in which legitimate expectations have been pleaded concern the various agricultural markets and the steel industry. That is, on the whole, unsurprising from an economic point of view. Both agriculture and steel are characterized by a high level of regulatory control.

The general rule appears to be that the European Court will usually be prepared to back the Council and/or Commission and to hold that they are entitled to have a fairly wide margin of maneuver in market management, even where the chosen scheme has been subjected to fairly heavy criticism. This ties in with the basic principle—essential, it is suggested, to a rational attempt at market management by the public authorities—that those authorities should be free to legislate (and to modify legislation) in the general economic interest, in the light of what they perceive to be the requirements of a changing overall economic situation.

Thus, in Case 265/85 *Van den Bergh en Jurgens BV and Van Dijk Food Products (Lopik) BV v. Commission*,<sup>10</sup> the Court stated, “. . . any trader in regard to whom an institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations. On the other hand, if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted.”<sup>11</sup> The European Court went on to hold that the “prudent and discriminating trader” ought to have taken into account the possibility that another “Christmas butter” scheme would be run, despite the earlier criticism of such schemes as a means of disposing of surplus Community butter.<sup>12</sup>

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<sup>10</sup> 1987 E. Comm. Ct. J. Rep. 1155.

<sup>11</sup> *Id.* at Paragraph 44, citing Case 87/77 *Lühns v. HZA Hamburg-Jonas* 1978 E. Comm. Ct. J. Rep. 169, *infra*.

<sup>12</sup> See also Case 92/77 *An Bord Bainne Co-operative v. Minister of Agriculture* 1978 E. Comm. Ct. J. Rep. 497 and—a more extreme example showing that individual traders cannot dictate to the Community institutions what their policy choices should be—Joined Cases 54 to 60/76 *Compagnie Industrielle et Agricole du Comté de Loheac and Others v. Council and Commission* 1977 E. Comm. Ct. J. Rep. 645.

The Community institutions do not, however, enjoy a completely unfettered discretion in their market management. Two striking recent examples to the contrary are Case 120/86 *Mulder v. Minister van Landbouw en Visserij* and Case 170/86 *Von Deetzen v. HZA Hamburg-Jonas*,<sup>13</sup> which concerned the position, when the milk “superlevy” was introduced, of farmers who had meanwhile given give-year non-marketing undertakings, and who found themselves without a reference quantity in the year chosen as the “reference year” and thus effectively excluded from the dairy market. The European Court held that, while a producer who had freely chosen to stop production for a certain period could not legitimately expect to be able to resume production under the same conditions as before, such a producer (who had been encouraged by a Community measure to suspend production for a limited period in the general interest and in return for a premium) could legitimately expect not to be made subject to specific restrictions arising precisely from the fact that she or he had taken advantage of the option offered by the Community legislation. The superlevy regulation was declared partially invalid as breaching those producers’ legitimate expectations.<sup>14</sup> As Advocate General Slynn put it in his Opinion in Case 120/86 *Mulder*, what had happened “crosses the line between what is merely ‘hard business luck’ and what is unreasonable treatment.”<sup>15</sup>

So much for basic market management in the agricultural sector. The web of financial arrangements surrounding Community trade in agricultural products has given rise to a considerable number of the legitimate expectations cases. The inexpert do not play in this market, which provides considerable opportunities for speculative gains—and also losses. The European Court has tended to look askance at legitimate expectations arguments raised by traders who found themselves on the wrong end of a particular deal. “[F]requent changes in monetary compensatory amounts [“MCAs”] in accordance with the state of the market at the time is a characteristic feature of the system,”<sup>16</sup> and no legitimate expectation in the status quo derives from the fact that there is usually a

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<sup>13</sup> 1988 E. Comm. Ct. J. Rep. 2321; 1988 E. Comm. Ct. J. Rep. 2355 respectively.

<sup>14</sup> See Case 120/86 *Mulder*, paragraphs 23-27; Case 170/86 *Von Deetzen*, paragraphs 12-16. The European Court’s decision caused considerable problems for the Council, which found itself trying to conjure up additional milk quotas out of thin air. There is now a plethora of further cases challenging the measures that were eventually adopted to try to give effect to the European Court’s judgment.

<sup>15</sup> 1988 E. Comm. Ct. J. Rep. at p. 2341. For a less extreme example of successful legitimate expectations, see Case 5/75 *Deuka v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* 1975 E. Comm. Ct. J. Rep. 759.

<sup>16</sup> Case 88/78 *HZA Hamburg-Jonas v. Kendermann* 1978 E. Comm. Ct. J. Rep. 2477.

time-lag before the financial mechanisms are changed in order to reflect underlying currency fluctuations.

Two *leitmotiven* of the European Court's decisions on non-retroactive changes in MCAs may perhaps be identified. First, the European Court regards speculative risk as a risk voluntarily assumed whose consequences are not to be altered judicially: indeed, Community measures may then be described as "a justified precaution against purely speculative activities."<sup>17</sup>

Secondly, the European Court sees the purpose of the MCA system as being, "in particular, to obviate the difficulties which monetary instability may create for the proper functioning of the common organizations of the market, rather than to protect the individual interests of traders"<sup>18</sup>—that is, the furtherance of the public, rather than the private, weal.

Against that background, it is scarcely surprising that MCA cases involving legitimate expectations tend to be unsuccessful.<sup>19</sup> Similarly, where the market organization has been structured so as to give traders a fairly straight choice between security (via advance fixing of MCAs or export restitution or both) and taking a gamble (with the possibility of extra gain, but also of unexpected loss if the trader guesses wrong),<sup>20</sup> the European Court has refused to recognize legitimate expectations where traders chose the more speculative route (or ingeniously managed to turn the "secure" route into a quasi-speculative route),<sup>21</sup> or where the previous economic situation was one of no real certainty and where, therefore, the contested action has produced no intrinsic change.<sup>22</sup> Even where advance fixing is used as intended, traders cannot have a legitimate expectation in something which is entirely divorced from the objective of that adjustment provision, which is unforeseeable at the time when the amount was fixed in advance and which it is therefore clear cannot have

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<sup>17</sup> Case 2/75 *Einfuhr und Vorratstelle für Getreide und Futtermittel v. Mackprang* 1975 E. Comm. Ct. J. Rep. 607 at paragraph 4 of the judgment.

<sup>18</sup> Case 97/76 *Merkur Aussenhandel GmbH and Co. KG v. Commission* 1977 E. Comm. Ct. J. Rep. 1063 at paragraph 5 of the judgment.

<sup>19</sup> See, e.g., Case 126/76 *Firma Gebrüder Dietz v. Commission* 1977 E. Comm. Ct. J. Rep. 2431; Case 152/80 *Debayer SA et al. v. Directeur du Fonds d'Intervention et de Régularisation du marché du sucre et al.* 1981 E. Comm. Ct. J. Rep. 1291; Case 146/77 *British Beef Co. Ltd. v. Intervention Board for Agricultural Produce* 1978 E. Comm. Ct. J. Rep. 1347; Case 281/82 *Unifrex v. Commission and Council* 1984 E. Comm. Ct. J. Rep. 1969.

<sup>20</sup> See Case 112/77 *Firma August Töpfer & Co. v. Commission* 1978 E. Comm. Ct. J. Rep. 1019.

<sup>21</sup> See Case 62/83 *Eximo Molkereierzeugnisse Handelsgesellschaft mbH v. Commission* 1984 E. Comm. Ct. J. Rep. 2295.

<sup>22</sup> See Case 1/73 *Westzucker GmbH v. Einfuhr und Vorratstelle für Zucker* 1973 E. Comm. Ct. J. Rep. 723.

been taken into account among the reasons which led the trader to request advance fixing.<sup>23</sup>

To have a legitimate expectation in the advantages of advance fixing, the trader must also comply precisely with all the requirements;<sup>24</sup> and there must be no suspicion of possible speculative activity.<sup>25</sup> However, if the trader has behaved prudently in every way, the European Court is prepared, in principle, to uphold a straightforward claim to legitimate expectations in the context of advance fixing. In Case 74/74 *Comptoir National Technique Agricole (CNTA) v. Commission*,<sup>26</sup> the European Court held that, while the system of compensatory amounts could not be considered to be tantamount to a guarantee for traders against the risks of alteration of exchange rates, the application of the compensatory amounts in practice avoided the exchange risk, so that a trader, even a prudent one, might be induced to omit to cover himself against such risk. A trader might therefore legitimately expect that, for transactions he had irrevocably undertaken, no unforeseen alteration would occur which could have the effect of causing him inevitable loss, by re-exposing him to the exchange risk. In the absence of an overriding matter of public interest, the Commission would act in violation of those traders' legitimate expectations if it abolished with immediate effect and without warning the application of compensatory amounts in a specific sector without adopting transitional measures which would at least permit traders either to avoid the loss which would have been suffered in the performance of existing irrevocable export contracts or to be compensated for that loss.<sup>27</sup>

In the context of a long-term investment project in the agricultural sector, the European Court will also uphold a claim of legitimate expectations if the Commission has been very slow to detect an error that

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<sup>23</sup> Case 100/74 *Cam SA v. Commission* 1975 E. Comm. Ct. J. Rep. 1393. Cf. Joined Cases 44 to 51/77 *Groupement d'Interet Economique Union Malt and Others v. Commission* 1978 E. Comm. Ct. J. Rep. 57, where the European Court drew a sharp distinction between the rules relating to the advance fixing of refunds and the rules relating to the advance payment of the refund fixed in advance—the trade circles concerned could not have been unaware, in the light of the development of the malt market, that the maintenance in force of the system for advance payment of the refund gave rise to very serious difficulties and that change was likely.

<sup>24</sup> Case 316/86 *HZA Hamburg-Jonas v. Firma P. Krücken* 1988 E. Comm. Ct. J. Rep. 2213; cf. Case 172/89 *Vandemoortele NV v. Commission* (pending).

<sup>25</sup> See Case 338/85 *Pardini v. Ministero del Commercio con l'Estero* 1988 E. Comm. Ct. J. Rep. 2041 for a fairly extreme example.

<sup>26</sup> 1975 E. Comm. Ct. J. Rep. 533.

<sup>27</sup> *Id.* at Paragraphs 40-43. For the subsequent history of the case, see 1976 E. Comm. Ct. J. Rep. 797. Note, however, that the European Court appears sometimes to give greater weight to the supposed (subjective) intention of the legislator than to an (objective) assessment of what traders might legitimately expect: Joined Cases 67 to 87/75 *Lesieur Cotelte and Associates SA v. Commission* 1976 E. Comm. Ct. J. Rep. 391.



could not, on any view, have been detected by the recipient of re-structuring assistance from Community funds.<sup>28</sup>

A major problem in the agricultural context—as indeed in other sectors—is the question of retroactive legislation. Such legislation is probably the single element most likely to destroy traders' and businesspersons' confidence in the way in which an economic system is being managed—as witness the extreme reluctance of multinational companies (despite apparently tempting subsidies, exemptions or fiscal advantages) to invest in developing countries which have a bad track record of changing their minds and/or expropriating foreign holdings retroactively. If such legislation is to be permitted at all, the conditions for determining its validity need to be applied very strictly, on the basis of a thorough examination of the underlying economic factors. Valid retroactive legislation should be the unusual exception to an otherwise general rule.

The best economic starting point is perhaps the assessment of the temporal effect of Community economic legislation offered by Advocate General Deutheillet de Lamothe in Case 37/70 *Rewe Zentrale GmbH v. HZA Emmerich*:<sup>29</sup>

"... The case-law of the Court is very subtle with regard to the temporal effect of Community acts.

"In fact the Court concedes that although in general the principle of legal certainty militates against a Community act's taking effect from a point in time before its publication, the application of this principle must be tempered with the requirements of economic law. This in fact implies that, going beyond an overstrict notion of the principle of non-retroactivity, a distinction must be made between retroactivity *stricto sensu* and a new situation termed by various contemporary experts in public law 'the immediate application of new provisions to pre-existing situations', which is frequently encountered in economic affairs.

"In fact, as regards laws relating to economics the economic occurrence is very often the source and basis of the legislative measure; the occurrence, its seriousness and consequences condition both the introduction and the lawfulness of that measure.

"It is the economic occurrence and not the measure resulting from it which constitutes the threat to legal certainty and consequently it is both necessary and desirable that it should be the date of that occurrence and not that of the legal measure which establishes the point of departure for the effects of the latter."<sup>30</sup>

In two cases concerning the application of MCAs to the wine sector,

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<sup>28</sup> Case 15/85 *Consortio Cooperative d'Abruzzo ("CCA") v. Commission* 1987 E. Comm. Ct. J. Rep. 1005. Cf. Joined Cases 63 and 147/84 *Finsider SPA v. Commission*, *infra*.

<sup>29</sup> 1971 E. Comm. Ct. J. Rep. 23.

<sup>30</sup> 1971 E. Comm. Ct. J. Rep. at p. 45.

Case 98/78 *A. Racke v. HZA Mainz*<sup>31</sup> and Case 99/78 *Weingut Gustav Decker KG v. HZA Landau*,<sup>32</sup> the European Court expressly accepted that retroactive legislation was not invalidated by the principle of legitimate expectations if certain conditions were met: in a slightly circular definition, it held that, "Although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected."<sup>33</sup> In terms of economic analysis, the "purpose to be achieved" part of the *Racke* test does not cause particular difficulty, given the caselaw cited earlier as to the importance of the public weal over the private interest.<sup>34</sup> When the legitimate expectations of those concerned will, and will not, be deemed to be respected is more arguable.<sup>35</sup>

Indeed, where regulations are not expressly stated (with reasons) to be retroactive, the *Racke* test has been duly applied so as to avoid retroactivity.<sup>36</sup> The test has also occasionally been applied to uphold a claim

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<sup>31</sup> 1979 E. Comm. Ct. J. Rep. 69.

<sup>32</sup> 1979 E. Comm. Ct. J. Rep. 101.

<sup>33</sup> Case 98/78 *Racke*, paragraph 20, Case 99/78 *Decker*, paragraph 8.

<sup>34</sup> See, e.g., Case 126/76 *Dietz*, *supra*. For a specific retroactivity case with a strong public weal element and no very plausible traders' expectations, see Case 84/81 *Staple Dairy Products Ltd v. Intervention Board for Agricultural Produce* 1982 E. Comm. Ct. J. Rep. 1763.

<sup>35</sup> See the series of "isoglucose cases": (i) Case 125/77 *Koninklijke Scholten-Honig NV v. Hoofdproduktenschap voor Akkerbouwprodukten* 1978 E. Comm. Ct. J. Rep. 1991, (ii) Case 138/79 *Roquette Frères SA v. Council* 1980 E. Comm. Ct. J. Rep. 3333 and Case 139/79 *Maizena GmbH v. Council* 1980 E. Comm. Ct. J. Rep. 3393, (iii) Case 108/81 *G.R. Amylum v. Council* 1982 E. Comm. Ct. J. Rep. 3107, Case 110/81 *SA Roquette Frères v. Council* 1982 E. Comm. Ct. J. Rep. 3159 and Case 114/81 *Tunnel Refineries Ltd. v. Council* 1982 E. Comm. Ct. J. Rep. 3189 for a striking example of retroactive legislation being upheld by the European Court against a background of underlying technical and economic changes, policy shifts and Pyrrhic procedural victories. In a different context (the need to have smooth transitional arrangements for the accession of Greece to the Community), see Case 337/88 *Società Agricola Fattoria Alimentare Spa (SAFA) v. Amministrazione delle Finanze dello Stato*, judgment of 9 January 1990, not yet reported, for an interesting example of how far the European Court is prepared to go in applying the *Racke* test to uphold retroactive legislation. For the *a posteriori* recovery of import duties—a form of quasi-retroactivity—see Case 210/87 *Remo v. Amministrazione delle Finanze dello Stato*, judgment of 5 October 1988, not yet reported. Note also that being a customs agent is a hazardous occupation so far as such recovery is concerned: see, e.g., Case 161/88 *Friedrich Binder GmbH v. HZA Bad Reichenhall*, judgment of 12 *Verpackungsbedarf GmbH v. HZA Itzehoe*, judgment of 28 June 1990, not yet reported; see also Joined Cases 98/83 and 230/83 *Van Gend et Loos NV and Expeditiebedrijf Wim Bosman BV v. Commission* 1984 E. Comm. Ct. J. Rep. 3763 (collection of additional duties).

<sup>36</sup> See Joined Cases 212 to 217/80 *Amministrazione delle Finanze dello Stato v. Srl Meridionale Industria Salumi et al.; Orlandi e Figlio and Divella v. Amministrazione delle Finanze dello Stato* 1981 E. Comm. Ct. J. Rep. 2735. A follow-up to Joined Cases 66, 127 and 128/79 *Amministrazione delle Finanze dello Stato v. Srl Meridionale Industria Salumi et al.; Orlandi e Figlio and Divella v. Amministrazione delle Finanze dello Stato* 1980 E. Comm. Ct. J. Rep. 1237, *qv.* for the previous

of legitimate expectations where the contrary result would be absurd.<sup>37</sup> And where the underlying economic reasoning is very clearly defective, the trader may not need to demonstrate a particular legitimate expectation in order to defeat retroactive legislation.<sup>38</sup>

The European Court has, on the whole, been reluctant to hold that respect for traders' legitimate expectations required the adoption of transitional measures to safeguard contracts in progress:<sup>39</sup> although from a purely economic point of view, granting a transitional period deals adequately with most genuine business expectations, the European Court has tended to reject arguments for transitional measures, on the basis that (a) there was an overriding public interest in favor of immediate change, (b) it was reasonable to fear that making a transitional period available would destroy the whole point of the change in legislation and (c) the prudent trader should have realized anyway that change was imminent. The concept of the matters about which the prudent trader "could not be unaware" is interesting not least because it assumes a fairly permeable membrane between the Commission and the outside world.<sup>40</sup>

#### A. Steel

Another highly-regulated area of economic activity in the Community is the steel sector. From being one of the building blocks of war, and therefore one of the first products to form the subject-matter of a European Community, steel has become a problem area of the economy. The situation was succinctly described by the European Court in 1985 as follows:

"Since 1973, the Community steel industry has been in particular difficulty owing to the recession which has affected all economic activities and which

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history of the dispute. Cf. Case 21/81 *Ministère Public v. Bout*, *BVI Bout en Zonen* 1982 E. Comm. Ct. J. Rep. 381.

<sup>37</sup> See Case 224/82 *Firma Meiko-Konservenfabrik v. Bundesamt für Ernährung und Forstwirtschaft (BEF)* 1983 E. Comm. Ct. J. Rep. 2539.

<sup>38</sup> Case 264/81 *SPA Savma v. Commission* 1984 E. Comm. Ct. J. Rep. 3915.

<sup>39</sup> See, e.g., Case 97/76 *Merkur Aussenhandel GmbH and Co. KG v. Commission* 1977 E. Comm. Ct. J. Rep. 1063; Case 68/77 *Interkontinentale Fleischhandels-gesellschaft mbH (IFG) & Co. KG v. Commission* 1978 E. Comm. Ct. J. Rep. 353; Case 127/78 *Hans Spitta & Co. v. HZA Frankfurt/Main Ost* 1979 E. Comm. Ct. J. Rep. 171; Case 112/80 *Firma Anton Dürbeck v. HZA Frankfurt-am-Main* 1981 E. Comm. Ct. J. Rep. 1095; Case 96/77 *SA Ancienne Maison Marcel Bauche et SARL François Delquignies v. Administration française des douanes* 1978 E. Comm. Ct. J. Rep. 383; Case 78/77 *Firma Johann Lührs v. HZA Hamburg-Jonas* 1978 E. Comm. Ct. J. Rep. 169; Case 90/77 *Hellmut Stimming KG v. Commission* 1978 E. Comm. Ct. J. Rep. 995; Case 84/78 *Ditta Tomadini SNC v. Amministrazione delle Finanze dello Stato* 1979 E. Comm. Ct. J. Rep. 1801; Case 26/81 *SA Oleifici Mediterranei v. European Economic Community* 1982 E. Comm. Ct. J. Rep. 3057.

<sup>40</sup> Joined Cases 95 to 98/74, 15 and 100/75 *Union Nationale des Coopératives Agricoles de Céréales et autres v. Commission and Council* 1975 E. Comm. Ct. J. Rep. 1615.

has entailed a reduction in demand for steel products. In addition to those difficulties flowing from the present economic situation, the steel industry is suffering as a result of the arrival on the common market of highly competitive products manufactured in non-member countries, and as a result of serious structural problems in the Community steel industry itself, such as the fact that much of its plant is obsolete. All those factors have combined to create excess capacity and a drop in prices which has affected the viability of the greater part of the undertakings in the steel industry . . .".<sup>41</sup>

The Community has tried various remedies and, given the Community's clear policy choice in favor of legislative freedom to apply here as in agricultural markets. Various challenges brought against the system of production quotas introduced in late 1980—both relatively straightforward claims of legitimate expectations<sup>42</sup> and claims alleging retroactivity<sup>43</sup> were duly unsuccessful. Nor could steel manufacturers in countries which acceded to the Community hope that they would get continued special treatment as newcomers if overall Community needs dictated otherwise.<sup>44</sup>

Even where long-term investment planning is concerned, the European Court has been unwilling to recognize any legitimate expectation in the *status quo* or, at least, in preferential treatment when the rules change, even where the Commission has issued an expert opinion in favor of a particular investment.<sup>45</sup> While the addressee of such an opinion could "entertain . . . certain expectations regarding the profitability of the investment"<sup>46</sup> (because, as the European Court recognized, the Commission was "well placed" to assess the current market and expected developments),<sup>47</sup> the difficulty of foreseeing at that time the likely seriousness of the crisis in the steel industry sufficed to invalidate what were otherwise, it is suggested, eminently reasonable legitimate expectations from an economic point of view.<sup>48</sup>

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<sup>41</sup> Joined Cases 63 and 147/84 *Finsider SPA v. Commission* 1985 E. Comm. Ct. J. Rep. 2857 at paragraph 4 of the judgment.

<sup>42</sup> See Case 14/81 *Alpha Steel Ltd v. Commission* 1982 E. Comm. Ct. J. Rep. 749.

<sup>43</sup> See Case 258/80 *Spa Metallurgica Rumi v. Commission* 1982 E. Comm. Ct. J. Rep. 487: the same argument was raised, and duly rejected, in Case 276/80 *Ferriera Padana Spa v. Commission* 1982 E. Comm. Ct. J. Rep. 517 and in Case 235/82 *Ferriere San Carlo Spa v. Commission* 1983 E. Comm. Ct. J. Rep. 3949. A situation arising from administrative practices later declared to be illegal by the European Court may also be rectified retroactively without violating legitimate expectations: see Case 111/63 *Lemmerz-Werke v. High Authority* 1965 E. Comm. Ct. J. Rep. 677.

<sup>44</sup> Case 258/81 *Metallurgiki Halyps SA v. Commission* 1982 E. Comm. Ct. J. Rep. 4261. From an economic point of view, the case is more attractive at the macro level (the general Community interest) than at a micro level (the business expectations of the individual steel manufacturer).

<sup>45</sup> See Joined Cases 63 and 147/84 *Finsider SPA v. Commission* 1985 E. Comm. Ct. J. Rep. 2857.

<sup>46</sup> Paragraph 21 of the judgment.

<sup>47</sup> *Id.*

<sup>48</sup> Cf. Case 15/85 *CCA, supra*. The difference in outcome between the two cases is probably best

In the steel sector as in the agricultural sector, a plea of legitimate expectations will occasionally be successful. Thus in Case 344/85 *Ferriere San Carlo SpA v. Commission*,<sup>49</sup> the company convinced the European Court that it had not been individually informed in time of a change in practice.<sup>50</sup> The European Court annulled the decision fining San Carlo and invited the Commission to reopen the file.<sup>51</sup>

#### B. External trade/commercial policy

Where the external trade policy of the Community is concerned, the European Court has approached the legitimate expectations argument in a definitely non-interventionalist way: in Case 245/81 *Edeka Zentrale AG v. Germany*<sup>52</sup> and Case 52/81 *OHG Firma Werner Faust v. Commission*,<sup>53</sup> an almost total ban on imports of preserved mushrooms from Taiwan once the Community had concluded a commercial agreement with the People's Republic of China was held not to contravene the legitimate expectations of those who traditionally imported from, and had long-standing trading relationships with, Taiwanese suppliers. Similarly, so far as anti-dumping measures are concerned, the Community institutions enjoy a very wide margin of maneuver, which can be justified readily enough in macro-economic terms (as part of the general interest in the institutions having the freedom to implement global economic policy), even though it may well produce unfortunate micro-economic results for particular economic agents. Thus, the Commission may alter the method used to calculate the dumping margin even when the product in question is covered by a price undertaking based on one particular method of calculation.<sup>54</sup> An importer certainly has no legitimate expect-

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explained by saying that, in *CCA*, the legitimate expectations arose out of a Commission error which was not detectable by reference to outside information, whereas in *Finsider*, although the Commission's expert opinion was based on an erroneous assessment of market developments, the steel company could itself have realized, by observing the market, that the expert opinion was based on a wrong economic forecast and could not serve as a foundation for a legitimate expectation. For another successful legitimate expectations case (involving the payment of a government re-structuring subsidy, or "state aid", in the shipbuilding sector) where the Commission's dilatoriness probably explains the result, see Case 223/85 *Rijn-Schelde-Verolme Machinefabrieken en Scheepswerven NV (RSV) v. Commission* 1987 E. Comm. Ct. J. Rep. 4617. Legitimate expectations are not usually successful in "state aids" cases: see Case 310/85 *Deufil GmbH v. Commission* 1987 E. Comm. Ct. J. Rep. 901.

<sup>49</sup> 1987 E. Comm. Ct. J. Rep. 4435.

<sup>50</sup> The new practice prohibited the company from attributing a sale against stocks held—the sale therefore became an over-quota sale and the company was fined.

<sup>51</sup> So as to check whether the over-quota sale could be attributed to the earlier practice.

<sup>52</sup> 1982 E. Comm. Ct. J. Rep. 2745.

<sup>53</sup> 1982 E. Comm. Ct. J. Rep. 3745.

<sup>54</sup> See Case 256/84 *Koyo Seiko Ltd v. Council* 1987 E. Comm. Ct. J. Rep. 1899; see also Case 258/84 *Nippon Seiko KK v. Council* 1987 E. Comm. Ct. J. Rep. 1923.

tation that provides protection against the imposition of an anti-dumping duty that will affect contracts in progress.<sup>55</sup>

### C. General dealings with the administration

In practice, it is frequently the case that discussions will have taken place between the Commission's services and traders or companies likely to be affected by a proposed measure. Such discussions may have the effect of putting the economic agent "on notice" that change is imminent. Where they are apparently favorable to the company or trader concerned, they can nevertheless not be relied upon as binding the Community administration so as to prevent it from subsequently adopting other measures or a more rigorous policy.<sup>56</sup> When dealing with national administrations implementing Community measures, the creation of legitimate expectations depends *inter alia* on the *right* national authority having taken the necessary action.<sup>57</sup> Legitimate expectations are not created by the fact that the competent authorities erroneously accepted the documents presented to them,<sup>58</sup> nor can they be relied on to preserve the *status quo* where the trader's previous profit arose partly out of an incorrect calculation by a Community institution, once the error is discovered.<sup>59</sup> Legitimate expectations can, in wholly exceptional cases, be used to fill in a clear legislative lacuna.<sup>60</sup>

The doctrine of legitimate expectations cannot be used to push the administration into taking a particular course of action, particularly where that might amount to allowing the enterprise concerned to substitute its own economic judgment for that of the Community institution.<sup>61</sup>

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<sup>55</sup> Case 246/87 *Continentalte Produkten-Gesellschaft Erhardt-Renken GmbH & Co. v. HZA München-West*, judgment of 12 May 1989, not yet reported. Here as elsewhere in this article, "not yet reported" means that the judgment has not yet been published in the official European Court Reports (ECRs)—it does not necessarily mean that it cannot be found elsewhere, e.g. in the Common Market Law Reports (CMLRs).

<sup>56</sup> See Case 78/83 *Union Sidérurgique du Nord et de l'Est de la France (USINOR) v. Commission* 1984 E. Comm. Ct. J. Rep. 4177; Case 188/82 *Thyssen Aktiengesellschaft v. Commission* 1983 E. Comm. Ct. J. Rep. 3721 (the fine imposed was, however, reduced by the European Court to a token amount); Case 67/84 *SPA Sideradria v. Commission* 1985 E. Comm. Ct. J. Rep. 3983, Case 1252/79 *Spa Accaiaierie e Ferriere Lucchini v. Commission* 1980 E. Comm. Ct. J. Rep. 3753; Case 8/83 *Officine Fratelli Bertoli SPA v. Commission* 1984 E. Comm. Ct. J. Rep. 1649 (again, the fine originally imposed was reduced by the European Court).

<sup>57</sup> See Case 77/88 *Firma Stute Nahrungsmittelwerke GmbH & Co. KG v. Germany*, judgment of 15 June 1989, not yet reported.

<sup>58</sup> See Case 316/86 *HZA Hamburg-Jonas v. Firma P. Krücken*, *supra*, and Joined Cases 98/83 and 230/83 *Van Gend et Loos NV and Expeditiebedrijf Wim Bosman BV v. Commission*, *supra*.

<sup>59</sup> Case 112/77 *Firma August Töpfer & Co. v. Commission*, *supra*.

<sup>60</sup> Case 165/84 *J.F. Krohn GmbH & Co. KG v. Bundesanstalt für Landwirtschaftliche Marktordnung* 1985 E. Comm. Ct. J. Rep. 3997.

<sup>61</sup> Case 64/82 *Tradax Graanhandel BV v. Commission* 1984 E. Comm. Ct. J. Rep. 1359.

The role of the Commission as a "middleman" where Third World development projects using Community funds are concerned is not clear: although companies have argued legitimate expectations as to the Commission's behavior in that context, the European Court has so far avoided dealing explicitly with those claims.<sup>62</sup> From an economic point of view, it seems reasonable to suggest that the contractor will often find it easier (for reasons of distance, communications, language, custom, project management and the like) to deal with the Commission for part of the time in such contracts rather than with the recipient government's officials. It would be helpful to know whether, in such circumstances, the contractor can have any legitimate expectation as to the behavior of the Community institution (and, if so, what the limits are of that expectation).

Because Community law and the national laws of the individual Member States may both apply to a particular situation, cases have naturally arisen in which, for example, a Community duty to recover a particular sum has been evaluated against the background of provisions of national law which protects a *bona fide* recipient of funds from very belated recovery proceedings. In such circumstances, the two types of protection—under national law and under Community law—appear to co-exist. Thus in Joined Cases 205 to 215/82 *Deutsche Milchkontor GmbH et al. v. Germany*,<sup>63</sup> the European Court first stressed the link between the Community law doctrine of legitimate expectations and the national laws of the Member States:

"... the principles of the protection of legitimate expectation and assurance of legal certainty are part of the legal order of the Community. The fact that national legislation provides for the same principles to be observed in a matter such as the recovery of unduly-paid Community aids cannot, therefore, be considered contrary to that same legal order. Moreover, it is clear from a study of the national laws of the Member States regarding the revocation of administrative decisions and the recovery of financial benefits which have been unduly paid by public authorities that the concern to strike a balance, albeit in different ways, between the principle of legality on the one hand and the principles of legal certainty and the protection of legitimate expectation on the other is common in the laws of the Member States."<sup>64</sup>

Therefore,

"Community law does not prevent national law from having regard . . . to such considerations as the protection of legitimate expectation . . . , pro-

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<sup>62</sup> See Case 267/82 *Développement SA and Clemessy v. Commission* 1986 E. Comm. Ct. J. Rep. 1907; Case 33/82 *Murri Frères v. Commission* 1985 E. Comm. Ct. J. Rep. 2759.

<sup>63</sup> 1983 E. Comm. Ct. J. Rep. 2633, 1984 3 CMLR 586.

<sup>64</sup> *Id.* at Paragraph 30.

vided . . . that the conditions laid down are the same as for the recovery of purely national financial benefits and the interests of the Community are taken fully into account.”<sup>65</sup>

### III. SOME GENERAL COMMON PRINCIPLES AND CONCLUSIONS

The essential factor to be borne in mind appears to be the overriding public interest in the conduct of what the Community regards as appropriate economic policy, coupled with the duty of a responsible administration to control speculation and evasion of Community regulations. Against that background, what elements go to establishing a successful claim of legitimate expectations?

The caselaw pivots around the question of the foreseeability of change; and here a distinction can be made between *quantitative change* (e.g. an adjustment to MCAs), which is usually foreseeable, and *qualitative change*, (e.g. a modification of the underlying system), where it all depends on the nature of the change effected. Similarly, one can distinguish between *changes of view by the authorities* (which are not usually foreseeable), *changes in underlying circumstances* (which may well be foreseeable by the alert, or prudent trader), and *changes caused by increased problems of the same essential kind as earlier problems* (which are surely foreseeable by those engaged in that particular economic sector). Allied to these points is the simple economic observation that changes in the underlying economic circumstances usually mean that the regulations linked to those circumstances will also change. Some regulatory systems and economic sectors (for example, the mechanisms for financial adjustments in the various agricultural markets) are generally recognized as being liable to frequent and sudden changes. In those sectors, it is virtually impossible to find a successful claim of legitimate expectations.

It also seems helpful to examine whether the applicant is in a *usual or normal situation* (no legitimate expectations created) or whether it is in an *unusual or abnormal situation*, either through some act of the Commission or through its own act, taken on the basis of something said/done by the Commission. In that connection, it appears clear that the

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<sup>65</sup> *Id.* at Paragraph 33. The passage is quoted at some length because it shows very clearly how the Community law principle of legitimate expectations is drawn from the national legal traditions of the individual Member States. A similar principle was applied in Joined Cases 119/79 and 126/79 *Lippische Hauptgenossenschaft EG and Westfälische Central-Genossenschaft EG v. Bundesanstalt für Landwirtschaftliche Marktordnung (BALM)* 1980 E. Comm. Ct. J. Rep. 1863. Note, however, that a change in national practice in applying Community law (from incorrect to correct application) cannot found a successful Community law claim of legitimate expectations: Case 5/82 *HZA Krefeld v. Société Maizena GmbH, Hamburg* 1982 E. Comm. Ct. J. Rep. 4601. The Community law doctrine of legitimate expectations will also not, it seems, be extended so as to fill a gap in the protection afforded by national law: Case 210/87 *Remo v. Amministrazione delle finanze dello Stato, supra*.



applicant must have *acted* on the expectation (or have refrained from taking some action which it would otherwise have taken): mere hopes in the continuance of the *status quo* are not sufficient to find a legitimate expectation. That position seems eminently sound in both theoretical and practical terms, linked as it is both to evidential questions (demonstration of reliance) and to any assessment of the quantum of damage that the applicant claims to have suffered.

The mere passage of time while negotiations go on with a Community institution provides no basis for legitimate expectations. Passage of time accompanied by inaction on the part of the Commission may, however, be a useful factor in helping to establish a claim to a legitimate expectation in the apparent *status quo*.

Legitimate expectations are most likely to be created as a result of discussions with the administration which put the administration on notice that a trader intends to avail himself or herself of a particular provision and which lead the trader to commit himself or herself reasonably and irrevocably to a particular course of action. If possible, therefore, the competent authorities should be duly notified.

So far as retroactive measures are concerned (the test in *Racke*), it seems likely that any matters of urgent market management by the Community authorities will be regarded as matters where the "overriding public interest" justifies retroactive measures. It will then be necessary for the trader to establish some special or individual interest in order to claim a legitimate expectation in transitional measures. From a purely economic point of view, such measures would usually provide an adequate answer to most economically legitimate expectations. The European Court has, however, been sensitive to the possibility that such measures will either nullify the Commission's legislative action or enable astute speculators to make considerable profits at the Community's expense. Although the way the *Racke* test is formulated may be open to criticism and could be misused, the fact remains that the actual results of its application so far have generally been acceptable from the economic point of view.

The question of how much disruption will be caused if the European Court annuls a decision or regulation by upholding a claim of legitimate expectations may also, indirectly, be relevant. How wide a door will be opened by helping a particular applicant? How much will it matter if the applicant benefits from an exception to the general rule (whatever that rule may be)? Interestingly, the European Court is sometimes (as in the

milk quota cases, Case 120/86 *Mulder* and Case 170/86 *Von Deetzen*)<sup>66</sup> prepared to annul a faulty piece of legislation in the full knowledge that the other institutions will then be left with an awkward problem that they will have to solve.

Very few cases succeed on the legitimate expectations argument. It is quite difficult to point to generic distinguishing features in those cases, save perhaps for the underlying feature that a decision going the other way would usually have made neither economic nor legal sense. Part of the answer may indeed lie in the essentially pragmatic attitude of the European Court: if the result of going one way in a particular case would be inequitable, or economically unsound, an argument is found for holding the other way.

The doctrine of legitimate expectations in Community law is, in some ways, rather intangible. Nevertheless, the fact that it exists and can, if necessary, be invoked provides a useful protection for the individual economic agent as the ever-increasing layers of legislation are set in place for the completion of the Community's internal market.

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<sup>66</sup> See *supra* note 13.