# OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 7 MARCH 1979 [1]

*Mr President,*
*Members of the Court,*

1. The case in which I am delivering this opinion was brought on 3 April 1978 by the Netherlands undertaking Granaria pursuant to Articles 175 and 178 of the EEC Treaty. It constitutes a further development in a situation which is already covered by a previous judgment of the Court of Justice: I refer to the judgment of 19 October 1977 in Joined Cases 117/76 and 16/77 [1977] ECR 1753.

It would be helpful to recall briefly the facts of the case. As a producer of quellmehl Granaria B. V. had received, between 1972 and 1974, the compulsory production refunds established by Article 11 (1) of Regulation No 120/67 of the Council of 13 June 1967 on the common organization of the market in cereals. It ceased to receive them from 1 August 1974, the date on which Regulation No 1125/74 of the Council of 29 April 1974 came into force because by virtue of that regulation the above-mentioned Article 11 was replaced by a new provision, which restricted the refunds to the production of pre-gelatinized starch, and no longer made provision for such payments in respect of quellmehl. The abolition of Community aid for that product gave rise to litigation before the Finanzgericht [Finance Court] Hamburg and a reference from that court led to the preliminary ruling of the Court of Justice in the above-mentioned case, given on 19 October 1977. The Court ruled that the aforesaid Article 11, in its amended version of 1974, was incompatible with the principle of equality in so far as it provided for "quellmehl and pre-gelatinized starch to receive different treatment in respect of production refunds for maize used in the manufacture of these two products". The Court added "It is for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct this incompatibility".

Following that judgment Granaria addressed itself to the Council and the Commission in a letter of 30 January 1978, requesting payment of the refunds in respect of the quellmehl which it had produced subsequent to 1 August 1974 and asking the two institutions to accept liability for the damage which it had suffered as a result of the abolition of the Community aid in question. After that, two months having passed without the requested measures being adopted, Granaria brought the application with which we are concerned now.

Pursuant to Article 175 of the EEC Treaty the applicant asks the Court to declare that the Council and/or the Commission have failed to take the measures requested by it. Alternatively, in case the Court should regard the failure of the two institutions to reply as implied decisions refusing its request, Granaria asks that such decisions be annulled. It is clear that the applicant's aim in making these requests is to obtain a declaration which will oblige the Community to pay it the refunds for the quellmehl produced by it after 1 August

1 — Translated from the Italian.

1974. Finally, pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, Granaria asks that the Community be ordered to compensate it for the damage caused by its institutions through the abolition of the production refunds on quellmehl. The applicant reserves the right to give particulars of the amount of damage at a later date.

To complete the exposition of the facts, I should mention that, following the commencement of the action, on 22 May 1978 the Council adopted Regulations Nos 1125/78 and 1127/78, which restored the production refunds in respect of quellmehl intended for bread-making, so excluding quellmehl used for feeding animals. The refunds may be granted as from 19 October 1977 (the date of the judgment of the Court cited above), but not for the period between 1 August 1974 and 19 October 1977.

2. Both the defendant institutions plead the inadmissibility of Granaria's first claim on the ground that it does not fulfil the conditions prescribed by Article 175 of the EEC Treaty. The effect of that provision is that every private person may, having duly called upon the Commission or Council to act and two months having passed from the date of that request, bring proceedings before the Court of Justice complaining that those institutions have "failed to address *to that person* any act other than a recommendation or an opinion". Since the aforesaid judgment of the Court in Joined Cases 117/76 and 16/77 had not declared Regulation No 1125/74 of the Council invalid and so could not have revived the previous rules laid down by Article 11 of Regulation No 120/67, the Commission and the Council, if they had wanted to accede to Granaria's request and pay it the refunds for the period after 1 August 1974, could not legitimately have addressed an individual act to it. Only an amendment of the legislation, that is to say the adoption of a new regulation, could have allowed Granaria's claim to be satisfied; but the failure to adopt a regulation cannot be challenged by an interested natural or legal person under Article 175. In any case the principle of equality of treatment would have constituted another obstacle to the suggestion that a decision could be taken in favour of Granaria, short of a general amendment of the rules: Granaria would, in such a way, have received unjustifiably preferential treatment as compared with the other producers of quellmehl.

The applicant, for its part, insists that it merely intended to request that an individual decision be addressed to it, granting it the refunds for the quellmehl produced by it as from 1 August 1974. It claims to be entitled to such refunds on the ground that the judgment of the Court in Cases 117/76 and 16/77 revived the rules which operated prior to Regulation No 1125/74: the incompatibility of that regulation with the principle of equality, declared by the Court, rendered it ineffective *ex tunc*, says the applicant, thus annulling the amendment of Article 11 of Regulation No 120/767.

In my opinion, that view is erroneous.

The aforesaid judgment of 19 October 1977 expressly stated (paragraph 11 of the decision) that the established illegality of Regulation No 1125/74 did not inevitably involve a declaration of invalidity. In support of that solution the Court gave three arguments. In the first place (paragraph 12 of the decision) the

infringement of the principle of equality which had been found to exist resulted from an omission rather than a provision of Regulation 1125/74, since Article 5 thereof, instead of expressly abolishing the refunds for quellmehl, had replaced the old version of Article 11 of Regulation No 120/67 by a new one, which merely omitted to make any mention of that product. In the second place (paragraph 13 of the decision), such illegality "cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision is ... invalid". Although this extract does not in my opinion prejudge the serious issue concerning the ability of a preliminary ruling to terminate *erga omnes* the effects of general measures which have been declared invalid, it certainly implies that, in cases like the one in question, to deprive the unlawful measure of effect is not sufficient to remedy the unlawfulness. What is required is a new provision from the competent Community institutions; and the third reason for taking this line is "the existence of several courses of action which would enable the two products in question once again to be treated equally and to make good any damage sustained by those concerned and ... the fact that it is for the institutions responsible for the common agricultural policy to assess the economic and political considerations on which the choice of action depends" (last part of paragraph 13 of the decision).

Thus the judgment of 19 October 1977 clearly avoided linking to the illegality of the regulation a declaration of its invalidity and hence its ineffectiveness *ex tunc*. This last solution was suggested in my opinion in Cases 117/76 and 16/77 [1977] ECR 1773, although I myself considered that in any case a special measure of the Council was necessary "laying down the amount and the rules for the application of the production refund for manufacturers of quellmehl for the period subsequent to the entry into force of Regulation (EEC) No 1125/74"; but the Court preferred to leave entirely to the Council the task of remedying the unlawful situation created by that regulation. And it is worth pointing out that the very language used by the Court — where it spoke of the fact that *in law the situation* created by Article 5 of Regulation No 1125/74 was incompatible with the principle of equality — confirms the suggestion that it was not just a question of a single provision and that therefore the problem would not be resolved simply by removing the effects thereof and automatically reviving the previous situation, but that it was necessary to require the Community institutions to reconsider the entire situation of the refunds for producers of quellmehl, adopting general measures in conformity with the rule which had been infringed.

It is hardly necessary to recall that, in principle, the illegality of an act, due to its incompatibility with a superior rule of law, does not necessarily lead to its invalidity. The incompatibility may be removed by a subsequent measure, emanating from the same authority that had issued the unlawful act, and designed to create a situation conforming to the superior rule, without prejudice to any liability for the damage caused by the unlawful act. Since, then, Regulation No 1125/74 was not declared invalid by the Court, it is otiose to discuss whether a preliminary ruling which contains a declaration of the type in question can produce effects similar to those of a judgment of nullity, and

whether, in particular, it may be relied upon by an individual who was not a party to the proceedings in which the preliminary ruling was given.

I am of the opinion that the matters considered so far can only lead to the view that Granaria was not entitled to require the Commission and the Council to address to it a measure providing for the payment of the refunds for the period subsequent to 1 August 1974, so that the failure to adopt such a measure did not constitute any infringement of Community law (and was not contrary to the operative part of the judgment of 19 October 1977). But this conclusion must lead to the rejection of the substance of the application based on the institutions' failure to act, not to a finding of inadmissibility. For purposes of admissibility it is sufficient that the provisions of the third paragraph of Article 175 were observed, that is to say that, before bringing an action, the person concerned must have called upon the institutions to address a given measure *to him.* That is what occurred in this case. The fact that such a measure lay outside the powers of the institutions, and that they would have instead to adopt a general provision in accordance with the judgment which has already been cited several times, is relevant to the substance of the case, but not to the admissibility of the action; but to maintain that the party concerned was asking for a regulation in substance, since that constituted the only method capable of achieving his objective in practice, would be to disregard the fact that in reality he asked for an individual decision. So in my opinion the action based on Article 175 of the EEC Treaty must be considered admissible, but unfounded.

3. Relying on Article 178 and on the second paragraph of Article 215 of the EEC Treaty, the applicant has submitted a claim, based on non-contractual liability, which is identical in its economic substance to the claim for failure to act. This second claim seeks payment of a sum equal to the amount of the refunds already requested in the above-mentioned letters of 30 January 1978 plus default interest.

Again the defendant institutions raise objections of inadmissibility. They state in the first place that, since the aforesaid claim does not specify the nature and amount of the alleged damage or provide evidence of any factor capable of proving the causal relationship between the act of the Council and the damage, it does not comply with the requirements laid down in Article 38 (1) of the Rules of Procedure.

But the failure to indicate the exact amount of the damage is not sufficient, in my opinion, to render the claim for compensation inadmissible; especially when, as in this case, the applicant maintains that it cannot provide such details because the defendants have not fixed the amount of the refunds to which it claims to be entitled.

In fact Article 38 (1) (c) requires a statement of the subject-matter of the dispute; and that has been identified by the applicant in the claim for the amount which it is allegedly owed in refunds on quellmehl produced by it from 1 August 1974. That amount must be determined, in the applicant's view, by taking account of the principle of equality with regard to the refunds for pre-gelatinized starch; and a further amount must be paid as default interest. It seems to me that these details supplied by the applicant constitute a sufficient identification of the subject-matter of the dispute for the purposes of the admissibility of the claim, the more so since, on this

question, the case-law of the Court seems to follow a non-formalistic line (see judgment of 14 May 1975 in Case 74/74 *CNTA* v *Commission,* [1975] ECR 533, in particular paragraphs 2 to 5 of the decision).

As for the alleged lack of proof regarding the causal nexus between the act of the Council and the damage, there we are dealing with an objection which concerns the substance of the application, not its admissibility.

According to the Commission a further ground of inadmissibility lies in the fact that the applicant is requesting, by way of compensation for damage, the amount of the unpaid refunds. On this question the Commission cited the judgment of 15 June 1976, also given in Case 74/74 *CNTA* v *Commission,* [1976] ECR 797. But it must be emphasized that in that case the Court refused to identify the damage for which compensation was payable with the amount of the abolished monetary compensatory amounts for a specific reason: because the applicant had had the opportunity to make payment in its own national currency and so had been able totally to exclude the exchange risk from which the trader was supposed to be protected by such amounts. Therefore I do not consider that we can extract from the judgment of 15 June 1976 general criteria governing the admissibility of actions for damages which would be valid also in the present case.

4. However, we must still examine the question raised by the Commission from another angle, namely whether it is legitimate for the applicant to seek from this Court, by means of an action for liability, the refunds to which it claims to be entitled under the Community system. There is no doubt that as a rule such a claim can be asserted only against the national administrative authorities, bringing proceedings if necessary before the national court having jurisdiction to judge the legality of such authorities' decisions. Taking account of this, the case-law of the Court has constantly refused to recognize the admissibility of actions under Article 178 and the second paragraph of Article 215 of the Treaty, wherever the function of the compensation claimed would be to act as a substitute for a benefit provided by Community law which the applicant could legitimately claim from the national authority.

The most important principle that has been laid down in this regard is that internal remedies must have been exhausted.

In Case 96/71, *Haegemann* v *Commission,* [1972] ECR 1005, the applicant asked that the Community be ordered to repay him, by way of damages, the amount of a Community import duty, based on a rule, the validity of which was in dispute, and collected for the account of the Community by the national customs authority. In its judgment of 25 October 1972 the Court rejected the claim without going into the substance of it, holding that "the question of the possible liability of the Community is in the first place linked with that of the legality of the levying of the charge in question" (paragraph 15 of the decision) and that "in the context of the relationship between individuals and the taxation authority which has levied the charge in dispute, the latter question comes under the jurisdiction of the national courts" (paragraph 16). Consequently the Court held that at that stage the application had to be rejected (paragraph 17). So it would seem that the essential obstacle to admissibility in that case was the failure to exhaust the internal remedies through which it should have been established whether the Community rule alleged to be the cause of the damage was unlawful.

Another point which has emerged from later cases decided by the Court is the need to avoid claims being made upon the Community institutions, by means of an action for damages before the Court, for benefits allegedly payable by the national authorities pursuant to Community rules. Such an idea was clearly expressed in the judgment of 27 January 1976 in Case 46/75 *IBC* v *Commission* [1976] ECR 65 and in the judgment of 2 March 1978 in Joined Cases 12, 18 and 21/77 *Debayser and Others* v *Commission* [1978] ECR 553. In this last case the Court declared inadmissible actions under Articles 178 and 215 of the EEC Treaty, in so far as the action was "in substance directed against measures taken by the national authorities pursuant to provisions of Community law".

But the most interesting question for the purposes of this case is that of the admissibility of actions claiming compensation for damage caused as a result of the application by the national authorities of Community rules which are held to be unlawful; actions which as a rule are designed to obtain from the Commission or the Council a benefit equivalent in its economic substance to that which the applicants would have received if the unlawful measure had not been adopted.

The traditional view of the Court in this regard is expressed in the following judgments: Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975; Joined Cases 9 and 11/71, *Compagnie d'Approvisionnement* v *Commission* [1972] ECR 391; Case 43/72, *Merkur* v *Commission* [1973] ECR 1055; Case 153/73, *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675; Case 74/74, *CNTA* v *Commission* [1975] ECR 533; Joined Cases 95 and 98/74, 15 and 100/75, *Union Nationale des Coopératives Agricoles de Céréales* v *Commission and Council* [1975] ECR 1615.

In all the judgments cited the Court accepted the admissibility of the actions without objecting that internal remedies must first be exhausted. That is explained, in my opinion, by the fact that they were cases in which, even if the applicants had succeeded in convincing the national court of the illegality of the Community measures which had caused them damage, they still could not have obtained from the national administration the benefit to which they claimed to be entitled without the prior intervention of the Community legislature. On the other hand, if the claim could be satisfied at the national level the court has rejected, as inadmissible, the action for damages under Article 215. That is why, for example, the action brought by *Grands Moulins des Antilles* was declared inadmissible (judgment of 26 November 1975 in Case 99/74, [1975] ECR 1531).

In my opinion the line followed in the cases cited so far remains valid in spite of the fact that, with the judgment of 17 March 1976 in Joined Cases 67 to 85/75 *Lesieur Cotelle et Associés* v *Commission*, [1976] ECR 391, the Court adopted a position which seems to break with the traditional one. In that case the actions sought to have the Community declared liable for the damage which the applicants claimed to have suffered as a result of the abolition, effected through a regulation of the Commission, of certain monetary compensatory amounts. The Court held the actions inadmissible in so far as they concerned the advance fixing

of subsidies requested and granted during the period following the entry into force of the regulation abolishing such amounts, because "the applicants were, in those cases, in a position to bring the alleged infringements 'of several rules laid down by the Treaty and secondary legislation intended to protect the nationals of the Community' before the competent national courts" (paragraph 16 of the decision). It is not clear what benefit the applicants could have gained from any finding of the national court that the regulation on which the prejudicial national decisions were based was unlawful. But I do not think that it is possible to read into that judgment a desire on the part of the Court to abandon, without the support of arguments of a general nature, its earlier line, which has a solid rational and practical basis.

Let us apply to the present case the tests which the prevailing case-law has made it possible to work out. We have seen that, in its judgment in Joined Cases 117/76 and 16/77, the Court recognized the illegality of the situation created by Article 5 of Regulation No 1125/74, but on the other hand, by not declaring that regulation invalid and by entrusting to the Community institutions the choice of methods for correcting the unlawful situation, it clearly rejected the possibility that the previous rules automatically came back into force. Thus, even after that judgment, the national administration found itself powerless to pay to the persons concerned the production refunds for quellmehl in respect of the period subsequent to 1 August 1974: so, as in most of the numerous cases referred to above, the Community legislative provisions required to enable the national authority to make the payments requested did not exist (at least at the time when the action was brought). In view of that the only remaining possibility of judicial protection, whereby the applicant might seek to eliminate the harmful effects which it had suffered as a result of the illegal Community action, lay precisely in an action for damages under Article 178 and the second paragraph of Article 215.

Such an action cannot be declared inadmissible on the ground that the applicant did not first try the internal remedies, because it is clear that that could not have led to any positive result. Thus it is irrelevant that the request for damages coincides substantially with the content of the principal right claimed by the applicant and denied him by the Community rule which has already been declared unlawful.

5. As regards the substance of the action, however, the claim for damages must be considered unfounded because of the absence of one essential condition for the Community's liability for the damage resulting from one of its acts: namely that the act in question must have infringed a right of the individual who claims compensation for the damage. Doubtless, in the absence of Regulation No 1125/74 the applicant would have continued to draw refunds on its production of quellmehl. But the abolition of that benefit is not sufficient to oblige the Community to compensate Granaria for the economic damage suffered by it, since the amendment of the system introduced by that regulation did not infringe a right of the undertaking itself.

It is apparent from paragraphs 8 and 9 of the decision in the judgment, already cited, in Joined Cases 117/76 and 16/77, that the Court established a breach of

the principle of equality solely in relation to quellmehl intended for "the specific use" to which it is "traditionally put", namely in food for human consumption. In the course of those cases the Council and the Commission maintained that the abolition of the refunds for quellmehl was justified by the fact that to a great extent that product had been diverted from its use in food for human consumption in order to be sold as animal feed. The Court obviously attached importance to that matter, since it requested the Commission to produce evidence of the use of quellmehl as animal feed; but the Commission was unable to comply with that request. The judgment of 19 October 1977 held that "even if adequate proof had been forthcoming that it was put to such use and that subsidized starch had not been put to similar use" — in the Italian version the negative is missing — "this could have justified the abolition of the refund only in respect of the quantities put to such use and not in respect of quantities of the product used in food for human consumption". So it is clear that, contrary to the apparent opinion of the applicant, that judgment established the breach of the principle of equality only as regards the abolition of the production refund for quellmehl used for human consumption.

Both the defendant institutions in this case have stated that the quellmehl produced by Granaria is intended for animal feed. In reply the applicant has said that it does not know to what use its customers put the goods in question. Thus it has not been able to provide the proof, which is indispensable, that the quellmehl produced by it is to be used for human consumption.

In fact, throughout the written procedure, Granaria based its alleged right to obtain the amount of the refunds, by way of damages, solely on the erroneous presumption of the revival of the rules existing prior to Regulation No 1125/74. Then, in the oral procedure, it raised, for the first time, the theory that there had been a breach of the principle of equality also in relation to quellmehl used as animal feed, asserting that maize starch, in respect of which refunds are paid, was also used as animal feed. But that is a mere assertion, not supported by any item of evidence, which the Commission absolutely rejects, stating that maize starch is too expensive to be profitably used in the preparation of animal feed. The only starch used for feeding animals is, according to the Commission, starch extracted from low-cost cereals, such as tapioca for example, but not maize starch. This objection has not been answered by the applicant, which has not supplied a scintilla of evidence in support of the argument advanced at a late stage in the oral procedure.

6. In conclusion, I invite the Court to declare both the claims submitted by Granaria on 3 April 1978 unfounded; consequently the applicant should be ordered to pay all the costs of the case.