OPINION OF ADVOCATE GENERAL JACOBS
delivered on 19 September 1996 *

1. In this case the Rechtbank van Koophandel (Commercial Court), Antwerp, has asked the Court to give a preliminary ruling on the interpretation of Council Regulation (EEC) No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport ('the Regulation'). [1]

The relevant Community provisions

2. The Regulation was adopted in response to the structural overcapacity in the fleets operating on the linked inland waterway networks of Belgium, France, Germany, Luxembourg and the Netherlands. It introduces a scheme for the scrapping of vessels coordinated at Community level but financed by the transport undertakings themselves.

3. Article 1 of the Regulation provides:

'1. Inland waterway vessels used to carry goods between two or more points by inland waterway in the Member States shall be subject to measures for structural improvements in inland waterway transport under the conditions laid down in this Regulation.

2. The measures referred to in paragraph 1 shall comprise:

— the reduction of structural overcapacity by means of scrapping schemes coordinated at Community level,

— supporting measures to avoid aggravation of existing overcapacity or the emergence of further overcapacity.'

* Original language: English.
1 — OJ 1989 L 116, p. 25.

4. Article 2(2) exempts the following vessels from the Regulation:

'(a) vessels operating exclusively on national waterways not linked to other waterways in the Community;

(b) vessels which, owing to their dimensions, cannot leave the national waterways on which they operate and cannot enter the other waterways of the Community ("prisoner vessels"), provided that such vessels are not likely to compete with vessels covered by this Regulation;

(c) — pusher craft with a motive power not exceeding 300 kilowatts,

— sea-going inland waterway vessels and ship-borne barges used exclusively for international or national transport operations during voyages which include a sea crossing,

— ferries,

— vessels providing a non-profit-making public service.'

5. Article 3 of the Regulation requires the Member States concerned to set up a Scrapping Fund to be administered by the competent national authorities. The Fund is to have separate accounts for dry cargo carriers and pusher craft, on the one hand, and tanker vessels on the other.

6. Article 4 requires owners of vessels covered by the Regulation to pay an annual contribution to the relevant Fund. Under Article 6 the rates of the contributions are to be fixed by the Commission, which must ensure that the Funds have sufficient financial resources to make an effective contribution to reducing the structural imbalance between supply and demand in the inland waterway transport sector. Article 5 provides that any owner scrapping a vessel is to receive a scrapping premium from the Fund to which his vessel belongs in so far as the financial means are available.

7. Article 8(1) of the Regulation introduces what is known as the 'old-for-new' rule,

which is designed to ensure that the entry of new vessels on to the market does not jeopardize the scheme. It provides as follows:

'(a) For a period of five years from the entry into force of this Regulation, vessels covered by this Regulation which are newly constructed, imported from a third country or which leave the national waterways mentioned in Article 2(2)(a) and (b) may be brought into service on inland waterways as referred to in Article 3 only where:

— the owner of the vessel to be brought into service scraps a tonnage of carrying capacity equivalent to the new vessel without receiving a scrapping premium; or

— where the owner scraps no vessel, he pays into the Fund covering his new vessel or into the Fund chosen by him in accordance with Article 4 a special contribution equal to the scrapping premium fixed for a tonnage equal to that of the new vessel; or

— where the owner scraps a tonnage smaller than that of the new vessel to be brought into service, he pays into the Fund in question a special contribution equivalent to the scrapping premium corresponding at the time to the difference between the tonnage of the new vessel and the tonnage scrapped.

...'

8. Article 8(3) lays down certain exceptions to the 'old-for-new' rule. In particular Article 8(3)(c) provides:

'The Commission may, after consulting the Member States and the organizations representing inland waterway transport at Community level, exempt specialized vessels from the scope of paragraph 1.'

9. It appears from a Note of 7 December 1990 [2] issued by the Commission Directorate General for Transport that, in deciding whether a vessel is a 'specialized vessel' for the purposes of Article 8(3)(c), the Commission applies *inter alia* the criterion of whether the vessel is specially designed for

2 — Note concernant la définition de critères généraux pour l'appréciation des demandes d'exclusion de bateaux spécialisés du règlement n° 1101/89 du Conseil.

the transport of a particular category of goods and whether it is technically suitable, without modification of its construction, for the transport of other goods on inland waterways.

The facts and the national court's questions

10. The order for reference provides few details of the factual background to the case, and the following description of the facts is based largely on the written and oral observations submitted to the Court by Wiljo and the Commission. It appears that Wiljo's activity consists in the bunkering of sea-going vessels. By letter of 19 January 1993 it requested the Commission to exempt a new vessel which it proposed to put into service, the '*Smaragd*', from the 'old-for-new' rule on the ground that the vessel was a 'specialized vessel' within the meaning of Article 8(3)(c) of the Regulation. In its application to the Commission it described the vessel as a 2 500 tonne motorized tanker vessel with dimensions of 100 metres x 11.40 metres x 4 metres and stated that the vessel was to be used exclusively for the bunkering of sea-going vessels. By a letter of 6 May 1993, addressed to Wiljo, the Commission informed the latter that it had 'decided, on the basis of Article 8(3)(c) of the [Regulation], to refuse the requested exemption' and that a copy of the letter would be sent to the administration of the Belgian Scrapping Fund. In its letter it stated that the vessel was technically suitable for the transport of all kinds of liquid loads on inland waterways and did not differ greatly from conventional tanker ships. It therefore contributed to the capacity of the fleet subject to the Regulation. Wiljo did not challenge that letter by way of proceedings under Article 173 of the Treaty.

11. Wiljo states that the *Smaragd* is a typical bunkering vessel specially equipped for bunkering sea-going vessels. In particular the vessel is fitted with a 20 metre hydraulic mast with a safety ladder in order to allow the boarding of sea-going vessels. Even if the mast is lowered the vessel is still unable to navigate inland canals and many rivers because it is unable to pass under the bridges. Moreover, in order to meet the requirements for sea navigation, it is fitted with a special cover to protect it from the swell, with the result that its draught when fully laden is too great to allow it to navigate the Rhine or Moselle. While the *Smaragd* has the necessary certificates for navigating inland waterways, in particular the certificate issued by the Central Rhine Commission, that does not mean that it is actually capable of doing so without restriction. It is obliged to have such a certificate in order to enter sea canals as part of its bunkering activities. The vessel also has an estuary class certificate, which allows it to navigate coastal waters.

12. The Commission emphasizes that the suitability of a vessel for transporting goods

on inland waterways is the only workable criterion for the purposes of applying Article 8(3)(c) of the Regulation. It is not in a position to monitor the actual use of a vessel. It disputes Wiljo's statements concerning the *Smaragd's* suitability for navigating inland waterways. Noting that the vessel is authorized to navigate the Rhine as far as Basle, it claims that the river is sufficiently deep and its bridges sufficiently high for the vessel, provided that the hydraulic mast is collapsed. The Commission refers to alleged sightings of the vessel on inland waterways. Finally, the Commission denies Wiljo's claim that the treatment of the *Smaragd* is out of line with the practice followed with respect to other bunkering vessels.

13. In the proceedings before the national court Wiljo challenges a letter of 1 October 1993 from the Belgian State demanding the single contribution to the Scrapping Fund pursuant to Article 8(1)(a) of the Regulation and to the Commission decision of 6 May 1993. The national court seeks a ruling from the Court on the following questions:

'1. Regard being had to the aim, the general objective and the specific purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, does the concept "specialized vessels" in Article 8(3)(c) of the Regulation in question refer to vessels which, as a result of their specific construction and equipment or of their specific use, do not increase the cargo capacity or the tonnage of inland waterway transport and are therefore not of such a nature as to affect the structural over-capacity of carriage of goods on the linked inland waterway networks of the Member States?

2. Regard being had to the principle of proportionality, does not the criterion of "technical suitability for carriage of goods by inland waterway" applied by the Commission of the European Communities in its decision of 6 May 1993, which makes even vessels which are not actually used for transport on the linked inland waterway networks of the Member States subject to the obligation to make a contribution in the framework of the "old-for-new" rule, conflict with the objective and purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport?

3. Regard being had to the aim, the general objective and the specific purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, is a purely theoretical suitability of a vessel for inland transport, in the sense that it could be made suitable for inland transport only after laborious and expensive and therefore economically unrealistic conversion or that use of the vessel for

inland waterway transport would be wholly unprofitable because the vessel is not designed or equipped for inland transport, sufficient for it to be subject to the obligation to make a contribution in the framework of the "old-for-new" rule?

4. Regard being had to the aim, the general objective and the specific purport of Council Regulation No 1101/89 of 27 April 1989 on structural improvements in inland waterway transport, can the decision of the Commission of the European Communities of 6 May 1993 be regarded as applicable to the mts. *Smaragd* since it subjects to the obligation to pay the single contribution in the framework of the "old-for-new" rule a vessel which is especially designed, constructed and equipped as a bunkering vessel with the exclusive purpose of supplying sea-going ships with fuel and is not particularly suitable or intended for carriage for a third party, or even on its own account, of fuel products on inland waterways and hence does not increase the cargo capacity of shipping or tonnage of inland transport?

5. Does not the application by the Commission of the criterion of technical suitability instead of the actual use of the vessel constitute an infringement of the prohibition of discrimination since, in accordance with the criterion used by the Commission for vessels operating in Belgium, the Netherlands, Luxembourg, Germany and France, the single contribution is due in certain cases although the vessel is not actually used for inland waterway transport and does not therefore contribute to increasing the tonnage of inland waterway transport whereas the single contribution on the putting into service of a vessel in the other Member States is due only if that is justified by its actual use (on the network of linked Community waterways)?'

14. In order to understand the purpose of those questions, it is necessary to examine Wiljo's claims before the national court. According to the order for reference, Wiljo claims that it is not obliged to pay the contribution because the *Smaragd* is a bunkering vessel used exclusively for the bunkering of sea-going ships and cannot be compared to an ordinary tanker vessel. Wiljo considers that the Commission decision is in conflict with the general purport of the Regulation and contains no proper technical analysis of the characteristics and equipment of the vessel. Thus the terms of the order for reference suggest that Wiljo's case before the national court is that the Commission decision is invalid because it is contrary to the Regulation. That is confirmed by a reading of Wiljo's application to the national court, in which it refers expressly to Article 8(3)(c) of the Regulation and concludes with the words 'for those reasons the Commission decision cannot be considered valid'.

15. Thus it is clear that the national court's questions, which are identical to those set out by Wiljo in its application, were designed to allow the national court to assess that plea. Although concerning the interpretation of the Regulation, they are intended to allow the national court to appraise the validity of the Commission's finding in its decision that the *Smaragd* did not qualify as a 'specialized vessel' within the meaning of Article 8(3)(c) and hence was subject to the 'old-for-new' rule.

16. In that regard it must be remembered that the Court has held that where the validity of a Community act is challenged before a national court, the power to declare the act invalid is reserved to the Court of Justice. [3] If the Court wished to reply to the national court's questions, it would be necessary for it to reformulate them and treat them as a request for a ruling on validity.

17. However, the Commission objects that Wiljo is precluded from challenging the validity of its decision in the national proceedings by the principle laid down in *TWD Textilwerke Deggendorf*. [4] There the Court held that TWD could not plead the invalidity of a Commission decision addressed to Germany ordering the recovery of aid paid to TWD in proceedings instituted before the German courts against the implementing decision adopted by the national authorities. TWD had failed to challenge the Commission decision under Article 173 of the Treaty, even though it was clear that it could have done so. To allow a recipient of aid to plead the illegality of the Commission decision in the national proceedings would enable it to overcome the definitive nature which, by virtue of the principle of legal certainty, must attach to a decision once the time-limit laid down by Article 173 has expired.

18. Wiljo argued at the hearing that the judgment in *TWD* should not be applied in this case. The judgment was given after the expiry of the time-limit for challenging the Commission decision of 6 May 1993 had expired. Moreover, it is the national authorities which have primary responsibility for administering the Fund, and it was reasonable for Wiljo to assume that the Commission decision could be challenged in proceedings against those authorities before the national courts, particularly in view of the Commission's statement in the decision that a copy would be sent to those authorities.

19. I am not persuaded by those arguments. The Court did not see fit to place any limitation on the temporal effect of its ruling in

3 — Case 314/85 *Foto-Frost* v *Hauptzollamt Lübeck-Ost* [1987] ECR 4199, paragraph 17 of the judgment.

4 — Case C-188/92 [1994] ECR I-833.

TWD. Moreover, the present case is if anything clearer than *TWD*. While administration of the scrapping funds is the responsibility of the national authorities, the Regulation reserves powers to the Commission in a number of matters. Article 8(3)(c) of the Regulation empowers the Commission to grant exemption from the Regulation for specialized vessels. Accordingly, Wiljo applied directly to the Commission for a decision under that provision. In response to that application the Commission issued an individual decision addressed directly to Wiljo. Wiljo was clearly aware therefore of the decision, and its consequences. Moreover, there is not the slightest doubt that the decision was open to challenge under Article 173 of the Treaty within the time-limit laid down by that provision. Clearly that is so notwithstanding the fact that a copy of the decision was sent to the national authorities responsible for implementing it.

20. The Court based its judgment in *TWD* on the principle of legal certainty. The same applies here. However, the present case also illustrates the importance of ensuring that cases are heard in appropriate proceedings and in the proper court. Preliminary rulings proceedings are simply inapt where the issues of law to be resolved are interwoven with complex factual issues. Furthermore, in the case of decisions such as that in issue it is the Court of First Instance which should make the necessary findings of fact and apply the law to those facts. It seems to me therefore that for that reason also the Court is justified in requiring individuals, wherever possible, to challenge the legality of such measures before the Court of First Instance, thereby allowing all the issues of law and fact to be examined in a single forum and in proceedings specifically designed for that purpose. [5]

21. Finally, in the proceedings before this Court Wiljo sought to evade the consequences of the ruling in *TWD* by arguing that the *Smaragd* fell wholly outside the scope of the Regulation. It was therefore open to Wiljo to contest the demand for payment of the contribution notwithstanding the fact that the Commission decision was now definitive and no longer open to challenge.

22. I do not think it is necessary for the Court to consider that question. That argument appears nowhere in the order for reference. Nor indeed does it appear in Wiljo's application to the national court contained in the national case file transmitted to the Court. Accordingly, the national court's questions are framed in terms not of Articles 1 and 2 of the Regulation but of Article 8(3)(c) of the Regulation and the Commission decision; they concern in particular the use by the Commission of the

5 — See on the same point paragraph 20 of my Opinion in *TWD*.

criterion of technical suitability for carriage of goods on inland waterways for the purpose of deciding whether a vessel is a specialized vessel qualifying for exemption under Article 8(3)(c). To go beyond the terms of the national court's reference would be irreconcilable with the Court's function under Article 177 of the Treaty, and also with the need to ensure that the rights of those entitled to submit written observations to the Court under Article 20 of the EC Statute are respected. [6]

23. For the foregoing reasons I do not think it is necessary for the Court to reply to the national court's questions.

Conclusion

24. Accordingly, I am of the opinion that the national court is bound by a Commission decision addressed to an undertaking where that undertaking did not bring an action against that decision under the fourth paragraph of Article 173 of the Treaty but brings an action before the national court in which it challenges the Commission decision; there is therefore no need to rule on the questions referred by the national court.

6 — See most recently Case 191/96 *Mario Modesti*, Order of the Court of 19 July 1996.