OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 22 October 1986 *

Mr President,
Members of the Court,

Given that the background to this case, the conclusions of the parties and their submissions and arguments are set out in detail in the Report for the Hearing, I shall at once proceed with my appraisal of the issues involved.

Article 39 of the Statute of the Court of Justice of the European Economic Community provides as follows:

'Member States, institutions of the Community and any other natural or legal persons may, in cases and under conditions to be determined by the Rules of Procedure, institute third-party proceedings to contest a judgment rendered without their being heard, where the judgment is prejudicial to their rights.'

Article 97 of the Rules of Procedure specifies the requirements which must be fulfilled in the case of an application originating third-party proceedings. Only two of those requirements concern us in this case, since the others are indubitably fulfilled.

An application originating third-party proceedings must:

1. State how the contested judgment is prejudicial to the rights of the third party (Article 97 (1) (b)); and
2. Indicate the reasons why the third party was unable to take part in the original case (Article 97 (1) (c)).

Let us examine those two requirements in order.

1. Is the contested judgment prejudicial to the rights of the third party?

I would recall in the first place that the action brought by Riseria Modenese in Case 267/80 was dismissed on the following grounds (paragraph 7 of the judgment of 13 November 1984 *Birra Wührer SpA and Others* v *Council and Commission* [1984] ECR 3693):

'However, the applicant in Case 267/80, Riseria Modenese, although seeking compensation for the damage which it sustained as a result of the non-payment of the refunds for broken rice between 25 November 1975 and 31 August 1977 — amounting, according to calculations given in its answer to a question put by the Court, to 59 954.5598 ECU —, formally admits in its reply and in its answer to the Court's question that it assigned its rights to the refunds in question to Birra Peroni, the applicant in Case 282/82. Since by means of that assignment it has disposed of its rights to the refunds at issue, it has ceased to be entitled to be compensated for the damage caused by the refusal to pay the refunds. Consequently, its claim for compensation must be dismissed.'

In its judgment of 23 October 1985 relating to Riseria Modenese's application for the

* Translated from the French.

revision [1] of the judgment of 13 November 1984, the Court held (paragraph 12) that 'the application was dismissed in the contested judgment solely because the applicant was claiming rights of which it had disposed by assignment (a fact which it confirms in its application for revision) and not on the ground that it has assigned them to a particular assignee. The reference to Birra Peroni as the assignee was not needed to support the operative part of the judgment. As a result Riseria Modenese's action had to be dismissed irrespective of the identity of its assignee or assignees'.

That reasoning is equally applicable to this application originating third-party proceedings.

It is common ground that Riseria Modenese assigned its rights to the payment of the refunds in question, in particular to Birra Dreher. That is expressly admitted by Birra Dreher in its application originating third-party proceedings (p. 3) and has been confirmed by Riseria Modenese in its observations (also at p. 3).

The fact that Birra Dreher is not referred to being an assignee in paragraph 7 of the judgment of 13 November 1984 is in no way prejudicial to its rights. There are two possibilities: either Birra Dreher was in a position to assert the rights assigned to it before the judgment was delivered, in which case the judgment did not deprive it of that position since it does not state that Birra Dreher was not the assignee of Riseria Modenese's rights, or it was not or was no longer in such a position, in which case the judgment was — *a fortiori* — incapable of affecting its rights.

Even if — purely hypothetically — the Court were to amplify its judgment of 13 November 1984 by stating that Riseria Modenese assigned its rights to the payment of the refunds to Birra Peroni *and to Birra Dreher* that would in no way alter Birra Dreher's legal position.

In fact, as the Council and the Commission point out, Birra Dreher's rights were time-barred at the date of the judgment.

Birra Dreher's claims relate to deliveries of broken rice by Riseria Modenese between 1 August 1975 and 19 October 1977. Since actions for damages are time-barred after five years, it must be admitted that the relevant claim in this case was time-barred at the latest by 19 October 1982.

For that reason too, the judgment of 13 November 1984 could not have been prejudicial to the applicant's rights.

Are the foregoing observations such as to show that the application originating third-party proceedings is inadmissible or do they relate to the substantive issue?

It has to be admitted that, in considering whether the requirement laid down in Article 97 (1) (b) of the Rules of Procedure is fulfilled, that is to say, whether the contested judgment is *prima facie* prejudicial to the applicant's rights, there is a tendency to be drawn imperceptibly towards considering the substance of the complaint.

On the face of it, the applicant staged how, in its view, the judgment is prejudicial to its rights.

However, it is immediately obvious that the reason given, that is to say that the judgment itself makes it impossible for the applicant to assert its rights against the assignor and against the Commission, is not convincing.

That is because the judgment simply *observed* that Riseria Modenese no longer

1 — Case 267/80 Rev. [1985] ECR 3499.

had the rights in question; it did not take away from Birra Dreher the possibility of asserting its rights against the Commission, assuming that that possibility still existed.

Accordingly, the application originating third-party proceedings is not admissible.

Moreover, the application is unfounded in so far as it claims that the Court should 'declare that Riseria Modenese is entitled to be compensated for the damage suffered by it as a result of the abolition ... of the production refunds ... and as a result of the failure to restore such refunds for sales of broken rice to Birra Dreher until 19 October 1977'.

The Court is precluded from declaring that a legal person has certain rights, when such rights are no longer vested in it.

My conclusion is therefore that Birra Dreher's application originating third-party proceedings is inadmissible on the ground that it does not satisfy the requirement laid down in Article 97 (1) (b), and, in the alternative, that it is unfounded.

For the sake of completeness, however, I would like to go on to consider whether the requirement laid down in Article 97 (1) (c) is satisfied.

2. Was the third party unable to take part in the original case?

In two judgments, both delivered on 12 July 1962,[2] the Court defined the scope and the meaning of Article 97 (1) (c) of the Rules of Procedure, which provides that an application originating third-party proceedings must 'indicate the reasons why the third party was unable to take part in the original case'. According to those judgments, the efficient administration of justice and the need for certainty in legal relationships demand that persons interested in the result of an action pending before the Court be precluded from asserting their rights once a judgment has been delivered settling the question in dispute. It is precisely in order to meet this requirement that Article 37 of the Protocol on the Statute of the Court makes available to third parties whose interests are involved in an action pending before the Court the right of voluntary intervention (provided only that the purpose of their conclusions is solely to support or reject the conclusions of a party to the proceedings).

Article 97 (1) (c) of the Rules of Procedure must be interpreted as making this procedure available in the first place to a third party who, though called upon to take part in the original case, was unable to do so for good and sufficient reasons, and secondly to any party who was not in a position to intervene in the original case under Article 37 of the Protocol on the Statute of the Court and Article 93 of the Rules of Procedure.

It is common ground that Birra Dreher was not 'called upon' to take part in the original case, indeed, that would have been impossible as compulsory intervention is not provided for in the Rules of Procedure.[3]

However, Birra Dreher could have intervened voluntarily in the original proceedings since it was manifestly 'interested in the result of the action'.

Admittedly, it would have been more logical and more prudent on its part to bring a

2 — Judgment of 12 July 1962 in Joined Cases 42 and 49/59 *Breedband NV* v *Société des Aciéries du Temple and Others* [1962] ECR 145; judgment of 12 July 1962 in Joined Cases 9 and 12/60 *Government of the Kingdom of Belgium* v *Société commerciale Antoine Vloebergbs and High Authority of the European Coal and Steel Community* [1962] ECR 171.

3 — Judgment of 10 December 1969 in Case 12/69 *Gustav Wonnerth* v *Commission of the European Communities* [1969] ECR 577.

direct action in its own name pursuant to Article 178 and the second paragraph of Article 215 of the Treaty in the same way as Birra Wührer (Case 256/80) and Birra Peroni (Case 282/82), which were also assignees of the rights of companies producing broken rice.

However, if Birra Dreher was genuinely convinced at the time that the rights in question could be recovered on its behalf only by Riseria Modenese, it would have been sensible for it to intervene in support of the latter's conclusions. In any event, it certainly was entitled to do so, provided, of course, that it complied with the relevant time-limits.

However, the applicant claims that there were good reasons preventing it from taking part in the original case.

The first of those reasons is that the case did not come to its notice until the operative part of the judgment of 13 November 1984 was published in the Official Journal of the European Communities.[4]

The assignor, Riseria Modenese, states that it did not inform its assignee, Birra Dreher, of its action against the Council and the Commission, which was dismissed by the aforementioned judgment (Case 267/80).

However, as the Council and the Commission point out, it is hard to believe that Birra Dreher found the operative part of the Court's judgment of 13 November 1984 in the Official Journal but failed to find the notice, published on 31 December 1980, of the action brought by Riseria Modenese,[5] from which Birra Dreher's interest in intervening in the action was manifest, or the operative part of the interlocutory judgment delivered by the Court on 27 January 1982, which was published on 5 March 1982.[6]

Even if those notices are left out of account, it is difficult to conceive how a company of Birra Dreher's importance did not get to know, through other channels, of the steps taken by its competitors Birra Wührer and Birra Peroni and by various companies producing maize gritz and broken rice following the judgments of 4 October 1979[7] in which the Court held, for the first time, in the same context that a whole series of other companies were entitled to damages. According to Birra Dreher, a further good reason was that when it asked the assignor for information about the recovery of the debt which had been assigned, the latter consistently assured it that the refund would be paid to it when Riseria Modenese, which alone was entitled to bring proceedings, had recovered the debt.

From this, too, it appears that Birra Dreher could hardly have been unaware that Riseria Modenese was preparing to bring an action or had already brought an action.

Lastly, Birra Dreher states that it considered the chances of an action brought by an assignee being held to be admissible and that it reached the conclusion, in the light of the Court's judgment of 4 October 1979,[8] that any action brought by it would not be

4 — Official Journal C 323 of 4. 12. 1984, p. 4.

5 — Official Journal C 340, p. 17.

6 — Official Journal C 57, p. 6.

7 — Case 238/78 *Ireks-Arkady GmbH* v *Council and Commission* [1979] ECR 2955; Joined Cases 241, 242 and 245 to 250/78 *DGV, Deutsche Getreideverwertung and Rheinische Kraftfutterwerke GmbH and Others* v *Council and Commission* [1979] ECR 3017; Joined Cases 261 and 262/78 *Interquell Stärke-Chemie GmbH und Co. KG and Diamalt AG* v *Council and Commission* [1979] ECR 3045; Joined Cases 64 and 113/76, 167 and 239/78, 28 and 45/79 *P. Dumortier Frères SA and Others* v *Council* [1979] ECR 3091.

8 — Case 238/78 [1979] ECR 2955.

admissible since it was not part of the same group of companies as Riseria Modenese.

However, in my view, a Community national cannot justify his failure to act in terms of his personal interpretation of a judgment of the Court.

Moreover, Birra Dreher could have learned from Official Journal C 340 of 13 December 1980 (p. 15) that, for its part, Birra Wührer, another assignee of rights to the payment of production refunds, had elected to bring a direct action for damages.

Accordingly, I do not think it is possible to consider that there were good reasons preventing Birra Dreher from taking part in the original case.

Conclusion

On the basis of all the foregoing observations I propose that the Court should declare that the application originating third-party proceedings is inadmissible or, in the alternative, that it is unfounded. I also consider that the Court should order the applicant to pay the costs.