OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 11 February 1988 *

Mr President,
Members of the Court,

1. On 20 June 1986 the applicant, which is the owner of a vineyard in Portugal, submitted to the Secretary of State for Agricultural Development and to the Minister for Agriculture, Fisheries and Food an application for the grant, under Council Regulation No 777/85 of 26 March 1985, [1] of a premium for the permanent abandonment of vine-growing in respect of an area of 30 hectares which it intended to grub up as part of the restructuring of the whole of its property.

2. On 14 July 1986 the Council adopted Regulation No 2239/86 on a specific common measure to improve vine-growing structures in Portugal (Official Journal 1986, L 196, p. 1), Article 6 (6) of which provides as follows:

'For the duration of the common measure, vine-growers may not qualify for the permanent abandonment premium provided for in Regulation (EEC) No 777/85.'

3. According to the applicant, the rules introduced by Regulation No 2239/86 specifically for Portugal are in several respects less favourable than those prescribed by Regulation No 777/85. It claims in particular that Regulation No 2239/86 can be applied throughout its 10-year period of validity only to an area of 15 000 hectares. It therefore gives the Portuguese authorities a wide discretionary power and all the persons affected will certainly not be able to benefit from it. Lastly, the amount of the permanent abandonment premiums for which it provides, adjusted by reference to the average yield per hectare of the areas under vines concerned, is lower than that fixed by Regulation No 777/85.

4. The applicant claims primarily that the Court should declare Regulation No 2239/86 void in so far as, owing to the effect of Article 6 (6) which deprives the applicant of the benefit of Regulation No 777/85, it infringes the general principles of Community law on legal certainty, respect for acquired rights, non-retroactivity of legislation, and the protection of legitimate expectations.

5. In the alternative, it claims compensation for the damage, assessed at ECU 150 000, which it has suffered by reason of the non-application of Regulation No 777/85.

Claim for a declaration of nullity

6. The defendant Council and the Portuguese Republic and the Commission,

* Translated from the French.

1 — Council Regulation (EEC) No 777/85 of 26 March 1985 on the granting, for the 1985/86 to 1989/90 wine years, of permanent abandonment premiums in respect of certain areas under vines (Official Journal 1985, L 88, p. 8).

intervening, claim primarily that the application for a declaration that Regulation No 2239/86 is void is inadmissible on the ground that the applicant is not directly and individually concerned by it.

7. The Court has already held in a long line of cases as follows:

'The second paragraph of Article 173 of the Treaty makes the admissibility of proceedings instituted by an individual for a declaration that a measure is void dependent on fulfilment of the condition that the contested measure, although in the form of a regulation, in fact constitutes a decision which is of direct and individual concern to him. The objective of that provision is in particular to prevent the Community institutions, merely by choosing the form of a regulation, from being able to exclude an application by an individual against a decision of direct and individual concern to him and thus to make clear that the choice of form may not alter the nature of a measure.

Nevertheless an action brought by an individual is not admissible in so far as it is directed against a regulation having general application within the meaning of the second paragraph of Article 189 of the Treaty. The test for distinguishing between a regulation and a decision is whether or not the measure in question has general application. It is therefore necessary to appraise the nature of the contested measure and in particular the legal effects which it is intended to produce or actually produces.' [2]

8. In this case it is clear that, taken as a whole, Regulation No 2239/86 is of general application. As is apparent from its title, it is designed to improve vine-growing structures in Portugal by means of vine restructuring measures and by encouraging the permanent abandonment of areas planted under vine. It is described in a generalized and abstract manner, applies to objectively determined situations and produces legal effects with regard to categories of persons described in a generalized and abstract manner.

9. It is addressed to all Portuguese vine-growers and is of concern to the applicant only in his objective capacity as a vine-grower, on the same basis as any other trader in the situations to which it applies: the applicant is therefore not individually concerned.

10. Nor is the applicant directly concerned. In particular, the granting of the permanent abandonment premium provided for by Regulation No 2239/86 depends on a formal decision adopted by the competent Portuguese authorities to which applications must be submitted. In exercising that power, the Portuguese authorities have a wide discretion, as the applicant itself acknowledges, in so far as throughout the proposed duration of the common measure under Article 6 of Regulation No 729/70, [3] that is to say for 10 years (Article 10 (1)), the permanent abandonment premium is restricted to a total area of 15 000 hectares of the Portuguese territory under vines (Article 6 (4)) which, however, in the undisputed submission of the Council covers 279 000 hectares.

2 — Judgment of 24 February 1987 in Case 26/86 *Deutz and Geldermann* v *Council* [1987] ECR 941, at paragraphs 6 and 7; see also order of 20 May 1987 in Joined Cases 233 to 235/86 *Champlor and Others* v *Commission* [1987] ECR 2251, at paragraphs 6 and 7.

3 — Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218).

11. In its reply (page 25), however, the applicant stated and confirmed at the hearing that it is seeking a declaration not that Regulation No 2239/86 is void in its entirety, as it does not deny that it is a regulation in the strict sense, 'but only the part (of the regulation) ... which is contrary to the Community legal order'. In the introduction to its application (page 2), it had stated that 'the applicant claims that the Court should:

(a) Declare that in so far as the Council provides in Article 6 (6) of Regulation (EEC) No 2239/86 of 14 July 1986 that throughout the duration of the common measure provided for by that regulation, vine-growers may not benefit from the permanent abandonment premium provided for by Regulation (EEC) No 777/85, it has breached the general principles of legal certainty, respect for acquired rights, non-retroactivity of legislation and protection of legitimate expectation, which form part of the Community legal order ...'.

12. It is clear from this definition of the object of the application that the applicant is claiming that not only in the 1986/87 wine year but in all subsequent wine years Regulation No 777/85 should apply to Portugal instead of Title II of Regulation No 2239/86. By claiming a declaration that Article 6 (6) is void, the applicant is therefore in reality seeking a declaration that all the provisions of Regulation No 2239/86 concerning the grubbing of vines are void, that is to say a declaration that a number of provisions having the nature of a regulation are void.

13. At the hearing, however, the applicant gave the impression that its application could also be interpreted as seeking the suspension of Regulation No 2239/86 exclusively in relation to the 1986/87 wine year and solely in its favour. It would therefore be an application for a type of transitional measure.

14. Agro-Pecuária claims that it should be considered to be individually concerned by Article 6 (6) of Regulation No 2239/86 because it is the only Portuguese agricultural undertaking which had submitted an application for a premium under Regulation No 777/85 at the time when Regulation No 2239/86 was adopted and entered into force. It was therefore particularly affected by Article 6 (6) which, by depriving it of the benefit of Regulation No 777/85, affected its legal position by reason of a factual situation in which it is differentiated from all other persons and distinguished individually just as in the case of a person to whom a measure is addressed.

15. The Council, the Portuguese Republic and the Commission deny that the applicant is individually concerned by the contested provision simply because of its application for a premium, which was submitted before 1 September 1986, and therefore before the beginning of the wine year in respect of which it could otherwise have been considered, and it had no legal effects.

16. The applicant considers that there is an obvious similarity between its case and Case 11/82 *Piraiki-Patraiki* v *Commission*.[4] In that case the applicants claimed that even if

4 — Judgment of 17 January 1985, [1985] ECR 207.

the decision at issue applied to all Greek exporters, actual or potential, of cotton yarn to France, they were in a special situation inasmuch as, before the decision was adopted, they had entered into contracts to be performed during the period of application of the decision. As regards those who could show that they had entered into such contracts, the Court acknowledged the existence of a circumstance which distinguished them from any other person concerned by the contested decision,

'in so far as the execution of their contracts was wholly or partly prevented by the adoption of the decision' ([1985] ECR 244, paragraph 19).

17. In reply to the Commission's contention that when it adopted the decision it was unaware that contracts governed by private law existed and had no way of obtaining information in that regard, the Court further considered the admissibility of the application from that point of view in conjunction with the substance of the case (paragraph 21) and in the end concluded that the undertakings which were party to such contracts were individually concerned

'as members of a limited class of traders identified or identifiable by the Commission and by reason of those contracts particularly affected by the decision at issue' ([1985] ECR 246, paragraph 31).

18. In the present case, it is undeniable that the application submitted by the applicant under Regulation No 777/85 certainly enabled him to be identified, among all the Portuguese vine-growers, as *one of those* who would be affected by the suspension of that regulation.

19. It cannot be said, however, that Agro-Pecuária was affected by that decision to a greater extent than the other Portuguese vine-growers who were preparing to submit applications at the beginning of the new wine year. It merely applied earlier than they did.

20. As the Court has frequently stressed:

'A measure does not cease to be a regulation because it is possible to determine the number or even the identity of the persons to whom it applies at any given time as long as it is established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in relation to its purpose' (paragraph 8 of the judgment in *Deutz and Geldermann*, cited above).

21. To my knowledge, there is only one judgment in which the Court has admitted actions brought by individuals who had simply submitted applications. That is the judgment of 13 May 1971 in Joined Cases 41 to 44/70 *(International Fruit Company and Others* v *Commission* [1971] ECR 411, at p. 422). But the regulation at issue in that case applied only to undertakings which had applied for an import licence before a certain date, fixed in the regulation and prior to its adoption. It was therefore possible for the Court to conclude that

'when the said regulation was adopted, the number of applications which could be

affected by it was fixed. No new application could be added' (paragraphs 17 and 18).

22. In the present case the situation would have been identical only if the contested regulation had been adopted after 31 December 1986, that is to say after the closing date fixed for the submission of applications for the abandonment premium for the 1986/87 wine year. Only then would the number and identity of the vine-growers affected by the reduction in the premium have been determined and fixed *ne varietur*. The measure would then have concerned, at least as regards that wine year, a closed category of traders. However, the contested regulation was adopted on 14 July 1986.

23. Furthermore, before an individual may be considered to be individually concerned by a provision of a regulation, it must affect his legal position (judgment of 18 November 1975 in Case 100/74 *Société C. A. M.* v *Commission* [1975] ECR 1393, at p. 1403, paragraph 19). In other words, the action taken by the individual must have had legal effects which are themselves affected by the contested measure.

24. Thus the Court considered that exporters were individually distinguished by the fact that they had obtained the advance fixing of refunds in licences issued before a certain date. [5]

25. In a case in which the national intervention agencies forwarded to the Commission tenders received in the context of a periodic invitation to tender for the sale of meat held by those agencies, the Court admitted the action brought by the tenderer because, although the Commission decision was adopted in the form of a decision addressed to the Member States, it directly determined the fate, be it favourable or unfavourable, of each of the tenders submitted. [6]

26. Even in the judgment in *Piraiki-Patraiki*, upon which the applicant has placed particular weight, the Court, in holding that the undertakings were individually concerned, based itself on the existence of contracts already entered into, which had been shown to exist, and whose execution would be wholly or partially prevented by the contested measure.

27. In the present case the applicant clearly cannot claim to have entered into any similar commitment, the execution of which was prevented by the adoption of Regulation No 2239/86.

28. Moreover, even if it should be accepted that, as the applicant claims, the competent authorities of the Member States have no discretionary power under Regulation No 777/85 as to whether or not to grant premiums to those of the persons concerned who apply and satisfy the conditions fixed, they must still check whether those conditions are met, ascertain the category to

5 — Judgment of 18 November 1975 in Case 100/74, cited above, at p. 1403; judgment of 31 March 1977 in Case 88/76 *Exportation de sucres* v *Commission* [1977] ECR 709, at p. 725; judgment of 3 May 1978 in Case 112/77 *Töpfer* v *Commission* [1978] ECR 1019, at p. 1029.

6 — Judgment of 6 March 1979 in Case 92/78 *Simmenthal* v *Commission* [1979] ECR 777.

which the vines in question belong, make an on-the-spot assessment of their yield and decide, on the basis of all these factors, the amount to be granted to each. An application submitted under Regulation No 777/85 therefore has no automatic effects.

29. Since it is also clear that no decision was taken on the application by the competent authorities, it may be concluded that the applicant's legal position was not affected by the contested provision. On the basis of all the foregoing considerations, the application for a declaration of nullity must therefore be dismissed as inadmissible.

Claim for damages

30. Although I have concluded that the application for a declaration of nullity is inadmissible, this does not mean that I have no need to consider the application for damages since,

'according to an established body of decisions of the Court, the application for compensation provided for by Article 178 and the second paragraph of Article 215 of the Treaty was introduced as an autonomous form of action with a particular purpose to fulfil within the system of actions and subject to conditions on its use dictated by its specific nature'.[7]

Thus the fact that the claim for a declaration of nullity is inadmissible does not necessarily mean that the claim for compensation is also inadmissible.

7 — See in particular the judgment of 26 February 1986 in Case 175/84 *Krohn* v *Commission* [1986] ECR 753, paragraph 26.

31. The Council, the Portuguese Republic and the Commission consider, however, that the alternative claim for compensation must be declared inadmissible on the ground that it does not comply with Article 38 (1) (c) of the Rules of Procedure of the Court, which requires that the application originating the proceedings should state the subject-matter of the dispute and the grounds on which the application is based.

32. It is true that in the pleadings the applicant has been very unforthcoming in this regard. In its application, it merely claims that the Court should 'order the Community to make good the damage suffered by the applicant as a result of the non-application to it of Council Regulation (EEC) No 777/85 of 25 March 1985'. Moreover, it was only in the reply (at p. 52) that it stated the extent of the damage which it claimed that it had suffered, namely ECU 150 000, together with interest from the date of service of the application on the defendant.

33. In my view, however, it is sufficiently clear from the application itself that the purpose of the claim is simply to obtain damages and interest equivalent to the premium to which the applicant claimed that he was entitled, under Regulation No 777/85, in respect of the 30 hectares under vine which it intended to grub (that is to say, ECU 150 000).

34. As to the grounds relied upon, they are clearly identical to those on which the claim for a declaration of nullity is based.

35. The fact that the desired result of the two heads of claim and the grounds relied upon are therefore identical does not seem to me to be sufficient grounds for concluding that the claim for damages is inadmissible.

36. In the case of *Compagnie d'approvisionnement* v *Commission*,[8] the Court was confronted with a similar situation. The Commission had contested the admissibility of the claims for compensation on the ground that, since the applicants had calculated the damage as the exact difference between the subsidies resulting from the contested regulations and those which would result from regulations adopted in accordance with their wishes, those applications were intended to circumvent the requirements of Article 173 of the EEC Treaty, which would have rendered an application for the annulment of the said regulations inadmissible.

37. The Court, however, held as follows:

'The action for damages . . . was established as an independent remedy; its specific function comes within the framework of the system of legal remedies and it is subject to the conditions laid down for its exercise in the light of its specific purpose. The action differs from an application for annulment in that it seeks compensation for damage caused by an institution in the exercise of its functions and not abolition of a specific measure. Applications for compensation seek solely the recognition of a right to compensation and, therefore, to a payment intended to affect the applicants alone. These applications are therefore admissible'.

38. In any event, the applicant in the present case could not be accused of having sought to circumvent the requirements of Article 173 since its action was brought primarily on that basis. Furthermore, the claim for damages was brought in the alternative, in the widest sense of the term: it has no purpose unless Regulation No 2239/86 is *not* declared void (either because the main action is held to be inadmissible or dismissed as unfounded). Indeed, if Regulation 2239/86 were annulled by the Court, Regulation No 777/85 would continue to apply to Portugal and the applicant would not suffer the damage alleged.

39. I therefore propose that the Court should not declare the claim for damages inadmissible but should examine the substance.

40. In this regard, the Court has consistently held as follows:

'By virtue of the second paragraph of Article 215 and the general principles to which this provision refers, the liability of the Community presupposes the existence of a set of circumstances comprising the unlawfulness of the conduct alleged against the institutions, actual damage and the existence of a causal link between the conduct and the alleged damage.'

It is established that in this case the measure which caused the alleged loss is a legislative measure. With regard to such measures, the Court has consistently held (see, primarily, Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975) that:

'The Community is not liable unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred'.[9]

8 — Judgment of 13 June 1972 in Joined Cases 9 and 11/71 [1972] ECR 391.

9 — Judgment of 14 January 1987 in Case 281/84 *Zuckerfabrik Bedburg and Others* v *Council and Commission* [1987] ECR 49, at paragraphs 17 and 18.

It is in the light of these requirements that this claim for damages must be assessed.

41. As has already been stated, we are entitled to assume that the superior rules of law for the protection of the individual whose breach the applicant alleges are the same as the rules on which its application for a declaration of nullity is based, that is to say the principles of respect for acquired rights, protection of legitimate expectations, legal certainty and non-retroactivity of legislation.

42. It has already been shown that the application for the grant of an abandonment premium submitted by the applicant to the Portuguese authorities could not have had any legal effects or *a fortiori* have given rise to any right to the premium under Regulation No 777/85.

43. Under those circumstances, there could be no question of an infringement of the principle of respect for acquired rights. Furthermore, the Court has recently confirmed, by referring to its judgment of 27 September 1979 in *Eridania*, [10] that

'It follows that an undertaking cannot claim a vested right to the maintenance of an advantage which it obtained from the establishment of the common organization of the market and which it enjoyed at a given time [11]'.

A fortiori, the same must apply to a potential advantage.

44. For the same reasons, it cannot be accepted that the principle of the protection of legitimate expectations was breached. Moreover, the Court has held that 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 (judgment of 1 February 1978 in Case 78/77 *Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169). [12] It must be pointed out in this case that Article 7 of Regulation No 777/85 itself provides for the amount of the premiums to be altered by the Council.

45. In this context, the Commission rightly stresses that 'it would be absurd if, by submitting (such) an application in advance (its having conferred no rights on its author), a person could compel the Community to maintain rules unchanged from one year to the next, regardless of the economic circumstances'. On more than one occasion, [13] the Court has held that:

'The field of application of the principle of legitimate expectation cannot be extended to the point of generally preventing new rules from applying to the future effects of situations which arose under the earlier rules . . . '.

10 — Case 230/78 *Eridania* v *Minister for Agriculture and Forestry* [1979] ECR 2749.

11 — See judgment of 21 May 1987 in Joined Cases 133 to 136/85 *Walter Rau Lebensmittelwerke and Others* v *BALM*, [1987] ECR 2289, at paragraph 18.

12 — See judgment of 11 March 1987 in Case 265/85 *Van der Burgh en Jurgens* v *European Economic Community* [1987] ECR 1155, at paragraph 44.

13 — See *inter alia* the judgment of 14 January 1987 in Case 278/84 *Federal Republic of Germany* v *Commission* [1987] ECR 1, at paragraph 36.

46. Furthermore, having acquired no rights under the old legislation, the applicant could not claim to be entitled to any transitional measures for his benefit.

47. As regards the principles of legal certainty and non-retroactivity of legislation, it is sufficient to stress that Regulation No 2239/86, which was adopted on 14 July, published on 18 July and entered into force on 21 July 1986, applied only with effect from the 1986/87 wine year, which commenced on 1 September 1986. The fact that it applied to the application submitted by the applicant in respect of that wine year therefore cannot constitute a breach of the general principles in question.

For all the reasons set out above, the claim for damages must be dismissed as unfounded.

48. In *conclusion*, I propose that the Court should declare that the claim for a declaration of nullity is inadmissible and should dismiss the claim for damages as unfounded and order the applicant to pay the costs, including those of the interveners.