OPINION OF ADVOCATE GENERAL RUIZ-JARABO COLOMER
delivered on 12 October 1995 *

1. By application lodged at the Registry of the Court of Justice on 22 December 1993, the Italian company Nutral SpA (hereinafter 'Nutral') brought an appeal against the order of the Court of First Instance of 21 October 1993 in Cases T-492/93 and T-492/93 R *Nutral* v *Commission* [1993] ECR II-1023. Nutral considers that, by declaring inadmissible the applications made by it in the two actions brought before the Court of First Instance, that order, which was notified to it on 25 October 1993, contravened Community law.

2. According to the order of the Court of First Instance, the Commission found that Nutral had committed irregularities in importing from Austria certain quantities of a preparation with a basis of skimmed-milk powder, described as an 'edible preparation with a basis of liquid skimmed milk, emulsified with refined edible beef fat'. The Commission requested the Italian authorities by letter of 6 August 1992, pursuant to Article 6 of Council Regulation (EEC) No 595/91, [1] to take part in the inquiry into those imports.

3. Nutral received from 1988 to 1991, through the intermediary of the Italian intervention agency, Community aid for skimmed-milk powder which has been denatured or used in the production of compound feedingstuffs, in accordance with Regulations (EEC) Nos 986/68, [2] 1725/79 [3] and 3033/80. [4]

4. By letter of 19 January 1993 the Head of the Unit on the Coordination of Fraud Prevention ('UCLAF') sent to the Italian authorities the report drawn up by the agents appointed by the Commission to participate in the inquiry, which found that the Community rules governing entitlement to the aid had been contravened. He additionally requested the Italian authorities to take the necessary administrative measures to secure the recovery of the sums unduly paid and to inform the Commission of the judicial steps taken in the matter.

* Original language: Spanish.

1 — Council Regulation (EEC) No 595/91 of 4 March 1991 concerning irregularities and the recovery of sums wrongly paid in connection with the financing of the common agricultural policy and the organization of an information system in this field and repealing Regulation (EEC) No 283/72 (OJ 1991 L 67, p. 11).

2 — Regulation (EEC) No 986/68 of the Council of 15 July 1968 laying down general rules for granting aid for skimmed milk and skimmed-milk powder for use as feed (OJ, English Special Edition 1968(I), p. 260).

3 — Commission Regulation (EEC) No 1725/79 of 26 July 1979 on the rules for granting aid for skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (OJ 1979 L 199, p. 1).

4 — Council Regulation (EEC) No 3033/80 of 11 November 1980 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products (OJ 1980 L 323, p. 1).

5. On 26 February 1993 the Comando Nucleo Polizia Tributaria di Cremona della Guardia di Finanza (hereinafter 'Guardia di Finanza') drew up a report against the applicant 'for the purposes of notification of the undue payment of Community aid in the agricultural sector in respect of 500 tonnes of milk powder, as referred to in paragraph (2) of the conclusions of the inquiry report sent by UCLAF in its letter SG(92) D/140.028 of 19 January 1993'.

6. On 3 March 1993, by letter bearing the reference SG(93) D/140.082, the Head of UCLAF informed the Italian authorities as follows:

'With a view to clarifying the points made in paragraph (2) of the conclusions of the inquiry report ... I would inform you that, although the aid for skimmed milk processed into feedingstuffs was properly awarded ... to Nutral by the competent agency, the payment of such aid ... must be regarded as unlawful.

In view of the foregoing, the competent national authorities must proceed not only to calculate the variable component in respect of all of the product imported and to recover the processing aid relating to the preparation manufactured from the 500 tonnes of powder originating in Ilyichevsk, but also to recover all of the processing aid awarded in respect of milk powder which was granted in relation to the preparation imported between January 1988 and 14 August 1991.'

7. By letter of 23 March 1993 sent to the Minister of Finance, the Minister of Agriculture and Forestry and the Minister of Community Policy and Regional Affairs, the Commission drew attention to its previous communications and requested the competent Italian authorities to proceed as rapidly as possible to take the necessary steps to recover the sums unduly paid, in accordance with Regulations (EEC) Nos 1697/79 [5] and 729/70. [6]

8. On 27 April 1993 the Guardia di Finanza drew up against Nutral a 'record of findings' in respect of the aid for skimmed-milk powder unduly paid between 1988 and 1991. A copy of that document was sent to the Ministry of Agriculture and Forestry with a view to the issue by that ministry of the 'decree-injunction' provided for by Article 3 of Italian Law No 898 of 23 December 1986.

5 — Council Regulation (EEC) No 1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (OJ 1979 L 197, p. 1).

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

9. In those circumstances, by application lodged at the Registry of the Court of Justice on 6 July 1993, Nutral brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of decision No SG(93) D/140.082 of the Commission of 3 March 1993 and of any other prior, linked or associated measure, relating in particular to UCLAF's inquiry report of 18 January 1993.

10. By a separate document lodged at the Registry of the Court on 13 September 1993, Nutral requested the Court of Justice, first, to order suspension of the operation of the Commission's decision of 3 March 1993 and of the prior measures, in particular UCLAF's inquiry report of 18 January 1993, and, second, to order the Commission to instruct the Italian authorities to suspend the operation of all measures for the recovery of the aid paid to the applicant and of the import duties pending delivery of judgment in the main proceedings.

11. The two cases were transferred by the Court of Justice to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC. [7] The order of the Court of First Instance of 21 October 1993 declared that both actions were inadmissible.

7 — Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993, amending Decision 88/591/ECSC, EEC, Euratom establishing the Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

12. Nutral relies on two pleas in support of its appeal: first, misinterpretation or misapplication of Regulations Nos 729/70 and 1697/79 in relation to Regulation No 595/91 and, second, violation of the legal concept of an act capable of being contested, as developed by the case-law of the Court of Justice.

Misinterpretation or misapplication of Regulations Nos 729/70 and 1697/79 in relation to Regulation No 595/91

13. By this plea the appellant contests the interpretation applied by the Court of First Instance to the Community rules on fraud prevention (especially Regulations Nos 729/70 and 595/91); it maintains that the Member States do not have sole responsibility for the implementation of the rules relating to the common agricultural policy. According to the appellant, it is for the Member States to undertake the recovery of sums unduly paid. However, as regards the investigation, determination, prevention and penalization of irregularities committed to the detriment of the Community budget, there exists a shared competence conferred on the national authorities and the Commission, by virtue of which the Commission may adopt measures having legal effects in relation to individuals, such as those contested by Nutral.

14. The protection of the financial interests of the Community against fraud constitutes

an area of competence which is reserved in principle to the Member States. In Case 68/88 *Commission* v *Greece* (the 'Greek maize' case), the Court of Justice held that 'where Community legislation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law'. Furthermore, the Member States 'must ensure in particular that infringements of Community law are penalized under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive'. [8] This involves the principle, enshrined in Article 209a of the Treaty, of the assimilation of the suppression of fraud affecting the financial interests of the Community to the suppression of fraud affecting national financial interests.

15. The principle that suppression of fraud affecting the interests of the Community is a matter for the Member States is complemented by the option on the part of the Community institutions to exercise their own powers of suppression in the matter by imposing penalties of an administrative nature, to be applied by the national authorities against traders guilty of fraud, [9] or by using procedures and penalties falling exclusively within Community law, such as those provided for in the competition rules.

16. Within the framework of the common agricultural policy, the Community has adopted various rules designed to protect its financial interests. The basic rules in the matter are laid down in Regulation No 729/70, Article 8(1) of which provides as follows:

'The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to:

— satisfy themselves that transactions financed by the Fund are actually carried out and are executed correctly;

— prevent and deal with irregularities;

— recover sums lost as a result of irregularities or negligence.

8 — Judgment of the Court of Justice in Case 68/88 *Commission* v *Greece* [1989] ECR 2979, paragraphs 23 and 24.

9 — Judgment in Case C-240/90 *Germany* v *Commission* [1992] ECR I-5383.

The Member States shall inform the Commission of the measures taken for those purposes and in particular of the state of the administrative and judicial procedures.'

That provision has been implemented by Regulation No 595/91, which requires the Member States to inform the Commission systematically of the legislative, judicial or administrative measures taken by the national authorities to combat fraud affecting the financial interests of the Community. Moreover, Article 6 of that regulation enables the Commission to inform the Member States of irregularities discovered by its officers, so that the national authorities may hold an inquiry in which officials of the Commission may take part. The results of that inquiry must be communicated to the Commission.

17. It is clearly for the Member States to investigate and determine cases of fraud affecting the financial interests of the Community, without prejudice to the fact that Commission staff, particularly UCLAF, may collaborate with the national authorities and assist them in that task. That interpretation is supported by the case-law of the Court of Justice, which indicates that, in accordance with the institutional system of the Community and the rules governing relations between the Community and the Member States, it is for the latter, in the absence of any contrary provision of Community law, to ensure that Community regulations, particularly those concerning the common agricultural policy, are implemented within their territory. It is therefore incumbent on the Member States to implement the Community rules in that sphere and to take the necessary individual decisions regarding the traders concerned, in accordance with the rules and procedures laid down in national legislation and subject to the limits imposed by Community law, for the recovery of sums unduly paid. [10] In any event, and irrespective of its legal characterization, the penalty imposed must be clearly based and free from all ambiguity, must seek to apply the corresponding Community rules in an effective manner and must not impair the legal protection of individuals arising from the general principles of law, in particular fundamental rights and the right to a fair hearing.

18. That interpretation of the fraud prevention rules in force in the agricultural sphere must apply regardless of the effectiveness of the abovementioned provisions in the attainment of their objectives. Thus, Report No 7/93 of the Court of Auditors emphasizes the limited use of Regulation No 595/91 in combatting fraud and proposes that the Commission and the Council adopt the measures necessary to establish a system of Community administrative penalties as a matter of urgency. [11] There exist, to that end,

10 — Judgment in Joined Cases 89/86 and 91/86 *Étoile Commerciale and CNTA* v *Commission* [1987] ECR 3005, paragraphs 11 and 12.

11 — Special Report No 7/93 of the Court of Auditors concerning controls of irregularities and frauds in the agricultural area (implementation of Council Regulation (EEC) No 4045/89 and Council Regulation (EEC) No 595/91), accompanied by the replies of the Commission (OJ 1994 C 53, p. 1).

proposals to amend the European Union rules on the protection of the financial interests of the European Communities. [12] Those new rules, if adopted, should include a precise determination of the powers of investigation and penalization conferred on the Commission and the Member States, in order to ensure scrupulous respect of the rights of individuals.

19. For all of those reasons, I consider that the Court of First Instance correctly interpreted Regulation No 729/70 in relation to Regulation No 595/91, and that the plea advanced in the appeal should therefore be rejected.

Violation of the legal concept of an actionable measure

20. The appellant maintains, as its second plea in the appeal, that, in ruling that the contested measures taken by the Commission produced no legal effects in relation to Nutral, the Court of First Instance applied a formalistic interpretation to the concept of an act capable of being challenged under Article 173 of the EC Treaty.

21. It should be recalled in that regard that the Court of Justice has consistently held, as noted by the Court of First Instance, that 'only a measure whose legal effects are binding on the applicant and are capable of affecting his interests is an act or decision which may be the subject of an action for annulment under Article 173 of the Treaty'. [13]

The Court of First Instance considered that the contested measures taken by the Commission did not constitute decisions capable of directly affecting the applicant's legal position, since the implementation of the common agricultural policy in general, and the recovery of sums unduly paid in particular, are matters falling within the competence of the Member States. Consequently, it was the decisions taken by the national authorities which produced legal effects in relation to Nutral, and it is those decisions which are open to challenge by Nutral before the national courts.

22. According to the appellant, that finding by the Court of First Instance is erroneous, since the reports drawn up against the appli-

12 — See the proposal for a Council Regulation (EC, Euratom) on protection of the Community's financial interests (OJ 1994 C 216, p. 11), the proposal for a Council of the European Union act establishing a convention for the protection of the Communities' financial interests (COM(94) 214 final, 15 June 1994), and the Council Resolution of 6 December 1994 on the legal protection of the financial interests of the Communities (OJ 1994 C 355, p. 2).

13 — Order in Cases C-66/91 and C-66/91 R *Emerald Meats* v *Commission* [1991] ECR I-1143, paragraph 26; judgments in Case C-366/88 *France* v *Commission* [1990] ECR I-3571 and Case 60/81 *IBM* v *Commission* [1981] ECR 2639.

cant by the Guardia di Finanza and the decree-injunction of the Ministry of Agriculture and Forestry merely constitute measures for the substantive implementation of the acts of the Commission, and do not in themselves amount to anything in the nature of a decision. Nutral argues that the illegality of the aid granted and the obligation to recover it are matters which were established in the acts of the Commission, and that the involvement of the Italian authorities was limited to the purely technical implementation of those acts.

23. That argument by the appellant cannot be accepted. The two letters sent by the Head of UCLAF and Commissioner Schmidhuber merely informed the Italian authorities of the results of an investigation carried out jointly by Community officials and the Italian civil service into possible irregularities in the grant of aid to Nutral and requested them in addition to take the necessary steps to recover the sums unduly paid to that company. As the Commission points out in its reply, the Italian State is not obliged itself to adopt the Commission's conclusions, nor to take the steps proposed by it, because the implementation within its territory of the Community rules on agriculture falls in principle within its area of competence. Consequently, the reports and the decree-injunction constitute autonomous acts under Italian national law and are not measures for the implementation of acts of the Commission. Nevertheless, the Italian authorities are clearly free to decide whether or not to take into account the information and suggestions received from the Commission. The Italian State could have requested Nutral to repay the aid unduly granted without the need for any intervention by the Commission; nor does the existence of acts of the Commission of the kind contested in this case oblige the Italian authorities to take action against Nutral. If the acts of the Commission are not binding on Italy, then they cannot, *a fortiori*, affect Nutral's legal position.

24. The only legal consequence for the Italian State which could arise from non-compliance with acts of the Commission of that kind would be the refusal by the Commission, in the decision clearing the accounts of the European Agricultural Guidance and Guarantee Fund (EAGGF), to bear responsibility for aid unduly granted which the national authorities have not sought to recover. In those circumstances, the act capable of being contested by means of an action for annulment would be the decision to clear the EAGGF accounts. As the Court of Justice has consistently held, communications to Member States concerning irregularities in the grant of aid, which are by nature preparatory acts, are not actionable. [14]

25. It may be concluded from the reasoning set out above that neither UCLAF's letter

14 — Judgments in Case 54/65 *Forges de Châtillon* v *High Authority* [1966] ECR 185 and *IBM* v *Commission*, cited above, paragraph 9.

SG(93) D/140.082 of 3 March 1993 nor the other measures linked to or associated with it possess the characteristics of an act of the Commission capable of forming the subject-matter of an action for annulment, since they cannot be regarded as decisions capable of directly affecting the applicant's legal position. Consequently, the decision of the Court of First Instance declaring the action inadmissible is entirely lawful, and that plea in the appeal should therefore be rejected.

26. Since the pleas invoked by the applicant in the appeal cannot be upheld, Nutral should be ordered to pay the costs, in accordance with Article 122 of the Rules of Procedure.

Conclusion

27. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order the appellant to pay the costs.