3. Orders the applicants to bear the costs of the action.

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 13 June 1972.

A. Van Houtte — Registrar

R. Lecourt — President

OPINION OF MR ADVOCATE-GENERAL DUTHEILLET DE LAMOTHE DELIVERED ON 14 JULY 1971[1]

Mr President,
Members of the Court,

Grands Moulins de Paris and the Compagnie d'Approvisionnement, de transport et de crédit are two big French undertakings, which are closely linked and specialize in trade in and the processing of cereals.

The origin of their dispute with the Community is as follows:

As a result of the devaluation of the franc in 1969, the Council decided, as one of various measures which it adopted concerning agriculture, that France should grant subsidies for imports of cereal products from the Member States and third countries and that the Commission should fix the amount of and the procedure for granting those subsidies. As regards common wheat and meslin, the amount was fixed first, on 22 August 1969, at FF 58.49 per metric ton and then, on 28 July 1970, at FF 44.43.

The applicants consider that, by fixing the subsidies at these amounts, the Commission infringed the provisions of the regulations of the Council empowering it to adopt such measures, and they sought various legal remedies to enable them to escape the pecuniary consequences which those measures might have for them.

To this end, the Compagnie d'Approvisionnement first tried to obtain the annulment of the Regulation of the Commission of 22 August 1969, in that it fixed the amount of the subsidy at FF 58.49, solely by means of an application for annulment lodged under Article 173 of the Treaty.

But, in its judgment of 16 April 1970 in Case 65/69 this Court dismissed that application as inadmissible on the ground that, as the contested measure was in the nature of a regulation and was not of individual concern to the applicant, the application provided for under Article 173 of the Treaty was not available to the undertaking concerned. Thereupon the latter and Grands Moulins lodged two successive applications before the Commission, the first of them concerning the implementation of the 1969 regulations, the second concerning the implementation of the 1970 regulations.

In these two applications those undertakings asked the Commission:

(1) to recognize their right to compensation for the damage caused them by the application of the regulations which, in their view, were unlawful,

(2) as a 'test case' as it were, to annul an import certificate issued by the French authorities and a decision taken by the same authorities settling their charges

1 — Translated from the French.

inasmuch as these documents were drawn up on the basis of the contested Community regulations.

The Commission rejected those two applications by a letter of 26 February 1971.
On 16 and 18 March 1971, the two undertakings lodged the present applications before this Court for:

(1) a declaration that the Commission incurred liability in respect of the applicants under the conditions laid down in the second paragraph of Article 215 on account of the damage caused them by the contested regulations which they consider as unlawful;

(2) the annulment of the decision resulting from the Commission's letter of 26 February 1971 and of the decisions rejecting their complaints implied, according to the applicants, by the absence for more than two months of a reply from the Commission to the complaints which they had lodged before it;

(3) annulment of the import certificate and of the discharge decision, which have already been contested before the Commission.

In accordance with the order of this Court of 9 June 1970, the Court must only examine the admissibility of these conclusions for the moment.
There are two aspects of this question of admissibility:

— first, with regard to the conclusions seeking a declaration by the Court that the Community incurred pecuniary liability in respect of the applicants;

— secondly, with regard to the other conclusions contained in the applications.

I

As regards the conclusions seeking recognition that the Community is pecuniarily liable to the applicants, the question of admissibility is approximately the same as the one considered before this Court yesterday by Mr Advocate-General Roemer in his Opinion in Case 5/71, *Aktien-Zuckerfabrik Schöppenstedt* v *Council of the European Communities*.
The solution which he proposed to this Court, namely to recognize the application for compensation as admissible, even though it questions the legality of a regulation, appears to emerge even more clearly in the present case than in the Zuckerfabrik Case.
In the latter case, the regulation which it is claimed is unlawful is a regulation of the Council. As these regulations are *sui generis*, this makes it difficult to apply to them the traditional distinctions made by our national systems of law between primary and subordinate legislation and complicates the problem.
That difficulty does not arise in the present case in which the contested regulations are regulations of the Commission adopted under powers expressly conferred by the Council and are therefore unquestionably more subordinate legislation.
Accordingly, I adopt in their entirety all the considerations which Mr Advocate-General Roemer advanced in favour of the admissibility of the application for compensation in which the legality of a regulation is called in question and I shall merely, first, briefly refute the arguments put forward by the Commission in the present case, and secondly, add a general comment to those already elaborated before this Court by Mr Advocate-General Roemer.

A — Two arguments were advanced by the Commission in the present cases in support of the contention that the application for damages is inadmissible.

1. The first is that, in such a case, an application for damages based on the illegality of a regulation is in fact a 'disguised' application for annulment, designed to circumvent the provisions of Article 173, which strictly limit the opportunity for individuals to lodge applications for the annulment of regulations.
The Commission's contention is that, in

such a case, an application for damages has the same effect as an application for annulment and that, in consequence, to hold it to be admissible would be contrary to the intention of the authors of the Treaty, as expressed in Article 173, and to the general balance of the provisions relating to applications to the Court.

As Mr Advocate-General Roemer stated before this Court yesterday, there is no doubt that, in certain specific circumstances, an application for damages is inadmissible if its only purpose or effect is to obtain the annulment of a measure which has become definitive because it was not contested within the prescribed period. This occurs, for example, in the field of public administration in the case of an application for damages the object of which is to obtain payment of compensation which has been refused by a decision which has become definitive.

But this is in no way true of the two cases before this Court today.

In fact, what the Commission is asking you to rule is that the authors of Article 173, by restricting the opportunity for individuals to apply for annulment of a regulation, intended by implication but inevitably to prevent this Court from appraising the legality of those regulations on the application of an individual, regardless of the nature of the dispute brought before you.

Given such a wide interpretation, this argument seems to be exaggerated because, if it is correct, it would no longer be at all possible to understand the meaning or the purpose either of Article 184 of the Treaty, which lays down the general principle that an objection to a regulation on grounds of illegality or invalidity can be raised before this Court in any proceedings properly brought before the Court, or even of Article 177, which confers the right and, sometimes, imposes an obligation on the national court to refer to this Court the task of ruling on an objection raised before it on the ground that a Community measure is illegal.

In my view, the intention of the authors of the Treaty is, in fact, more readily discernible by comparing Articles 173 and 174.

The authors of the Treaty were clearly afraid of the possible consequences for the functioning of the Community of the annulment of Community regulations in view of

— first, the *erga omnes* effect of such annulments,

— secondly, the *retroactive* effect of those annulments.

In order to meet these two dangers they first restricted the conditions in which applications for annulment lodged by individuals are admissible in the second paragraph of Article 173 and secondly, in the second paragraph of Article 174, they empowered this Court to restrict the retroactive effect of its annulments.

On the other hand, the authors of the Treaty did not, in my view, in any way rule out the possibility for individuals to prevent a provision of a regulation from being applied in their particular case and from regulating the extent of their *subjective rights*.

This is the underlying purpose of both Article 177 and Article 184 of the Treaty. The application for damages resulting from Article 178 in conjunction with Article 215 is in fact an application for a declaration of *subjective rights*.

Contrary to the contention of the Commission, the effects of that application are not, in cases such as those which this Court must appraise today, the same as those which might be produced by an application for annulment.

First, it brings before the Court only an individual dispute the solution of which has no *erga omnes* effect.

Secondly, even though the solution of an individual dispute may entail reparation for damage which has already been suffered, the decision of the court in such cases does not nevertheless have, properly speaking, retroactive effect.

It does not appear, therefore, that the Commission's first argument should be upheld.

2. The Commission has also advanced a second argument, on which it laid special

emphasis at the hearing, probably because of the effects of the judgment of this Court of 28 April 1971 in the *Lütticke* case; this second argument is based on the provisions of Article 177 of the Treaty.

It can, in my view, be summarized as follows: the applicants have available a legal remedy for having a Community regulation declared illegal, as they claim it is: that means is to plead that illegality before their national court in an action against individual decisions of application. This Court will then have to appraise the validity of the Community regulation under the conditions laid down in Article 177 after a reference to it by order of the national court and any application for damages brought before you might then, and only then, be admissible.

In my opinion, this argument should be dismissed for several reasons:

(a) If the applicant is obliged to commence, prior to any application for damages, the 'long march' of Article 177, it is more than probable that, in view of the various levels at which he will have to bring his case in the national courts, he will only complete the course at a date at which he can be defeated by the limitation period of five years provided for under Article 43 of the Protocol on the Statute of the Court.

I cannot imagine, in fact, on what provision this Court could rely in order to find that an application for the annulment of an individual legal measure adopted by a national authority, brought before a national court, stops the limitation period under Article 43 from running in proceedings based on the liability of the Community brought before this Court.

(b) But there is more to be said.

It the Commission will excuse me from saying so, a shiver of apprehension went through me when I was listening to it the other day.

I wondered whether, without repeating the expression, the Commission was not endeavouring to make this Court establish in Community law the '*exception de recours parallèle*' ('objection of a parallel remedy') which had so many deplorable effects in French law that the combined efforts of the legislature and of the courts have virtually rendered it meaningless.

It was, the Court will no doubt remember, a construction developed in case-law by French lawyers of the Second Empire, according to which as an application for annulment was of a 'alternative' nature, it was admissible only when the applicant had no 'parallel means of redress', in particular, no action in which the court had unlimited jurisdiction.

If I have understood correctly, the Commission would like this Court to apply the same principle but, so to speak, 'in reverse'. According to that principle an application for damages which calls in question the legality of a regulation is of an alternative nature and is, therefore, admissible only after the exhaustion of all other legal remedies whereby the validity of the regulation may be appraised.

I do not think this Court can adopt that argument.

(a) Search as one may, there is no provision in the Treaty which might even suggest that an application for a declaration of liability is only of an alternative nature.

(b) An arrangement of this kind would inevitably lead to those almost insoluble legal situations for which French lawyers who are, regrettably, very experienced in the subject, have coined the expression '*contrariétés de jugement*' ('*conflicting judgment*') resulting in a '*déni de justice*' ('*denial of justice*'). These are cases in which a party who has been referred from one court or jurisdiction to another finds that, owing to the rules of procedure or jurisdiction, no court can be found which will give a ruling on his case.

Such cases exist, or did exist, under the national legal systems. If proof of this is required, one need only recall the pressing circumstances which caused the German Bundestag in 1960 to redraft paragraph 17 of the law on the organization of the judicature, the Gerichtsverfassungsgesetz (paragraph 41 of the law on administrative proceedings, Verwaltungsgerichtordnung) and the French authorities to adopt, in 1959, a new Article 168 of the Code of Civil Procedure.

Clearly these cases arise even more frequently under a legal system and system of Courts as complex as that of the Community.
None of the arguments advanced by the Commission in the present case appear to me, therefore, to counteract those put to yesterday by Mr Advocate-General Roemer in favour of the admissibility of applications such as those now before this Court.

B — I should like to add a brief comment to the reasons relied upon by Mr Advocate-General Roemer.

On all issues of admissibility, it is essential, if unnecessary complications are to be avoided and if we wish a party to know which court to apply to in a dispute, to appraise the admissibility of an application solely on the basis of his conclusions, in other words, on the basis of what the applicant is seeking, without reference to the arguments on which he relies in support of his conclusions.
When the applicant is capable of submitting an application, when it is lodged within the prescribed period and when this Court is competent to grant him, where appropriate, what he asks, the application is admissible, regardless of the value or even the relevance of the arguments on which he relies.
In the present case, the Court has been asked within the prescribed period to order the Community to compensate the applicants for damage allegedly inflicted by its institutions.
This Court has jurisdiction and it alone in fact has jurisdiction to give a ruling on such conclusions.
Whether, in support of that application for damages, the applicants can properly claim the illegality of a Community regulation, whether this illegality exists and whether, if it is established, the Community can incur liability on account thereof are all questions which, in my view, are problems of substance but are irrelevant with regard to admissibility.
The position would be exactly the same if the action for damages were based on the possible liability of the Community, even in the absence of any illegality or wrongful act or omission, on account of the regulations which it had adopted.

II

It now remains for me to comment on the questions of admissibility raised by the other conclusions in the applications.

1. The conclusions for annulment of the import certificate and of the decision discharging that certificate seem to be inadmissible.
This Court is not competent to annul a measure adopted by a national administration even if that measure is adopted in implementation of Community provisions.
On the other hand, the conclusions directed against the letter in which the Commission refused to annul that import certificate and that decision to discharge it and against the failure of the Commission to reply to the requests submitted to the same effect by the applicants are, in my view, admissible.
I take the view that, even if the Commission, as it maintains, does not have jurisdiction to take the decisions asked of it, the Court on the other hand, has jurisdiction to appraise the validity of the view-point adopted by the Commission.

2. As regards the conclusions directed against the Commission's letter refusing the request for compensation I have some doubts as to their admissibility.
It may, in fact, be open to question whether the applicants have an interest in seeking the annulment of that refusal if, as I am suggesting, this Court rules in favour of the admissibility of the conclusions in which they request this Court directly to find the Community. There are two reasons for this:

(a) In contrast to certain national laws, Article 215 imposes no obligation to submit an administrative complaint to the Community authorities prior to the lodging of an application to the Court for damages;

(b) The only period of limitation or expiry which affect the lodging of such an

application is that laid down in Article 43 of the Protocol on the Statute of the Court of Justice.

If an application opposing a decision refusing compensation were accepted, would not this mean, in such circumstances, that the application to the Court would, improperly, become subject to the period of two months provided for under Article 173? My considered view is that none of these objections invalidates the application.

(a) In the first place, from the practical point of view it is desirable that parties who are claiming compensation should first of all approach the responsible Community authority before instituting proceedings and Article 43 expressly provides for such a step to be taken.
But this is clearly a right and not a duty.

(b) Secondly, if the application to the administrative authority interrupts the period of limitation laid down in Article 43, this interruption can only benefit the party concerned.
This Court expressly gave a ruling to that effect in its judgment of 14 July 1967 (*Firma E. Kampffmeyer and Thirteen Others* v *Commission of the EEC*) in which it applied the old axiom '*nul ne se forclot lui-même*' (no-one is barred by his own act).

3. There now remain the conclusions directed against what the applicants call the implied decision by the Commission rejecting their application for compensation.
These conclusions must first of all be redesignated.
The concept of an implied decision of refusal is provided for in the third paragraph of Article 35 of the ECSC Treaty but was not re-enacted in the EEC Treaty. Article 175 of the latter refers, in fact, to a different concept, that of failure to act.
The practical outcome is quite often the same but the two concepts are different, as this Court recalled only yesterday in its judgment in the *Komponistenverband* case. What has been referred to the Court under Article 175 of the EEC Treaty is the absence of a decision and not, as under Article 35 of the ECSC Treaty, an implied decision of refusal.
The conclusions on this point in the two applications must therefore, it seems to me, be interpreted as conclusions seeking a declaration that the Commission has failed to make its attitude known on applications for compensation.
In view of the indivisibility of Articles 173 and 175 of the Treaty, I take the view that these conclusions based on failure to take a decision are admissible for the same reasons as those which made me suggest earlier that this Court acknowledge the admissibility of the conclusions for the annulment of the decisions refusing compensation.

To summarize, my opinion, at the present stage of proceedings, is that:

— This Court should declare that all the conclusions in the applications are admissible, with the exception of those for annulment of the import certificate and of the decision discharging the said certificate;

— Costs should be reserved.