OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 10 March 1989 *

Mr President,
Members of the Court,

1. The company Roquette frères ('Roquette') asks the Court to award it compensation for the damage which it claims to have suffered as a result of being obliged to pay excessive monetary compensatory amounts in respect of exports of certain products. The high level of the monetary compensatory amounts for the products in question, namely those derived from maize starch, wheat starch and potato starch, was attributable to the calculation methods adopted in Commission Regulation No 652/76 of 24 March 1976, [1] which was declared invalid by the Court's judgment of 15 October 1980, delivered in response to a request for a preliminary ruling by the tribunal d'instance (District Court), Lille. [2] That regulation, it will be recalled, related to the fixing of monetary compensatory amounts granted on imports into France and charged on exports from France. The French court referred to this Court of Justice a number of questions concerning the method of calculating the monetary compensatory amounts for the abovementioned products, in proceedings brought by Roquette against the French customs administration.

2. The action now before the Court is based on the second paragraph of Article 215 of the EEC Treaty. Its object is therefore to establish non-contractual liability on the part of the Community.

3. Roquette's motive in using that means to obtain reparation for the alleged damage resulting from the excessive monetary compensatory amounts charged to it — whereas in principle the appropriate remedy for seeking repayment of Community levies overcharged by national authorities would be an action before the national court for compensation or for the recovery of sums improperly charged — is perfectly well known to the Court. When pronouncing the invalidity of the provisions of the Commission regulation implementing the incorrect method of calculating the monetary compensatory amounts, the Court stated, in its judgment of 15 October 1980, that

'the fact that the abovementioned provisions are invalid does not enable the charging or payment of monetary compensatory amounts by the national authorities on the basis of those provisions to be challenged as regards the period prior to the date of this judgment'. [3]

4. Therefore, not being permitted to challenge the overcharging of monetary compensatory amounts prior to 15 October 1980, Roquette seeks from this Court the

* Original language French

1 — Commission Regulation No 652/76 changing the monetary compensatory amounts following changes in exchange rates for the French franc, OJ L 79, 25.3.1976, p. 4

2 — Case 145/79 *Roquette* [1980] ECR 2917

3 — Case 145/79, *supra*, paragraph 53

award of compensation for the damage which it claims to have suffered as a result.

5. The Court is also aware that the path which has taken Roquette as far as bringing the present action to establish liability has been a long one. Initially, the applicant tried to avoid that part of the Court's judgment which limits the effects of the invalidity by asking the tribunal d'instance, Lille, to disregard it on the ground that it had no basis in law, in so far as the Court had made a ruling on a point not included in the questions referred to it by the national court. That approach was looked on favourably by the tribunal d'instance, Lille [4] and then by the cour d'appel (Court of Appeal), Douai, [5] before the Cour de cassation (Court of Cassation) quashed the latter court's judgment, taking the view that it had 'not attributed to the judgment of the Court of Justice of 15 October 1980 the effects which ought to flow from it' [6] and remitted the case to the cour d'appel, Amiens. The latter's judgment, dated 1 June 1987, [7] rejected Roquette's application for repayment, relying essentially on the authority of the decision of the Court of Justice regarding limitation of the effects of the invalidity of the Community provisions. It was after that final setback that Roquette resolved to bring before the Court an action founded on Article 215 of the Treaty.

6. There can be no question today of resuming the debate provoked by the Court's judgment of 15 October 1980 limiting the effects in time of the invalidity of a regulation established in preliminary-ruling proceedings. That is a *fait accompli* and it is appropriate simply to accept its consequences.

7. Roquette seeks compensation for damage which it puts at ECU 10 million. It comprises, according to the applicant, the sums paid in excess in respect of monetary compensatory amounts in France and the Federal Republic of Germany and also a loss of profit resulting from the levying of excessive monetary compensatory amounts.

8. The Commission has not expressly raised any objection or even expressed any reservation regarding the admissibility of Roquette's application or the possibility of its being time-barred under Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. That does not mean that it would have been inappropriate to raise the issue.

9. Thus, it might not have been entirely pointless to raise the question whether the application lodged at the Court Registry on 19 January 1987 relating to the loss associated with the monetary compensatory amounts charged before the date of the judgment establishing the invalidity of the method by which they were calculated, namely 15 October 1980, complies with the rule contained in the first sentence of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, according to which 'Proceedings against the Community in matters of non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto'.

10. The Court has stated that:

4 — Judgment of 15 July 1981, annex 4 to the application.

5 — Judgment of 19 January 1983, annex 5 to the application.

6 — Judgment of 10 December 1985, annex 6 to the application.

7 — Annex 7 to the application.

'The period of limitation which applies to proceedings in matters arising from the non-contractual liability of the Community . . . cannot begin before all the requirements governing the obligation to provide compensation for damage are satisfied and in particular before the damage to be made good has materialized'. [8]

If it is considered that in Roquette's case the damage to be made good materialized at the time when the remedy of the action for reimbursement, as a means of recovering the amounts overpaid, ceased to be available, that is to say on 15 October 1980 — the date of the judgment limiting the effects of the invalidity determined therein — then it may be concluded that, when the application was lodged, more than five years had elapsed since the occurrence of the alleged damage. I would also add that it is the date of the judgment of this Court alone which is decisive as regards materialization of that damage and not the date of the judgment of the French Cour de cassation censuring the decision of a lower court which had partially disregarded the judgment of this Court, or the date of the judgment of the cour d'appel, to which the case was subsequently remitted, rejecting the application for compensation. I adhere to the view that the authority attaching to the judgments of the Court of Justice is immanent in them *per se* and that it prevails as from delivery of the judgment itself without the need for any approval by any national court.

11. However, in the absence of any objection or even a reservation expressed by the Commission regarding observance of Article 43, it does not seem that the Court may state, of its own motion, that the action brought by Roquette is time-barred. The Court may indeed have said that

'the periods prescribed for instituting proceedings are mandatory and are not subject to the discretion of the parties or of the Court'. [9]

But there are no grounds for saying that the Court thereby assimilated the limitation period for actions to establish liability to the time-limit for instituting proceedings before the Court. To date it seems that this Court has never made an express pronouncement as to whether the expiry of the period within which proceedings must be instituted is a matter which may be raised by the Court of its own motion, and I would even be tempted to say that it has avoided doing so. With respect to actions to establish the liability of the ECSC, which are also time-barred 'after a period of five years from the occurrence of the event giving rise thereto' pursuant to Article 40 of the Protocol on the Statute of the Court of Justice of the ECSC and which might appear to be out of time in certain respects even though no objection was raised in that connection in the written procedure, Mr Advocate General Lagrange expressed the opinion that the time-limit for actions to establish non-contractual liability was not mandatory. He relied essentially on the example of French law, referring to Article 2223 of the code civil (Civil Code), according to which 'judges may not, where no party has done so, raise an objection based on limitation periods', and to the case-law of the administrative courts concerning the 'four-year limitation period'. However, this Court did not express a view on the point dealt with by its Advocate General, since after considering the substance of the applications it stated that:

8 — Judgment of 27 January 1982 in Case 51/81 *De Franceschi* [1982] ECR 117, paragraph 10

9 — Judgment of 12 December 1967 in Case 4/67 *Muller née Collignon* [1967] ECR 365

'since the applications have to be dismissed as unfounded . . . there is no need to rule on the question whether the claims made by the applicants are in part time-barred'. [10]

12. Admittedly, the circumstances are a little unusual in the present case, since the applicant took the initiative, in its application, to affirm that it had been lodged within the period prescribed by Article 43. [11] It does not seem to me, however, that the Court can deduce from that precaution taken by Roquette that an objection based on time-limits has been raised. The fact that an applicant asserts that his application is not time-barred, in order to forestall an objection in that regard by the opposite party which was not ultimately made, cannot in my view justify the conclusion that an objection based on time-limits has been raised. Moreover, one cannot fail to observe that despite the arguments expounded in the application concerning the limitation period, the Commission, which had notice of the content of the application, made no observation whatsoever on the matter in its defence or rejoinder. Finally, it must be borne in mind that, in response to the very precise questions put to him at the hearing, the Commission's agent did not at any time say that the defendant considered the application time-barred, but rather expressed his doubts as to the point at which time started running, mentioning the possibility that it began to run when the remedy of an action for reimbursement was regarded by the French courts as having been exhausted. The Commission's agent expressed the view, referring to the dicta of the Court concerning the mandatory nature of the time-limits for bringing proceedings, that the Court could itself raise the question of the action's being time-barred.

13. Whatever the case may be, consideration of the law at present in force in the Member States shows that only two of them allow a court to raise the issue of an action to establish the State's non-contractual liability being time-barred. And it must also be made clear that only Greek law provides, without restriction, that the issue of a time-bar may be raised by the court of its own motion. In Germany, the judge's right or obligation to draw a debtor's attention to the possibility of objecting that an action is time-barred — which has in fact provoked discussion regarding the duty of impartiality — appears to be seen as a manifestation of the judge's duty to safeguard the interests of the parties, which varies according to their circumstances. But it seems clear that in all the other Member States an objection that an action to establish liability on the part of the State might be time-barred cannot be raised by the court of its own motion. Therefore, having regard to the second paragraph of Article 215 of the EEC Treaty, according to which 'in the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage', I consider that in the absence of any common general principle to that effect the Court cannot of its own motion raise the question of the expiry of the period for bringing proceedings.

14. The terms of the application lodged by Roquette nevertheless raise doubts as to its admissibility, in so far as the alleged loss appears, to some degree, to be merged with the overcharging of monetary compensatory amounts and the remedy normally available for the recovery of amounts overcharged is an action for repayment brought before the national court, a remedy which the Court's

10 — Judgment of 13 July 1961 in Joined Cases 14, 16, 17, 20, 24, 26 and 27/60 and 1/61 *Meroni & Co. and Others* [1961] ECR 161, and Opinion of Mr Advocate General Lagrange, p. 172 *et seq.*, especially pp. 172 and 173.

11 — P. 26 of the application.

judgment of 15 October 1980 specifically removed from the traders concerned, including Roquette. In other words, is it not the case that under the cloak of an action to establish liability that company has brought an action for repayment which the Court's judgment, by limiting the effects of the invalidity of the regulation, prevented it from bringing?

15. I must clarify the point I am raising. I am not suggesting that an objection as to the availability of a parallel remedy might be made against Roquette's claim on the ground that the repayment of sums improperly charged by the national authorities in respect of monetary compensatory amounts is a matter reserved exclusively to the national courts. No one can be unaware of the fact that such inadmissibility, the basis of which was clearly set out in the Court's judgment of 27 January 1976 in *IBC*,[12] can only operate if proceedings by which satisfaction can be obtained are in fact pending before the national courts. Where the remedies available under national law do not afford the trader concerned effective protection of his rights, the objection of the availability of a parallel remedy cannot be countenanced, precisely because no parallel proceedings are in fact pending. That important reservation, emphasized by academic legal writers,[13] was expressed with particular clarity in the Court's judgments of 12 April 1984 in *Unifrex*[14] and of 26 February 1986 in *Krohn*.[15] Accordingly, it seems to me to be difficult to envisage the possibility of Roquette's application being held inadmissible by virtue of an objection as to the availability of a parallel remedy, since the Court's judgment of 15 October 1980 stated specifically that the finding of invalidity contained in it did not allow the charging of monetary compensatory amounts at an earlier stage to be challenged. It seems hardly conceivable that it should be argued that Roquette's action for repayment, masquerading as an action to establish liability, has not been brought before the proper court, the national court. I do not in fact see what action capable of effectively protecting its rights could be, or could have been, brought by Roquette before a national court, in view of the Court's decision to limit the effects of the finding of invalidity.

16. The undisputable fact nevertheless remains that, by its action to establish liability, Roquette seeks, in part, to obtain the payment of sums equal to the excess charge in respect of monetary compensatory amounts, whereas the Court's judgment of 15 October 1980 laid down that the charging of monetary compensatory amounts before the date of the judgment could not be challenged. That means that the action is liable to raise a more delicate problem of admissibility, this time in relation to the binding authority of the judgments of this Court.

17. However, it does not seem easy to determine to what extent that authority would prevent Roquette from bringing an action to establish non-contractual liability. The Court's order of 5 March 1986 in the *Wünsche* Case[16] applied the principle of *res judicata* to relations between the Court of Justice and a national court, which had submitted questions to and received answers from this Court, in most unusual circumstances. It will be recalled that the Verwaltungsgericht (Administrative Court), Frankfurt am Main, which had been provided with a preliminary ruling by judgment of 12 April 1984,[17] submitted

12 — Case 46/75 [1976] ECR 65

13 — R Joliet *Le droit institutionel des Communautés européennes*, 'Le contentieux', Faculté de droit, d'économie et de science sociale de Liège, p. 250 and G. Isaac *Droit communautaire général*, Masson, p. 268

14 — Case 281/82 [1984] ECR 1969, paragraphs 11 and 12

15 — Case 175/84 [1986] ECR 753, paragraph 27

16 — Case 69/85 [1986] ECR 947

17 — Case 345/82 *Wunsche Handelsgesellschaft* [1984] ECR 1995

further questions, in the same proceedings, casting doubt upon the very validity of that judgment. In reply, the Court first stated that:

'a judgment in which the Court gives a preliminary ruling on the interpretation or validity of an act of a Community institution conclusively determines a question or questions of Community law and is binding on the national court for the purposes of the decision to be given by it in the main proceedings'. [18]

The Court then stated:

'the authority of a preliminary ruling does not preclude the national court to which it is addressed from properly taking the view that it is necessary to make a further reference to the Court of Justice before giving judgment in the main proceedings'.

Then, clarifying the circumstances in which a further reference for a preliminary ruling may be made, the Court stated, referring to established case-law, that:

'such a procedure may be justified when the national court encounters difficulties in understanding or applying the judgment, when it refers a fresh question of law to the Court, or again when it submits new considerations which might lead the Court to give a different answer to the question submitted earlier'.

However, the Court finally stated that:

'it is not permissible to use the right to refer further questions to the Court as a means of contesting the validity of the judgment delivered previously, as this would call in question the allocation of jurisdiction as between national courts and the Court of Justice under Article 177 of the Treaty'. [19]

18. Thus, the case-law of the Court describes with sufficient clarity the authority of a preliminary ruling given by the Court as regards the court to which the judgment is addressed: that court is bound, as regards the decision to be given in the main proceedings, by the answer given to the question which it submitted. The circumstances of the present case do not allow the authority thus defined to be transposed outright. In this case a party to the main proceedings which gave rise to the Court's judgment of 15 October 1980 is now proceeding against a different defendant, on a clearly distinct legal basis and before the Court of Justice, which this time is the competent court for the main proceedings. May or must it be considered in those circumstances that the authority of the Court's judgment of 15 October 1980, relating to proceedings in which Roquette was suing the French customs administration before the tribunal d'instance, Lille, for recovery of sums overpaid, prevents that company from instituting proceedings before this Court to establish non-contractual liability on the part of the Commission of the European Communities? I believe that if the Court said that it did, the effect would be to approve a singularly far-reaching definition of the binding authority of preliminary rulings — a development which I view as inconceivable.

18 — Case 69/85, *supra*, paragraph 13.

19 — Ibid., paragraph 15.

19. In support of that view I should like to make an observation concerning the nature of the action to establish non-contractual liability before this Court. That action, whose autonomous nature the Court has emphasized on numerous occasions, cannot merge with an action for payment or reimbursement. As far as Community legislation on economic matters is concerned, the only precondition for the success of an action for reimbursement is that the provision on which the charge was based is invalid. Provided that such invalidity is established — and its effects are not limited to an exceptional extent — the right to full reimbursement of the undue payment is itself established. The position is different in an action to establish non-contractual liability before this Court, the success thereof being conditional upon much more stringent requirements, even where the alleged damage derives from the invalidity of the same piece of legislation. A trader who, purporting to bring an action to establish liability, seeks by that means to recover an undue payment will have to fulfil the requirements laid down in law relating to liability and not the less restrictive requirements applied to actions for payment or recovery. In particular he will have to establish much more than the mere invalidity of the legislation on which the charge was based. According to the case-law of this Court, liability cannot be incurred through the adoption of a legislative measure involving a choice of economic policy

'unless a sufficiently flagrant violation of a superior rule of law for the protection of the individual has occurred', [20]

and, more specifically, in relation to a legislative context characterized by a wide margin of discretion for the implementation of the common agricultural policy, only if the institution concerned has

'manifestly and gravely disregarded the limits on the exercise of its powers'. [21]

The manifest character of the invalidity of a piece of legislation having been established, compensation for a trader equivalent to the undue charges will not be automatically available since the Court has stated, regarding the requirement of gravity, that

'individuals may be required, in the sectors coming within the economic policy of the Community, to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void', [20]

and that, to qualify for compensation, the alleged damage must go beyond

'the bounds of the economic risks inherent in the sector concerned'. [22]

20 — Judgment of 2 December 1971 in Case 5/71 *Zuckerfabrik Schöppenstedt* [1971] ECR 975, paragraph 11

21 — Judgment of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL* [1978] ECR 1209, paragraph 6

22 — Judgment of 4 October 1979 in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier and Others* [1979] ECR 3091, paragraph 11

20. Therefore, it seems to me that an analysis which identifies, in an action to establish liability intended in part to obtain compensation for damage equal in amount to that of sums unduly paid in respect of monetary compensatory amounts, a disguised action for reimbursement disregards the real situation of the trader bringing the action. The trader, whatever he thinks, is, I may say, genuinely bringing a different action. His situation perfectly illustrates the autonomy of the action to establish liability, as it emerges from the case-law of this Court. By so doing, the trader in question is not challenging the authority of the judgment by which the Court held that he was not permitted to bring an action for reimbursement.

21. The foregoing observations thus lead me to conclude that the authority of the Court's ruling of 15 October 1980 is not called in question by Roquette's action and that the latter cannot be considered in any way inadmissible on that count.

22. However, if it could be conceived to be appropriate to make a finding of inadmissibility based on an objection as to parallel proceedings elsewhere or on the binding authority of preliminary rulings it would be for the Court to take the initiative to hold the action to be inadmissible, in so far as the Commission has not raised any objection or even expressed any reservation regarding the questions at issue. It follows very clearly from the Court's judgment in *Krohn, ante*, that the objection concerning parallel proceedings before another court is a mandatory bar to proceeding with a case. As regards the bar to proceeding based on the binding authority of preliminary rulings, it seems that the Court takes a similar view, even though, in the Court's orders, the reference to such authority is implied [23] or indirect. [24] But the Court should not declare the action inadmissible if it agrees with the analysis which I have expounded.

23. I shall now consider the substance of the application, as regards only the principle of liability. The foregoing considerations concerning the authority of the Court's judgments have already provided an opportunity for referring to the substantive conditions laid down in the decisions of the Court under which the legislative activity of the Community in the economic sphere, in particular in relation to the common agricultural policy, may give rise to non-contractual liability on its part.

24. It will be remembered that the Court has laid down the requirement that, in the first place, the alleged damage must result from

'a sufficiently flagrant violation of a superior rule of law for the protection of the individual'. [20]

25. The existence of a violation of law must be regarded as having been established since, in its judgment of 15 October 1980, the Court found that Commission Regulation No 652/76 was invalid as regards the fixing of monetary compensatory amounts for certain products. But a precise description of that breach must be given in order to see whether it manifestly infringed a superior rule of law for the protection of individuals. This will involve a more detailed analysis of the Court's reasoning.

23 — Order of 1 April 1987 in Joined Cases 159 and 267/84, 12 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraphs 3 and 4.

24 — Case 69/85, *supra*, see footnote 16.

20 — Judgment of 2 December 1971 in Case 5/71 *Zuckerfabrik Schöppenstedt* [1971] ECR 975, paragraph 11.

26. The Court was called upon to assess the validity of certain provisions of a Commission regulation which, by means of the request for a preliminary ruling, were challenged as regards the method of calculating the monetary compensatory amounts to be applied. In making that assessment, the Court had to define the scope of the technical rules which the Commission was required to observe. It took care to view those rules within the system of monetary compensatory amounts and against the background of the philosophy underlying that system, in relation to the common agricultural policy.

27. Thus, the Court stated that it was apparent from Regulation No 974/71 of the Council of 12 May 1971 [25] that:

'in relation both to basic products and to dependent products, the introduction of monetary compensatory amounts is intended to correct the effects of unstable variations in the rates of exchange which, within a system of organization of the markets in agricultural products based on common prices, are capable of causing disturbances in trade and in particular of jeopardizing the system of intervention laid down in respect of such products'.

The Court added that the introduction of the monetary compensatory amounts was essentially intended

'to maintain the system of single prices within the common organization of the agricultural markets, since that system of single prices, having regard to the objectives of such organizations, that is to maintain the standard of living of agricultural producers and to stabilize the markets, constitutes the foundation of the free movement of agricultural products within the Community'.

It stated, on the other hand, that the objective of their introduction

'is not and cannot be to provide additional protection for the markets in respect of the level of agricultural prices of one particular State in relation to the others, which would be incompatible with the uniformity sought'. [26]

28. I think it is important to place particular emphasis here on the close link described by the Court between monetary compensatory amounts on the one hand and, on the other, the free movement of agricultural products, the essential function of the former being to preserve the latter by means of the system of single prices.

29. Going on to analyse the scope of the provision of Regulation No 974/71 which relates specifically to the determination of the monetary compensatory amounts applicable to products derived from a base

25 — Regulation No 974/71 of the Council on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation for the currencies of certain Member States, OJ, English Special Edition 1971 (I), p. 257

26 — Case 145/79, *supra*, paragraph 11.

product, namely Article 2(2), the Court states that the Commission may only take into account

'the effect on the price of the dependent product of the monetary compensatory amounts applied to the basic product'. [27]

The Court concedes that the calculation of the incidence on the prices of dependent products of the monetary compensatory amount fixed for a basic product causes 'difficult technical and economic problems' [28] with regard to a large number of products and that therefore the Commission must be acknowledged to have a 'wide margin of discretion'. [28] In those circumstances, the fact that the monetary compensatory amount fixed for a processed product is not appropriate for a particular undertaking or group of undertakings does not constitute a basis for challenging it. However, the Court observes that

'if the result of the method of calculation employed is persistently to apply to processed products compensatory amounts the burden or, as the case may be, the benefit of which continually exceeds the amount necessary to take account of the incidence of the compensatory amount applicable to the basic product, the objective of the provisions establishing those amounts may no longer be deemed to be the neutralization of the effects of the currency fluctuations between the Member States'. [29]

The Court considers that, in such a case, 'the Commission no longer acts within its powers under Regulation No 974/71'. [29]

30. On the basis of those considerations, the Court concludes in the *Roquette* judgment, that Commission Regulation No 652/76 is invalid as regards the system of calculating monetary compensatory amounts for products derived from a single basic product such as maize or wheat, referring, for the reasons for that view, to the Court's judgments in *Providence agricole de la Champagne* [30] and *Maïseries de Beauce* [31] of the same date. Looking at those judgments, we see that they set a clear limit to the Commission's discretionary power regarding the incidence of the monetary compensatory amount applicable to the basic product on the prices of derived products. That limit is

'the ceiling which prevents the sum of the monetary compensatory amounts on the products derived from a certain quantity of basic product from exceeding the monetary compensatory amount on the quantity of the basic product from which they are obtained'. [32]

It was therefore that 'ceiling' which prompted the Court to conclude in *Roquette*

'that, by adopting for the calculation of monetary compensatory amounts . . . a system which results in establishing for the

27 — Ibid., paragraph 12.
28 — Ibid., paragraph 13.
29 — Ibid., paragraph 14.
30 — Judgment of 15 October 1980 in Case 4/79 [1980] ECR 2823.
31 — Judgment of 15 October 1980 in Case 109/79 [1980] ECR 2883.
32 — Case 4/79, *supra*, paragraph 32, and Case 109/79, *supra*, paragraph 32.

various products obtained by processing a given quantity of maize or wheat in a specific manufacturing process monetary compensatory amounts the sum of which amounts to a figure clearly in excess of that of the monetary compensatory amounts fixed for a given quantity of maize or wheat, the Commission has infringed Regulation No 974/71 and Article 43(3) of the Treaty'. [33]

31. You may have found my analysis of the Court's reasoning too detailed but I thought it important to make it clear that, according to the judgments of the Court, the technical provisions relating to the fixing of monetary compensatory amounts are closely linked with the principles on which the common agricultural policy is based. Indeed, since, in the Court's view, a technical provision of that kind relating to calculation of the monetary compensatory amounts can be interpreted only by strict reference to the principles which I have just mentioned, it becomes foreseeable that an infringement of that provision will be of more than slight importance having regard to those principles.

32. The invalidity determined by the Court, in the circumstances which I have just described, calls for a first observation. The illegality referred to appears fairly clear cut. The 'ceiling' rule seems to set a clear limit on the margin of discretion regarding the 'incidence' defined in Article 2(2) of Regulation No 974/71, and the same clarity is evident regarding infringement thereof. The incorrectness of the Commission's assessment in calculating the monetary compensatory amounts applicable to derived products could be discerned even by a non-specialist. It is patent, manifest. My view is in line with that expressed by Mr Advocate General Mayras when, in his Opinion in the *Providence agricole, Maïseries de Beauce* and *Roquette* cases, he said:

'Simple arithmetic shows that as soon as the sum of the amounts applied to all the products obtained from the processing of a single basic product exceeds that of the amounts applicable to that product there is a *manifest error*, not to say an arbitrary calculation, at variance with certain minimum requirements'. [34]

33. It is impossible not to compare the adjectives used by the Advocate General with those used by the Court in describing,

'in the context of Community provisions in which one of the chief features was the exercise of a wide discretion essential for the implementation of the common agricultural policy', [35]

the conditions under which the Community incurred liability. In the Court's judgment in *Dumortier*, it states that the Community

'did not incur liability unless the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers'. [35]

33 — Case 145/79, *supra*, paragraph 32

34 — Cases 4/79, 109/79 and 145/79, *supra*; Opinion, pp 2862 and 2863.

35 — Case 64/76, *supra*, paragraph 9.

And in *Amylum* the Court notes, regarding errors which rendered a Council regulation invalid, that:

'these were not errors of such gravity that it may be said that the conduct of the defendant institutions in this respect was verging on the arbitrary and was thus of such a kind as to involve the Community in non-contractual liability'. [36]

In a way, those two judgments define what must be understood, in relation to the Community activity in question, by 'serious breach'.

34. Even if account is taken — and account was taken by the Court — of the margin of discretion which the Commission must be recognized as enjoying, the illegal act done by it appears no less manifest. That description of it seems to be called for by the reasoning of the Court, and by the observations of the Advocate General which clarify it. Thus, I consider that the invalidity determined by the Court consisted in a serious unlawful act, a manifestly incorrect assessment on the part of the Commission.

35. May it be considered that that illegality is verging on the arbitrary, the conclusion which seems to be demanded by the Court's judgment in *Amylum*? I think that, now that the Community rules actually infringed have been identified, that question may be answered in the affirmative.

36 — Judgment of 5 December 1979 in Joined Cases 116 and 124/77 [1979] ECR 3497, paragraph 19.

36. The *Roquette* judgment refers expressly to an infringement of Regulation No 974/71 and of Article 43(3) of the Treaty.

37. The provisions of Regulation No 974/71 are essentially technical. In particular, Articles 1 and 2, mentioned in the judgment of 15 October 1980, dealt with the charging or grant of monetary compensatory amounts, the types of product to which they apply, and the method of evaluating the amounts in relation to the basic products and the derived products. Strictly speaking there is thus no question of 'superior rules of law' as defined in the case-law of the Court. The latter appears to adopt as such the principle of respect for vested rights, [37] the principle of the protection of legitimate expectations, [38] the principle of proportionality [39] and the principle of non-discrimination. [40] Breach of the abovementioned provisions of Regulation No 974/71 cannot, on the basis of their appearance alone, be compared with breach of one of those principles.

38. But in fact it does not seem possible, having regard to the Court's analysis in the *Roquette* judgment, to consider invalidity merely by reference to the particular appearance of the infringed provisions. Account being taken of the context of the introduction of the monetary compensatory amounts and the arrangements for fixing them, the illegality of the method of calculating them had direct repercussions on the foundations of the system. In other words, the objective of maintaining single prices was directly affected by the invalidity of the

37 — Judgment of 10 December 1975 in Joined Cases 95 to 98/74, 15 and 100/75 *Union nationale des coopératives agricoles de céréales and Others* [1975] ECR 1615.

38 — Judgment of 8 June 1977 in Case 97/76 *Merkur* [1977] ECR 1063.

39 — Judgment of 13 November 1973 in Joined Cases 63 to 69/72 *Werhahn Hansamühle* [1973] ECR 1229.

40 — Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL, supra.*

technical provisions of the regulation and the same applied to the principle of which it is one of the foundations, that of the free movement of agricultural products in the Community. It would seem relevant in that regard to cite a passage from the *Providence agricole* and *Maiseries de Beauce* judgments, under the heading of 'General considerations', in which the Court stated:

'Monetary compensatory amounts fixed at a level which clearly overcompensates for the margin between the prices expressed in national currency and those expressed in units of account by the application of representative rates of exchange (green rates of national currencies) would be contrary to the nature of monetary compensatory amounts as a temporary expedient and the requirement that their introduction should be strictly necessary, which is a condition of their lawfulness. Instead of constituting a means of maintaining so far as possible the system of single prices and thus the free circulation of agricultural products, they become obstacles to such free circulation which may be compared to charges having an effect equivalent to customs duties and which are incompatible with the objective which Article 43(3)(b) assigns to the common organization of the markets, namely that of ensuring conditions for trade within the Community similar to those existing in a national market'. [41]

Although that passage is not repeated in *Roquette*, the analysis contained in it may be regarded as being of a general character and as being perfectly valid in the context of that judgment, in particular where, in the second sentence, it describes the perverse effect of incorrectly fixed monetary compensatory amounts. Article 43(3) of the Treaty is, moreover, expressly mentioned in *Roquette* as having been infringed in that case. [42]

39. I therefore consider that the invalidity determined by the Court's judgment consisted in a serious breach not only of the technical provisions relating to the fixing of monetary compensatory amounts applicable to derived products but also, through them, of the principle of the free movement of agricultural products in the Community.

40. That principle is, of course, of fundamental importance in Community law. But does that mean that it can be included among the 'superior rules of law', the only rules whose infringement can give rise to liability on the part of the Community? Further hesitation is permissible if it is borne in mind that the superior rules in question must, according to the case-law of this Court, protect individuals. The specific function of protecting individuals inherent in the principle of the free movement of agricultural products can hardly be compared to that same function as embodied in principles such as those requiring respect for vested rights or protection of legitimate expectations or the principle of proportionality.

41. I consider, however, that such hesitation is of no great consequence in so far as the invalidity in question has directly and manifestly affected a principle which has been included by decisions of this Court amongst the 'superior rules of law for the protection of individuals', namely the principle of non-discrimination.

41 — Cases 4/79 and 109/79, *supra*, paragraph 25

42 — See paragraph 32 of the judgment

42. In so far as this Court's judgments of 15 October 1980 stated, with greater or lesser emphasis, that the incorrect fixing of monetary compensatory amounts resulted in their being excessive, the consequence of which was, in practical terms, that the system of single prices was jeopardized and veritable charges having equivalent effect were introduced, undermining the free movement of agricultural products, the emergence of distortion of trade between the Member States and differences of treatment as between traders is not fortuitous but inevitable, through the simple operation of the most elementary laws of economics.

43. The applicant company has pointed out that the Court expressly noted, in paragraph 52 of the *Roquette* judgment, the considerable distortion as between the various traders in the Community caused by 'the Commission's erring ways'.

44. In the paragraph in question, which is precisely the one in which the Court sets out the reasons for limiting in time the effects of the declaration of invalidity, the most that is to be found is a reference to distortion of competition, which Roquette regards as infringing the principle of non-discrimination. The Court states:

'the invalidity of the regulation in this case might give rise to the recovery of sums paid but not owed by the undertakings concerned in countries with depreciated currencies and by the national authorities in question in countries with hard currencies which, in view of the lack of uniformity of the relevant national legislation, would be capable of causing considerable differences in treatment, thereby causing further distortion in competition'.

45. It seems indeed that, in Roquette's view, by stating that the claims for reimbursement following the declaration of invalidity would be liable to cause further distortion of competition, the judgment implied that the overvalued monetary compensatory amounts, in themselves, had already caused such distortion.

46. That reference apart, the *Roquette* judgment does not, it is true, deal really explicitly with the distortions of competition as between traders in 'countries with depreciated currencies' and those in 'countries with hard currencies' resulting from the unlawful setting of the monetary compensatory amounts at too high a level. But it is also true that such distortions are, as I have said, overshadowed by the 'technical' illegalities noted by the Court. It may also be observed that Mr Advocate General Mayras was more explicit on that point than the Court was in its judgment. Thus he stated that

'The choice of the coefficient adopted for calculating the monetary compensatory amounts applicable to processed products *is not neutral from the point of view of trade.* The method adopted in the contested regulations necessarily entailed distortion in trade between Member States and thus constituted *discrimination between producers contrary to Article 43(3) of the Treaty.* A system which "overcompensates" for the effects of currency depreciation favours traders in countries with hard currencies at the expense of those in countries with soft currencies'. [43]

43 — Case 4/79, *supra*: paragraph II — 5, p. 2863.

The Advocate General devoted several pages of his Opinion to drawing attention to the discrimination between producers in countries with soft currencies and those in countries with hard currencies [44] before concluding that the method of calculating monetary compensatory amounts adopted by the Commission

'resulted in *increasing artificially exports of maize groats and meal from countries with hard currencies* . . . although the system was in fact intended to *prevent* artificial distortion in trade arising from currency fluctuations and not to cause or aggravate such distortion'. [45]

47. Thus, although the Court's judgment did not refer expressly to any breach of the principle of non-discrimination resulting from the illegalities specifically noted, the reality of such a breach seems to me to be hard to deny, and moreover is not contested by the Commission in the present proceedings.

48. Having regard to the rather narrow purpose of the introduction of monetary compensatory amounts, by comparison with maintenance of the system of single prices and the free movement of agricultural products in the Community, the Commission could not but be aware of the ineluctable effects, in terms of discrimination, of setting those amounts at too high a level. Thus, it may be considered that by applying a method for the calculation of monetary compensatory amounts which was manifestly incorrect for products derived from a single basic product, the Commission created distortions in trade between Member States and thereby discrimination between traders.

49. Naturally, it did not seek that result deliberately. Mr Advocate General Mayras reminded the Court in his Opinion that

'on being questioned by the Judge-Rapporteurs, the Commission recognized that it exercises its powers . . . in order to increase the protection provided by the levy for producers in countries with hard currencies against non-member countries, with the result that this increased protection was accompanied by distortion in intra-Community trade at the expense of countries with depreciated currencies'. [46]

It seems to me that the *Roquette* judgment made indirect reference to that 'misuse' of the monetary compensatory amounts system when the Court stated that

'its objective is not and cannot be to provide additional protection for markets in respect of the level of agricultural prices of one particular State in relation to the others, which would be incompatible with the uniformity sought'. [47]

50. Thus, the objective pursued, even if not dictated by caprice, was alien to the monetary compensatory amounts system. In those circumstances, I think that by purposely declining to observe the rules for

44 — Pages 2863 to 2867

45 — P 2867

46 — Ibid., p 2880.

47 — Case 145/79, *supra*, paragraph 11

the establishment and calculation of monetary compensatory amounts and thereby introducing, in full awareness of the situation, distortion into Community trade and discrimination between traders, the Commission indulged in conduct verging on the arbitrary, of the kind referred to in the Court's judgment in *Amylum*. [48]

51. In so far as the applicant has been content, in support of its claim for damages before this Court, to rely only on the finding of invalidity relating to the fact that the monetary compensatory amounts applicable to products derived from a single basic product exceeded the monetary compensatory amounts applicable to that product, [49] I need not consider the other findings of invalidity specific to maize starch, wheat starch and potato starch.

52. In order to answer the question whether the preconditions for establishing non-contractual liability on the part of the Community may be regarded as fulfilled, it is still necessary to consider certain information relating to the impact of the illegal measure. It must be remembered that, according to the case-law of the Court, Community liability in respect of economic measures presupposes that the institution concerned overstepped the limits of its powers in a manner which was not only manifest but was also serious. Seriousness entails breach of a 'superior rule' affecting 'a limited and clearly defined group of commercial operators' [23] and not 'very wide categories of traders', [50] the effects of the measure concerned on individual undertakings then being 'considerably lessened', and the damage alleged must go 'beyond the bounds of the economic risks inherent in the activities in the sector concerned'. [23]

53. On the question of the number of undertakings affected by the excessive monetary compensatory amounts arrived at by the method found by the Court to be illegal, the Commission has not contested the applicant's claim that it is very small. What is involved, it must be remembered, is a miscalculation of monetary compensatory amounts charged in respect of French exports and the parties agree that, in the event, five or six undertakings exporting cereals from France were affected, of which two, Providence agricole de Champagne and Maïseries de Beauce, secured reimbursement of the amounts overcharged. The Court is aware of the circumstances in which the French administrative courts took the view that they need not observe the limitation of the effects of the finding of invalidity. By way of comparison it may be observed that, in the cases regarding discriminatory abolition of the compulsory refunds in respect of maize groats and meal, this Court took the view that seven French undertakings and seven German undertakings, which accounted for all the producers of maize gritz in the Community, were a 'limited and clearly defined group of commercial operators' [51] and were therefore in a position to enforce the non-contractual liability of the Commission with respect to them.

48 — *Supra*.

49 — Application, p. 14.

23 — Order of 1 April 1987 in Joined Cases 159 and 267/84, 12 and 264/85 *Ainsworth and Others* v *Commission* [1987] ECR 1579, paragraphs 3 and 4.

50 — Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL*, *supra*, paragraph 7.

51 — Case 64/76, *supra*.

54. Thus, it cannot so far be said that Roquette does not form part of a limited and clearly defined group of starch exporters affected by distortions in competition resulting from the excessive level at which monetary compensatory amounts for exports from France were fixed.

55. It remains to be considered whether Roquette can claim a loss going beyond the limits of the risks inherent in business in the sector concerned. This appraisal must focus not on the detail of the alleged damage but, might I say, on its structure. The Court has postponed to a later stage of the proceedings, if it should prove necessary, the question of the precise evaluation of the damage. The Court must therefore, at the present time, concern itself with overall consideration of the main heads of damage, without going into detail regarding each.

56. It seems clear that the Court must reach its decision on the basis of the alleged damage to the extent to which it appears at least conceivable, not having, at this stage, been proved. Any other attitude would merely amount to confirming in advance the statements made by the plaintiffs in the actions to establish liability.

57. In that respect, the general description given by Roquette of the damage suffered by it seems to raise a number of problems. I refer here not to the damage arising from the excessive monetary compensatory amounts, in the strict sense, but to what Roquette describes as 'préjudice réel' in its application. That expression is, moreover, a little surprising in so far as it might give the impression that the excessive monetary compensatory amounts did not represent real damage to Roquette. But surprise gives way to puzzlement when one tries to appraise, as accurately as may be considered desirable, the nature of that 'real' damage. The Court has — as have I — been struck by the extreme difficulty experienced by Roquette in explaining what the real damage comprises, in defining that concept. It consisted in particular in a loss of profit resulting from Roquette's having been doubly penalized by comparison with its competitors, in so far as the setting of the monetary compensatory amounts at too high a level had a twofold effect, first by being charged to French exporters, to their detriment, and then by being paid to traders in Member States with hard currencies, to their advantage. Even if the genuineness of that twofold effect is left unchallenged, it is hard to see how it could lead to a loss of profit.

58. However, a number of clarifications, albeit of a somewhat summary nature, given in response to questions asked at the hearing, together with a rather brief passage in the application, enable a better impression to be obtained of what the 'real damage' comprises. It derives from that fact that Roquette, whose cash flow was cut, to an extent greater than is permissible under Community law, by the monetary compensatory amounts, had to bring its prices into line with those of its competitors in Member States with hard currencies whose cash flow, swollen to an extent greater than is permissible under Community law by the monetary compensatory amounts, allowed them to set their prices abnormally low. Abnormally here means that the prices fixed by those traders had been influenced by their comfortable financial situation resulting from the excessive level of the monetary compensatory amounts. Roquette considers that its alignment with the prices thus fixed resulted in its losing profit.

59. Quite apart from the fact that in support of the few specific arguments which it devoted to this subject Roquette produced no document whatsoever substantiating its loss of profit, even in general terms, whereas numerous tables are attached to its application to prove some of the instances of overcharging, it is impossible not to entertain some doubts as to the plausibility of a loss of profit of the kind just described. A loss of profit is inconceivable unless it is presumed that the fixing of prices at a higher level, in the absence of an abnormally favourable cash flow enjoyed by competitors, leads almost certainly to greater profits for the traders concerned. However, the laws of economics provide no grounds for saying that the charging of higher prices, in a market open to competition, will secure higher profits. Such an effect will not be achieved unless the trader concerned maintains his volume of sales at the same level as that achieved with lower prices. If the turnover falls there is no certainty of higher earnings. And there is no reason to say that traders' turnover will remain stable if they charge higher prices. On the contrary, the probable result of an increase in prices is a fall in sales.

60. It is appropriate to bear in mind that at the hearing Roquette's representative did not deny that his company had achieved a considerable volume of exports during the period in which the excessive level of the monetary compensatory amounts made itself felt, which he said was attributable to 'pricing sacrifices during that period' and alignment with competitors' prices. He himself thus illustrated perfectly the link between price levels and turnover, conceding that a relatively low level of prices led to an increase in sales. In the same way, a price rise would probably not have left turnover unaffected, and there is therefore no certainty that it would have led to increased earnings.

61. Accordingly, I consider that the very foundation on which Roquette bases the loss of profit which it describes is very uncertain. It seems to me that account should be taken of that great uncertainty in deciding whether the damage alleged by Roquette exceeds the 'risks inherent' in its business activity.

62. Moreover, it must be observed that Roquette made absolutely no reply to the Commission's contention that, through some of its transactions, Roquette secured profits from the high level of the monetary compensatory amounts. The Commission stated that in respect of exports of starch from France to the United Kingdom and Ireland overvalued monetary compensatory amounts were paid to the exporters. According to the Commission, 'the very considerable currency fluctuations' [52] recorded in those Member States 'gave rise to monetary compensatory amounts in respect of exports to those countries', [52] an example being the currency variations in 1976. Quite apart from Regulation No 652/76, which the Court found to be invalid on 15 October 1980, it was the entire set of rules on monetary compensatory amounts, applying the calculation methods at the material time, which set them at an excessive level. That high level then benefited Roquette, the largest French exporter of starch, when it exported to the United Kingdom and Ireland, in so far as the currencies of those Member States were undergoing considerable fluctuations.

52 — Commission's rejoinder, p. 6.

63. It is not without importance, in that connection, that in 1976, according to the tables produced by the Commission, 25 359 tonnes of starch were exported from France to Germany, and at the same time 20 796 tonnes were exported to the United Kingdom and 12 081 to Ireland. And whilst some of the exports to Germany gave rise, with the entry into force of Regulation No 652/76, to overcharging of monetary compensatory amounts, it is clear that monetary compensatory amounts were paid in excess, under the Community rules in force, in respect of at least some of the exports to the United Kingdom and Ireland. The Commission's arguments, not challenged by Roquette and borne out by a number of objective findings, thus provoke considerable doubts in my mind as to the gravity of any damage suffered by the applicant.

64. Finally, the Court must take account, in assessing such gravity, of the economic significance, in the strict sense, of the inordinacy of the monetary compensatory amounts. The Commission's Agent explained at the hearing that the burden of the erroneous calculation, that is to say the difference between the correct figure and the incorrect figure, represented a little less than 10% of the monetary compensatory amount payable and that the maximum charge which could have been made at that time was 2.5% of the price of the raw material (maize), the monetary gap then being at its greatest. He added that when that gap was smaller, as it was for most of 1976, the unlawful charge borne by Roquette represented 1.3% of the price of the raw material. Roquette has not contested those assessments.

65. Comparisons between figures relating to different situations may be somewhat arbitrary. Subject to that reservation, I think it is useful to bear in mind that in the cases concerning liability in respect of the compulsory purchase of skimmed-milk powder held by intervention agencies and intended to be used in animal feeding-stuffs, the Court, which had decided in the preliminary rulings that the regulation creating that obligation was not valid, noted that:

'the effects of the regulation on the price of feeding-stuffs as a factor in the production costs of those buyers were only limited since that price rose by little more than 2%',

in other words an increase which was

'particularly small in comparison with the price increases resulting, during the period of application of the regulation, from the variations in the world market prices of feeding-stuffs containing protein, which were three or four times higher than the increase resulting from the obligation to purchase skimmed-milk powder'. [50]

The Court thus concluded that:

'the effects of the regulation on the profit-earning capacity of the undertakings did not ultimately exceed the bounds of the

50 — Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL*, *supra*, paragraph 7

economic risks inherent in the activities of the agricultural sectors concerned'. [50]

66. On the other hand, in the case of *Ireks-Arkady*[53] the Court took the view that the alleged damage had exceeded the bounds of those risks in so far as the abolition of the refunds for meal had benefited starch by between 6.3 and 8.6%.

67. Thus, it appears that illegality whose economic repercussions, as a percentage of the price of the agricultural product concerned, vary between 1.3 and 2.5% is, prima facie, closer to the cases in which the Court has held that there was no damage going beyond the bounds of the economic risks inherent in the sector in question than to those cases in which it decided that such damage had been suffered.

68. Admittedly, appraisal of the economic significance of the illegality determined in the present case requires the percentage at issue here to be placed in the context of the number of traders concerned. It is true that, since they are few, it cannot be asserted that there was no damage going beyond the bounds of the inherent economic risks. But I think that the assessment to be made must also take account of the considerable uncertainty surrounding the very plausibility of the loss of profit purportedly suffered by Roquette and of the probability of profits also made by that company from the higher level of monetary compensatory amounts. If those factors are taken into account, it seems to me that Roquette can hardly claim to have suffered a loss going beyond the bounds of the economic risks inherent in its business, even if the group of traders affected by the over-high monetary compensatory amounts, namely the French starch exporters, is very small. On the basis of the information so far produced to the Court, I do not think it is possible, otherwise than by relying on mere assertions, to conclude that the alleged damage exceeded those bounds and therefore to decide that the Community has incurred liability.

69. I shall therefore summarize my reasoning by saying that, although the Commission's breach of the principle of non-discrimination was manifest and was committed knowingly, thus indicating that that institution's conduct verged on the arbitrary, it was not, on the other hand, of sufficient gravity as far as the traders affected were concerned, to render the Community liable.

70. It is undeniable that such a conclusion can do nothing to remove the economic disadvantage suffered by certain traders, including Roquette, as a result of the Court's judgment of 15 October 1980. The fact nevertheless remains that the principles governing the Community's non-contractual liability in relation to the common agricultural policy, which have been expounded clearly in the decisions of the Court and are perfectly well known, do not provide scope for the reparation of all damage suffered. To qualify for compensation, the damage must be particularly serious; but that is not the case here and, it must be pointed out, it would not be the case even if there were rules imposing liability without fault. This was properly emphasized in the Court's judgment of 6 December 1984 in *Biovilac.*[54]

50 — Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL*, *supra*, paragraph 7.

53 — Judgment of 4 October 1979 in Case 238/78 [1979] ECR 2955.

54 — Case 59/83 [1984] ECR 4057, paragraphs 28 and 29.

Consequently, although my assessment might, at the end of the day, seem hard on the traders concerned, it does no more than give effect to the principles which the Court has so clearly expounded.

71. However, it seems to me that the manifest invalidity of Regulation No 652/76, categorically declared in the Court's judgment of 15 October 1980, gave Roquette reasonable grounds for bringing an action to establish the non-contractual liability of the Community, even though it cannot be concluded that any such liability was incurred in this case. Accordingly, the Court could, as it did in its judgment of 19 September 1985 in *Asteris*,[55] apply the first indent of Article 69(3) of the Rules of Procedure and order the parties to bear their own costs.

72. My Opinion is therefore that:

(i) the application should be dismissed;

(ii) the parties should be ordered to bear their own costs.

55 — Joined Cases 194 to 206/83 [1985] ECR 2815