# OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 6 MAY 1980 [1]

*Mr President,*
*Members of the Court,*

1. This Court has recently had occasion to consider and to answer some questions of interpretation of Community law raised by national courts in relation to the reimbursement of charges unduly paid by private citizens, which were imposed by municipal rules of law contrary to the EEC Treaty. I refer, in particular, to the two judgments of 27 February 1980 in Case 68/79, *Hans Just* [1980] ECR and of 27 March 1980 in Case 61/79, *Amministrazione delle Finanze* v *Denkavit Italiana* [1980] ECR. This case, however, originates in a claim for restitution of monies which the Intervention Board for Agricultural Produce (which is the British authority charged with managing the agricultural policy of the EEC in the United Kingdom) collected from private citizens by duly applying Community rules, the validity of which is now disputed following upon an preliminary ruling delivered by this Court.

Express Dairy Foods Limited, the plaintiff in the main action, an exporter of powdered whey from the United Kingdom to other Member States, brought an action before the High Court of Justice, Queen's Bench Division, Commercial Court, seeking an order against the said British intervention agency for repayment of sums paid by the plaintiff by way of monetary compensatory amounts for the whole period from 1 February 1973 to 7 August 1977. Those judicial proceedings are a consequence of the fact that this Court, by its judgment of 3 May 1978 in Case 131/77, *Milac* v *Hauptzollamt Saarbrücken* [1978] ECR 1041, ruled that Article 1 of Commission Regulation No 539/79 was invalid in so far as it fixed compensatory amounts in respect of trade in powdered whey between Member States for the period between 3 March and 4 August 1975. The plaintiff, considering that it may be inferred from that ruling that all the regulations having the same purpose in force between 1 February 1973 and 7 August 1977 may be regarded as invalid in so far as they provided for the application of monetary compensatory amounts to intra-Community trade in powdered whey, claims to be entitled to recover the sums which it unduly paid in terms of those regulations and to be paid interest thereon.

In its turn, the defendant Board pleaded that the Community rules in question, including Regulation No 539/75 which was declared invalid by the Court in the judgment cited above, were fully binding at the time at which the compensatory amounts in question were levied. The defendant accordingly denied that it was bound to repay the sums collected for the account of the Community in fulfilment of its clear Community

1 — Translated from the Italian.

obligation and stressed also that, at the time of the claim, it had already paid over those sums in accordance with the Commission's instructions.

In the context of that dispute, the English High Court, by order of 23 July 1979, referred to this Court for a preliminary ruling three questions seeking to ascertain, first, whether the finding of invalidity contained in the aforementioned *Milac* judgment must be extended to all the Commission regulations on the subject adopted between 1 February 1973 and 7 August 1977; secondly, whether, following upon a preliminary ruling holding invalid a regulation authorizing or requiring the levying of monetary compensatory amounts, the national authorities are bound, under Community law, to repay the sums collected, and if so, to what extent; and finally, whether any possible duty to make repayment also carries with it payment of interest, and if so, from what date and at what rate.

2. In regard to the first question, it is appropriate to recall at the outset that in the *Milac* judgment of 3 May 1978 the Court held Article 1 of Regulation No 539/75 of the Commission to be invalid because it was contrary to the basic regulation, No 974/71 of the Council. In fact, Article 1 (2) (b) of the latter regulation authorized the introduction of monetary compensatory amounts only for products the price of which depends on that of products for which intervention arrangements have been provided. In the case of powdered whey, since it is a product to which intervention measures do not apply, it would have been necessary — in order to make lawful the introduction of monetary compensatory amounts — that its price be dependent upon that of skimmed-milk powder. The Court, however, held that no such dependence existed. It may therefore be said that the invalidity of the said provision of Regulation No 539/75 was a consequence of the fact that the price of skimmed-milk powder has no effect upon the price of powdered whey.

That said, it should be emphasized that, as the Commission conceded in the course of the present proceedings, the same consideration applies for all provisions having the same object contained in the other regulations of the Commission and relating to periods between 1 February 1973 and 7 August 1977. It would therefore not be warranted to test those provisions by a different yardstick from that applied to the said Article 1 of Regulation No 539/75, which has been declared invalid.

The Commission agrees on this point and submits that all national courts will be bound to apply the *ratio decidendi* of the said *Milac* judgment in accordance with the essential aim of Article 177, namely, that of seeking to ensure uniformity in the interpretation and application of Community law in all Member States. That accords with the view expressed by Mr Advocate General Warner in his opinion delivered in Case 112/76, *Manzoni* v *Fonds National de Retraite des Ouvriers Mineurs* [1977] ECR 1647 at p. 1662 ff., that the rule of *stare decisis*, which concerns not simply the operative part of a judgment but, more generally, its *ratio decidendi*, applies to preliminary rulings. Consequently, principles laid down in a judgment of that kind would apply even to facts which are not identical to those

of the case in which the said principles were formulated.

In my opinion, it is not necessary, in order to answer the first question, to reach a conclusion on this point since the national court has confined itself to asking whether in the light of the said *Milac* judgment all the regulations of the Commission on the same subject but relating to various periods between 1 February 1973 and 7 August 1977 are invalid in so far as they fix compensatory amounts to be applied to trade in powdered whey. The Court is in a position to make a declaration of that invalidity on the basis of the available facts, it being completely undisputed that the factual position is the same as that established in the *Milac* case (that is to say, that throughout the period from 1 February 1973 to 7 August 1977 the price of skimmed-milk powder had no effect upon the price of powdered whey) and that the same legal reasoning applies as that from which the decision in the *Milac* case arose. It thus appears to me that, irrespective of the arguments concerned with the general or indirect effect of judgments such as that delivered on 3 May 1978, the Court may refer to the arguments upheld in the decision in the *Milac* case (or reiterate the grounds for the latter) in order to be in a position to declare invalid all the provisions in question.

3. The second question submitted for a preliminary ruling is concerned with whether a duty to make repayment is incumbent upon national bodies which have levied monetary compensatory amounts on the basis of Community rules subsequently declared invalid, and if so , with the scope of that duty.

In order to answer that question it is necessary to clarify at the outset the nature of the personal right which is claimed by the party seeking repayment of those amounts. Indeed, no right to compensation for loss or damage caused by the charge may be claimed as against the national bodies which imposed it — and correspondingly no obligation to pay compensation may be considered as incumbent on them — for the simple reason that the levying of the amount, which took place on the basis of Community regulations in force, is a wholly lawful, or rather, mandatory act, since those regulations are binding until declared invalid. It is to be observed that liability may attach to a State in consequence of acts or behaviour provided for under Community rules in so far as the national authorities have not applied or have misapplied those rules. But — as I observed in my opinion of 23 January 1979 in Case 101/78, *Granaria* v *Hoofdproduktschap voor Akkerbouwprodukten* [1979] ECR 623 — the situation is wholly different where a Member State has correctly applied Community regulations, which are in force, albeit defective, from the moment when a Community measure, vitiated by an irregularity such as to give rise to its annulment or to a declaration of its invalidity in a preliminary ruling, comes into effect with regard to the persons concerned until this Court delivers its judgment.

For that reason, had this case taken the form of an action for damages having as its basis an alleged liability for an unlawful act on the part of the national authority, it would undoubtedly be necessary to regard such a claim as unfounded and it would only remain to

ascertain whether, and if so, subject to what conditions, liability might attach to the Commission.

But in truth one who seeks repayment of sums paid to national bodies by virtue of Community rules which are subsequently declared invalid is claiming only the right to restitution of undue payment. The corresponding duty of the body which received the sum does not in the least presuppose that its collection was illegal and that is different from what occurs in a case of extra-contractual liability for damages. That duty is connected with the mere fact that, failing restitution, there would be an unjust enrichment of the party subject to the duty.

That said, it remains to be seen whether relevance attaches to the fact that a State body has unduly levied certain sums, not in the interest of the State itself, but for the account of the Community, to which the sums had to be credited. It might be thought that, in cases of that kind, there is an unjustified enrichment of the Community inasmuch as the Member State, acting in the exercise of powers binding upon it, has performed a mere executive function linking the body imposing the charge and the passive subject of the charge. If that point of view were accepted there could be no talk of a duty of restitution being incumbent upon the State. Those having a right to reimbursement would have to seek it directly from the Commission by asserting its liability for having adopted the provision, subsequently recognized as invalid, which provided the basis for the imposition of the charge by the Member State. And that, in substance, is the defence of the defendant body in the present case.

In practice, a system permitting reimbursement to be claimed from a Community body would offer the advantage of avoiding differences in treatment between citizens, who may be nationals of different Member States, when they seek to remove the adverse effects on them of invalid Community rules. It would, moreover, avoid disputes between national intervention bodies and the Commission in relation to the satisfaction of the credits which the former claim as against the latter after reimbursing individuals sums which, in the time intervening, have already been credited or paid to the Commission.

However, the case-law of the Court has made clear that it is not open to persons concerned to claim directly from the Community reimbursement of sums paid on the basis of Community regulations the application of which is called in question.

In its judgment of 25 October 1972 in Case 96/71, *Haegeman* v *Commission* [1972] ECR 1005 the Court decided an application by an undertaking which sought, *inter alia,* restitution of sums which it considered the national authorities had wrongly levied on the basis of regulations of the Commission (concerning the Community's "own resources") which the applicant maintained did not apply in its case. The Court held that not only disputes regarding the interpretation and validity of the said regulations but also claims for repayment of charges which the national authority had collected for the account of the Community on the basis of those

regulations came within the jurisdiction of the national courts. The Court accordingly dismissed the application brought by the undertaking concerned against the Commission with a view to obtaining both the annulment of the decision refusing to exempt it from a given charge, in the event of the Court's declaring the regulations in question to be inapplicable, and also restitution of the sums paid. For the purposes of the present dispute, it is of no moment that in the *Haegeman* case it was the interpretation given to a regulation by the national authorities and by the Commission which was in question and not the validity of the regulation. The claim was similarly for reimbursement of sums collected by the national authority for the account of the Community and the preliminary issue in every case is that of establishing whether the Community regulation presents a proper basis for the making of that charge. In short, what is important is the reason which led the Court to lay down that national courts have exclusive jurisdiction in claims for repayment of the kind indicated. The reason is to be discerned in the fact that the collection is carried out by national bodies under detailed rules governed by national laws, regulations and administrative provisions and subsequently the sums are put at the Commission's disposal. That observation applies also as regards the collection of the monetary compensatory amounts with which the present proceedings are concerned.

Another precedent which it is worth recalling is that contained in the judgment of 27 January 1976 in Case 46/75, *IBC* v *Commission* [1976] ECR 65. In it, the Court, accepting (for different reasons) what was suggested by Mr Advocate General Warner, regarded as inadmissible an action for compensation for the damage which the applicant claimed to have suffered as the result of the application by the Italian customs authorities of a regulation of the Commission on monetary compensatory amounts which it claimed to be unlawful. The Court held that the action concerned essentially the legality of the imposition of the sums in dispute by the Italian national authorities — who were responsible for the implementation of the Community provisions concerning monetary compensatory amounts — and sought reimbursement by the Community, instead of by the national authorities, of the sums which were said to have been improperly charged. As in the *Haegeman* judgment, here also the Court stated that under the Community rules in question "the actual assessment and imposition of the sums due are matters for the national authorities". The question of the legality of such implementing measures under Community law was, therefore, a matter for the competent national courts or tribunals to decide, using the procedures laid down under national law and after application, where appropriate, of Article 177 of the Treaty, in particular on questions concerning the validity of the Community provisions applied.

That judgment thus confirms the test laid down in the *Haegeman* judgment. And still to the same effect may be cited the judgment of 21 May 1976 in Case 26/74, *Roquette Frères* v *Commission* [1976] ECR 677. I would add that Mr Advocate General Trabucchi, in his opinion of 31 March 1976 in that case, had already deduced from the case-law of the Court that "disputes concerning the relationship created between a State authority and a national as a result of an undue payment claimed by the authority

when carrying out its duty to apply Community rules must first be resolved at national level, before the competent national court" (at p. 690).

That does not, of course, mean that the burden resulting from the reimbursement of charges which it has collected and already credited or paid to the Community may be placed upon the finances of the Member State. It must thus be considered that in making the repayment, just as in collecting the charge, the national authorities continue to act on behalf of the Community, which, logically, will have to bear the pecuniary burden mentioned above. But that concerns relations between Member States and the Commission at a stage which, logically, comes after the act of repayment.

4. I mentioned at the outset the judgments of 27 February 1980 in Case 68/79, *Just* and 27 March 1980 in Case 61/79, *Amministrazione delle Finanze* v *Denkavit Italiana,* and I observed that in those cases the question of repayment was tackled starting from a very different situation, namely the fact that the charges unduly paid had been imposed on individuals by the Member States in contravention of Community rules. That notwithstanding, it is possible to extract from both of the judgments matters which assist in the solution of the present case.

I refer in particular to the following statement which is contained in both the *Just* judgment and also, with minor variations, in the *Denkavit* judgment (paragraph 25 of each of the decisions): "In the absence of Community rules concerning the refunding of national charges which have been unlawfully levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which subjects derive from the direct effect of Community law". Moreover, the Court laid down two limits to the freedom of States to legislate on the matter: the procedural conditions may not be less favourable than those relating to similar actions of a domestic nature and in any case they may not make it impossible in practice to exercise rights conferred by Community law. Finally, the Court stated specifically that national rules which may take account of the passing-on to purchasers through the prices paid of the amount of the charges unduly paid by the undertaking, or which may take into consideration the damage suffered by discriminatory or protectionist fiscal measures through their restricting the volume of imports are compatible with that system.

It appears to me that, for various reasons, the standpoint recently adopted by the Court deserves to be borne in mind. First, although it is true that that standpoint was adopted with reference properly speaking to the case of repayment of national charges wrongly imposed, it does not appear to me to be arbitrary to extend its *ratio* to the reimbursement of monetary compensatory amounts wrongly levied by national authorities. In truth, the levying both of national charges which are contrary to the Treaty of Rome and of compensatory amounts which have proved to be unwarranted in the light of Community rules as interpreted by this

Court must be described as *unlawful* (and it must not be overlooked that, where the invalidity of a Community regulation has been established by the Court, it operates *ex tunc*). Secondly, the decisive factor, which is common to both cases, is the absence of a system of Community rules governing the arrangements for repayment. There is nothing to prevent such rules being introduced by the Community legislature — and, in fact, as I shall again have occasion to stress, it would turn out to be extremely useful — but since it is lacking it is necessary to apply the law of the Member States. They collect both domestic charges and monetary compensatory amounts, the former — if a percentage of the VAT is excepted — being for their own account and the latter for the account of the Community, whilst none the less establishing a dual relationship in two distinct phases: first with the individual who pays the amounts and thereafter with the Commission in the wider context of an accounting for the revenue and expenses of the common agricultural policy. Thirdly, — and herein lies the most difficult aspect of the present case — the right to reimbursement of the individual who has paid charges contrary to Community law arises directly from the rule of Community law which imposed the prohibition; and it therefore remains for national law to govern only the detailed arrangements for making restitution, in particular at the procedural level. It must be asked whether, in parallel, the right to recover sums unduly paid by way of monetary compensatory amounts also derives from the Community legal system. Emphasis might be placed upon the fact that, in view of the declaration of the invalidity of the Community regulation upon which the collection was based, the sum levied was collected by the Member State without there being any longer an initial foundation in Community law. And if from that it might be argued that, since the duty of the State to pay over the sum to the Commission has disappeared, there has occurred an unjust enrichment of the State itself which is to be considered in all respects (that is to say, from the point of view of its substantial effects as well and thus of the right to repayment) according to the provisions of its domestic law.

In my opinion, however, — apart from the difficulties which arise where the sum received has already been paid to the account of the Community — to accept that view would mean ignoring the fact that, at the time when the charge was levied, the obligation placed on the individual found its justification in a Community rule and that it would not be fair to leave the individual without a corresponding protection under Community law consisting in the benefit of the general principle of *repetitio indebiti*. I consider therefore that the personal right to recover sums paid by way of Community charges where the payments are partially or wholly undue derives from the Community legal system and in particular from the above-mentioned general principle, common to the Member States, which forms part of that system. The parallels with the *Just* and *Denkavit* cases must accordingly be recognized also in regard to the aim of judicial proceedings brought by one who is entitled to reimbursement of sums paid. Such proceedings are directed towards ensuring the protection of rights conferred on individuals by the

Community legal system and in particular, in this case, of the personal right under Community law to recovery of undue payment. Consequently, the limiting conditions listed by the Court in the *Just* and *Denkavit* judgments must also be confirmed.

In the context of the case-law of the Court on recovery of undue payment, it is appropriate, finally, also to recall the judgment of 5 March 1980 in Case 265/78, *H. Ferwerda BV* v *Produktschap voor Vee en Vlees* [1980] ECR. In that instance the question of interpretation which required to be resolved was related to a claim by a national administrative authority to reimbursement from an exporter of sums which the authority had wrongly paid by way of export refunds. Nevertheless, the Court referred to the category of "disputes in connexion with the reimbursement of amounts collected for the Community" in ruling that such disputes are a matter for the national courts and must be settled by them under national law in so far as no provisions of Community law are relevant (paragraph 10 of the decision). At the same time the Court safeguarded the application of Community rules having direct effect and re-affirmed the two restrictions with reference to national law which had been specified in the said *Just* judgment of 27 February 1980. The consistency of the Court's approach in regard to the reimbursement of sums which, by a Community yardstick, have been unduly levied (whether because they are in contravention of Community prohibitions, or on grounds of an erroneous interpretation of Community rules, or by the application of Community rules subsequently shown to be invalid) therefore appears to me to be clear.

5. Making reference to national law to determine the detailed conditions for recovery of undue payment — undue payment in the sense just now clarified — certainly does not represent the most fair or convenient solution. Both in the *Ferwerda* judgment (already cited) and in that delivered on 27 March 1980 in Joined Cases 66, 127 and 128/79, *Amministrazione delle Finanze* v *Società Meridionale Industria Salumi* [1980] ECR, the Court had occasion to observe that, whilst the system relating to the levying of financial charges of Community origin is dominated by the general principle of equality, we are, on the other hand, only at the start of the path which will lead to achieving non-discrimination between all Community traders in regard to the conditions of form and substance governing claims for recovery of undue payment. At the present time, given the differences in legal rules between one Member State and another, that inequality in treatment exists. The Council is exercising its power to regulate matters with lamentable slowness. In fact, only last year did Regulation No 1430/79 of 2 July 1979 introduce rules of this kind on reimbursement of import and export duties. The rules will come into force on 1 July next. That partial and restricted step is certainly not sufficient to correct the absurdities arising from the differences in the conditions laid down by national laws. I refer in particular to the well-known problem of limitation periods. However, it was stressed in the

same judgments of 5 March 1980 in Case 265/78, *Ferwerda* and of 27 March 1980 in Joined Cases 66, 127 and 128/79, *Amministrazione delle Finanze* v *Società Meridionale Industria Salumi* that "the necessarily technical and detailed nature of such provisions means that a judicial interpretation can only provide a partial remedy".

The Commission, moved by the desire to prevent the long periods of limitation in force in certain Member States from giving a special advantage to undertakings in those States, suggested in its observations that repayment of the compensatory amounts in question to a party who has not proved that he was not able to pass on the charge to customers should be allowed only where a claim has been duly made to the appropriate national authorities prior to 3 May 1978, the date of issue of the said *Milac* judgment, (without prejudice to the application of any shorter limitation period provided for by any applicable domestic law). According to the Commission, that solution might be based upon an analogous application of Article 174 of the EEC Treaty which allows the Court when upholding an application for annulment involving a Community regulation to restrict the temporal effects of its judgment.

It is to be observed at the outset that in that regard only one precedent exists, namely the well-known judgment of 8 April 1976 in Case 43/75, *Defrenne* v *Sabena* [1976] ECR 455 and in relation to it, it may be doubted whether it was Article 174 applied by analogy which persuaded the Court of the possibility of making the direct effects of Article 119 run from a certain date. More recently — in the already cited judgments of 27 March 1980 in *Denkavit Italiana* and *Amministrazione delle Finanze* v *Società Meridionale Industria Salumi* — the Court preferred to refer to "a general principle of legal certainty" to justify possible temporal restrictions on the possibility that individuals might avail themselves of an interpretative judgment in order to call in question prior legal relationships. That reference, however, allowed the Court to state the exceptional nature of the restrictions involved: there must be present the risk that the judgment may create "serious disturbance" as regards the past, affecting legal relationships created in good faith. It appears to me that in the present case any parallel with the *Defrenne* case is to be ruled out and that in any event the serious grounds indicated in the already-cited judgments of 27 March 1980 do not exist so as to warrant the solution which the Commission suggests.

I would add that the Commission, in mentioning the possibility that a large number of claims for repayment analogous to that advanced by Express Dairy Foods exist or may subsequently be submitted to the appropriate national bodies, suggested that there should be laid down a time-limit which should not be restricted to the particular case from which the present proceedings arose but would apply as regards all who have been wrongly constrained to pay the amounts in question by virtue of regulations adopted in regard to the subject-matter under discussion during the five years preceding the publication of the *Milac* judgment. That, however, would be equivalent in substance to the introduction of a limitation period *a posteriori* and by way of judicial pronouncement and that appears to me to be completely beyond the powers of the Court.

In its judgment of 15 July 1970 in Case 41/69, *ACF Chemiefarma* v *Commission* [1970] ECR 661 the Court laid down, at page 683, that "in order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance" and made clear that that power resided exclusively with the legislature. On that occasion the Advocate General's suggestion that a limitation period be placed upon the Commission's power to impose financial penalties in competition matters was rejected. *A fortiori* it appears to me that the introduction by this Court of a time-limit would not be permissible where the limit, instead of circumscribing the powers of a Community institution, was designed to have effect in an area governed by national law and to assume direct relevance in the field of the work of domestic courts.

6. It remains to consider the question of interest on the sums the repayment of which is claimed, which is the subject of the third request for a preliminary ruling. In this context I would recall that, in his opinion in the *Roquette Frères* case which I have already cited, Mr Advocate General Trabucchi had occasion to state that "payment of the interest on a capital sum unduly paid is strictly dependent upon the right to repayment of the principle itself. The determination of the amount due as interest on a contract or as default interest directly and necessarily depends on the amount of the sum unduly paid and on the period which has elapsed between the undue payment, or at least the final notice served by the body collecting the payment, and its repayment. ... An application for interest is subject to the same criteria as those laid down by the case-law of the Court in respect of the claim for repayment of the capital on which the interest is based. An application for interest must, therefore, be made in accordance with the same procedure as that applicable to recovery of the capital sum." The Court decided to that effect in its judgment in that case on 21 May 1976 by stating (at paragraph 12 of the decision) that "in the absence of provisions of Community law on this point, it is currently for the national authorities, in the case of reimbursement of dues improperly collected, to settle all ancillary questions relating to such reimbursement, such as any payment of interest". In my opinion, the answer to the question here under consideration must be strictly in accordance with that precedent.

7. For the reasons set out above I conclude by suggesting that the Court answer as follows the questions submitted for a preliminary ruling by the High Court of Justice, London, by order of 23 July 1979:

(1) All provisions fixing monetary compensatory amounts in respect of trade in powdered whey contained in regulations adopted by the Commission and applicable to the period between 1 February 1973 and 11 August 1977 are invalid inasmuch as they are contrary to Article 1 (2) (b) of Regulation No 974/71 of the Council.

(2) The national authorities empowered to levy the said amounts are bound, by virtue of a general principle of Community law, to reimburse sums levied on the basis of Community regulations which the Court of Justice has recognized as being invalid. In the absence of a system of Community rules defining the detailed conditions for making reimbursement, it is for the domestic legal order of each Member State to determine those conditions, to designate the courts having jurisdiction and to regulate the procedural aspects of proceedings whereby those concerned enforce their right to repayment of the sums unduly paid. National law may not make a less favourable provision therefor than that provided for proceedings designed to enforce similar rights of a domestic nature and must not in any event make impossible in practice the exercise of the right to recovery of sums unduly paid. Community law does not preclude account being taken of the fact that the burden of compensatory amounts unduly levied may have been passed on to other traders or to consumers; thus it would also be compatible with Community law to take into consideration, where appropriate, under the national law of the State concerned, the damage suffered by a party who has been obliged to pay the compensatory amounts, wherever they may be shown to have a restrictive effect on the volume of trade with other Member States.

(3) The rate of interest, and the date from which it is payable, on sums unduly paid, the repayment of which is sought, are governed by the legal system of the Member State the authorities of which have levied such sums in implementation of invalid Community regulations.