3. The question of compensation by a national agency for damage caused to private individuals by the agencies and servants of Member States, either by reason of an infringement of Community law or by an act or omission contrary to national law, in the application of Community law does not fall within the second paragraph of Article 215 of the Treaty and must be determined by the national courts in accordance with the national law of the Member State concerned.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 13 February 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 23 JANUARY 1979 [1]

Mr President,
Members of the Court,

1. For the second time in the context of the actions brought by the undertaking Granaria against the Hoofdproduktschap voor Akkerbouwprodukten (Central Board for Agricultural Products), the Netherlands intervention agency for agricultural products, the College van Beroep voor het Bedrijfsleven (Administrative court of last instance in matters of trade and industry) has submitted preliminary questions to the Court of Justice, thereby increasing the number of problems arising from Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feeding stuffs. It will be recalled that the earlier reference for a preliminary ruling gave rise to Case 116/76 which the Court settled with its judgment of 5 July 1977 ([1977] ECR 1247), declaring that the said regulation was void. On the basis of that judgment Granaria claimed

1 — Translated from the Italian.

that the provisions adopted by the Netherlands intervention agency on the basis of the regulation in question should be annulled and that the agency should be ordered to pay it compensation for the damage caused to it by those provisions.

I shall endeavour to summarize the numerous questions which the Netherlands court has now referred to the Court of Justice. That court wishes first to ascertain whether the national intervention agency was obliged to comply with Regulation No 563/76 until it was declared void, and if so, further, whether that agency was empowered to exempt Granaria from the obligation to comply with the conditions laid down in the regulation. In the event of the reply to the first question being in the affirmative and the reply to the second question on the other hand being in the negative, the Netherlands court requests the Court of Justice to state whether that situation gives rise to the direct and exclusive liability of the Community towards injured parties or whether the intervention agency of the Member State which implemented the regulation is also liable (Questions 3 and 4); it also asks the Court of Justice to rule as to whether such State, if it is held liable, may seek redress from the Community (Question 5). In the event of the Member State or its agency being considered to be liable, two further questions are submitted concerning the law to be applied (national law alone or in conjunction with the principles of Article 215 of the EEC Treaty?) and on the interpretation of Article 215 (under that provision must all kinds of damage be compensated?). The final question which the College van Beroep raises is whether, according to Community law, the costs of legal representation are to be regarded as damage suffered for which the injured party can in principle demand compensation or whether they constitute procedural costs which must be settled on the basis of national law.

The national court has stated in the order making the reference that it is of the opinion that the contested provisions have in fact caused damage to the plaintiff under the various heads adduced by it (in addition to the procedural costs: financial charges, administrative and staff expenses, loss of profits and loss of turnover). The national court, however, considers that, since such damage stems from an invalid provision enacted by the Community and applied by the national authority to the plaintiff, it is necessary first of all to settle the points concerning liability which it sets out as questions concerning the interpretation of Regulation No 563/76 and Article 215 of the EEC Treaty.

Before considering those questions it should be recalled that the Court of Justice, in its judgment of 25 May 1978 in Joined Cases 83 and 94/76, 5, 15 and 40/77, *Bayerische HNL Vermehrungsbetriebe GmbH & Co. KG and Others* v *Council and Commission* ([1978] ECR 1209), held that the finding that the said Regulation No 563/75 was void was insufficient for the Community to incur non-contractual liability within the meaning of the second paragraph of Article 215 of the EEC Treaty and that such liability was excluded since the Council, in adopting the provision, had not manifestly and gravely disregarded the limits on the exercise of its powers. The Court of Justice reached its decision on the basis of the characteristics of Regulation No 563/76 which affected very wide categories of traders and had only limited effects on the price of feeding-stuffs — and, more generally, on the profitability of the undertakings

concerned — having regard to the notable variations in world prices of feedingstuffs containing proteins during the same period.

2. Although the first question is worded as though it was intended to establish the true interpretation of Regulation No 563/76 it concerns in substance a problem of a general nature: namely, whether the national agencies charged with the application of Community regulations are obliged to observe them until they are declared invalid. It seems to me clear that the reply on this point must be in the affirmative. The fact that there are doubts as to the validity of a binding measure of a Community institution is certainly insufficient to justify an administrative agency of a Member State charged with the application of Community legislation refusing of its own motion to perform its duties arising from the measure in question. Moreover, this applies to any addressee of Community measures. Such a course is contrary to the principle of legal certainty which must be upheld within the Community system with the assistance of the agencies of all Member States and which is furthermore analogous to the fundamental requirement of the uniform interpretation and application of Community law throughout the entire territory of the Community.

The plaintiff in the main action maintains that the national administration can and must disregard unlawful Community provisions, at least in the case of a manifest infringement of the Treaty. In the present case it is unnecessary for the Court to pronounce on that argument since, in its judgment of 25 May 1978, it ruled that the infringement of the principles of Community law, which was the reason for the invalidity of the regulation in question, was not manifest. However, it seems to me relevant to recall that under the Treaties the invalidity of a Community measure cannot be established other than through proceedings before the Court of Justice (under Article 173 or 177 of the EEC Treaty) and that until such a ruling is given every measure is presumed to be lawful and has effect. In addition, it is clear that the Treaty does not make provision for a finding that a Community measure is void *ab initio.* Legal writers have referred to marginal cases of measures which are void *ab initio* but a manifest infringement of the Treaty is certainly not sufficient to constitute such a case, especially as all kinds of infringement of the Treaty or of any rule of law relating to its application are covered by Article 173 in the context of defects which provide grounds for an application for annulment. Consideration might be given, for example, to the case of the enactment of a measure by an institution which has no power whatever to do so or that of a measure which it is impossible to execute, but such consideration would entail a fruitless digression from the matter in point.

With regard to the second question, by which it is asked whether a national intervention agency in agricultural matters was empowered to exempt an undertaking from the obligation to comply with conditions imposed by the said Regulation No 563/76, the answer must be in the negative, as is recognized by the relevant undertaking itself. In fact no provision of the above-mentioned regulation conferred upon the national agencies the power to make derogations or grant exemptions. In the absence of a provision of that nature any exemptions would have been arbitrary and unjustified. Furthermore, the situation of the plaintiff undertaking was no different from that of the mass of undertakings to which the regulation applied and

accordingly its exemption from compliance with a rule in force, even if the regulation had invested the national agencies with power to grant such an exemption, would have been incompatible with the principle of equality of treatment of the persons concerned, to which an exception in the form of an exemption may be made only in exceptional situations.

3. By the third question the Netherlands court asks specifically whether the second paragraph of Article 215 of the EEC Treaty must be interpreted as meaning that, because the Community enacted the regulation which was then declared void by the Court of Justice, it is directly liable to a person who has suffered damage as a consequence of the normal application of that regulation by the competent national agency.

I shall begin by pointing out that the Court in its decisions (and in particular in the above-mentioned judgment of 25 May 1978, *HNL),* has already clarified the conditions which must be fulfilled in order that the Community may be held liable for damage arising from invalid legislation. I do not consider it necessary to repeat those conditions here.

In fact the court making the reference is not seeking fresh details regarding the principles evolved in the case-law of the Court of Justice concerning the liability of the Community for damage suffered by third parties as a result of the enactment of unlawful legislative measures. It wishes rather to ascertain whether an infringement of the kind which the Court found in its judgments of 5 July 1977 in Cases 114/76 *Bela-Mühle,* 166/76 *Granaria* and Joined Cases 119 and 120/76 *Ölmühle* and *Becher* ([1977] ECR 1211, 1247 and 1269) in relation to the said regulation of the Council may render liable not only the Community but also the Member States whose agencies applied the invalid Community legislation. This is made clear by the fourth question, which is closely connected to that preceding it in that it presupposes that the Community has been found directly and principally liable and merely hypothesizes as to whether a Member State may be held liable *in solidum* or *pro quota.*

In this connexion it should first of all be emphasized that the factors which give rise to liability on the part of the Communities and on the part of the Member States *are not identical:* The Community may be held liable for having *enacted* a measure of economic policy contrary to specified principles of Community law; such conduct entails the obligation laid down in the second paragraph of Article 215 to make good damage caused to individuals — provided, naturally, that the conditions specified most recently in the said judgment of 25 May 1978, *HNL,* are present. As regards the Member State, on the other hand, the question is whether it may be held jointly and severally liable for having *applied* the Community legislative measure which is contrary to those principles and which has subsequently been declared invalid by the Court. Such conduct is different and certainly falls outside the rule contained in the second paragraph of Article 215, which deals solely with damage caused by the Community institutions or by its servants in the performance of their duties.

This leads me to a second and important point: there is no provision of Community law governing the non-contractual liability of the Member States. It is, of course, conceivable that a Member State might be required to make good damage suffered by individuals as a

result of an unlawful, non-contractual measure which constitutes an infringement of Community provisions or is the result thereof; that liability, however, must be established by the national courts "in the context of the provisions of national law relating to the liability of the State" (although it is clear that the existence of an infringement of Community law must be ascertained on the basis of Community law). This was made clear by the Court of Justice in its judgment of 22 January 1976 in Case 60/75 *Russo* v *AIMA* ([1976] ECR 45, cf. in particular paragraph 9 of the judgment). It is accordingly necessary to establish within each national legal system whether the State is required to make good the damage caused by its failure to comply with Community measures; however, and I emphasize this point, it must be a failure for which such State is responsible. Such a situation is quite different from that in the present case.

In fact in the present case there has been no infringement of Community law by a Member State; accordingly, there is no reason to suppose that the State has incurred liability. I have already said that under Community law a binding measure of general application which contains a defect which may lead to its annulment (in particular, infringement of the Treaty or of any rule of law relating to its application) continues in force with regard to the persons concerned until it is declared invalid by the Court of Justice. This amounts to stating that an unlawful provision remains, notwithstanding its unlawfulness, binding until the time I have indicated. It is therefore impossible to refer to unlawful measures on the part of a Member State, or by an agency subject to its control, in relation to measures in implementation of Community provisions in force.

In setting out these considerations I have had regard to Community regulations which are not only unlawful but which, by way of hypothesis, may also give rise to liability on the part of the Community. It is clear that the same considerations apply *a fortiori* where, as in the present case, the unlawful and invalid regulation does not display characteristics which render the Community liable for the damage caused.

Ultimately, there are in this case a number of reasons for discounting the view that a Member State which has applied a Community regulation subsequently declared to be invalid is liable jointly and severally or *pro quota* with the Community. There is the difference between the courses of conduct of the Community and of the Member State which, it is maintained, are preconditions for liability; there is the difference between the legal orders which govern respectively the non-contractual liability of the Community and that of the State; finally, and most important, there is the fact that the Member State has not committed a wrongful act by implementing a regulation in force, even if it is defective because it is at variance with higher rules of Community law.

Two factors, however, appear to be relevant (although they do not affect the reply to be given to the national court). First: in certain cases the Member States, in applying a regulation, enjoy a margin of discretion; this is so above all where such application requires the enactment of national implementing or organizational provisions. The exercise of that discretionary power may lead a State to enact specific provisions which are at variance with Community law, even if only in the sense of misapplying it. It is clear that in that case it would no longer

be sufficient to maintain that those provisions were in implementation of a Community regulation for the State to be considered to be exempt from liability. In so far as implementing measures by a State give rise to infringements of Community law which may be imputed to specific options chosen by the State it may be held to be answerable therefor. In specific cases the solution to the above-mentioned problem of liability will depend, then, not only on establishing that there has been an infringement of Community law but also on the existence of the preconditions for the liability of the State under national law.

Secondly, even those measures which the Member State is obliged to enact under a regulation may be described as "implementing provisions" only whilst that regulation is in force and accordingly must be applied. When a regulation is declared invalid it ceases to have effect. Accordingly, the conduct of a Member State which continues thereafter to give effect to provisions adopted in implementation of that regulation may no longer be justified in terms of its obligation to respect Community provisions in force.

4. By the fifth question the Netherlands court asks whether the Member State (or the authority which it controls) has a right of redress against the Community if that State is held liable, whether wholly or in part, for damage arising from the application of the regulation. We have seen that it is necessary to rule out all liability on the part of the State in respect of its application of an invalid Community measure in view of the fact that this course is lawful and indeed mandatory. Accordingly, it is unnecessary to reply to this question. In fact a right of redress can only arise in relations between a "subsidiary" debtor, or a person jointly and severally liable, and the principal debtor; no such relationship exists in the present case.

The sixth question also concerns the supposed liability of a national intervention agency; the Netherlands court has considered the problem of the law governing such liability and is undecided as to whether Article 215 of the EEC Treaty or Netherlands domestic law applies. Since the foregoing point has been answered in the negative the question need no longer be considered. However, I have already had occasion to note that, when a Member State infringes Community law, any non-contractual liability towards individuals is governed by internal law; Community law applies only for the purposes of establishing the existence and characteristics of the infringement.

It is thus unnecessary to consider the seventh question, which was submitted only in case the alleged liability of the national intervention agency should have been appraised under Article 215 of the EEC Treaty.

Finally, I consider it necessary with regard to the eighth question to have regard for the circumstances which prompted the Netherlands court to submit it. In the case pending before that court, which turns chiefly on whether the Netherlands intervention agency bears any liability for having implemented Regulation No 563/76, the party which has suffered damage, the plaintiff, claims *inter alia* that it should receive a considerable sum in respect of the legal costs which it has incurred in its various proceedings contesting the implementation of the said regulation. In substance, the Netherlands court asks

whether the principles or provisions of the EEC Treaty imply that legal costs may be included in the damage to be made good or whether the point must be decided on the basis of the national law concerning legal costs. It would be simple to reply that there is no principle or provision in the EEC Treaty which governs the problem. However, it is perhaps appropriate to add that the point may be relevant if it is linked to the precondition of proceedings before a national court concerning the liability of the State (or of an authority controlled by it) towards individuals who have suffered damage as a result of an infringement of Community law. Within the framework of such proceedings the various aspects of liability must be appraised, as I have already said, in terms of domestic law; those aspects include establishing the categories of damage to be made good. It seems to me that a reply might be given in those terms to the eighth question referred to the Court of Justice by the Netherlands court.

5. Before I conclude I should like to comment on the suggestion of the Commission that the examination by the Court should extend to the whole problem of the effects of the declaration that Regulation No 563/76 is void. The Commission, in reliance on the application by analogy of the second paragraph of Article 174 of the EEC Treaty, which, as you know, authorizes the Court in the context of proceeding for annulment under Article 173 to state, if it considers it necessary, which of the effects of the regulation which it has declared void shall be considered as definitive, has invited the Court to take advantage of the present reference for a preliminary ruling to rule that on the basis of the general principles of Community law claims for compensation put forward by direct purchasers of skimmed-milk powder can be upheld only where such persons are able to show that the charges paid under the regulation which has been declared void have not been passed on to subsequent purchasers.

If the Commission's suggestion were adopted it would be necessary to consider complex problems of interpretations of the Treaty, in particular the problem of the relationship between Article 177 (and perhaps also Article 215), on the one hand, and the second paragraph of Article 174, on the other.

The application by analogy of the second paragraph of Article 174 in proceedings for a preliminary ruling would entail the determination by the Court of its own motion (that is, no such point having been raised by the national court) of the effects of the declaration in such proceedings that a regulation is void.

In any event, such applicability by analogy might be considered if a request for a preliminary ruling were made concerning the validity of the regulation. However, the present proceedings for a preliminary ruling, as we have seen, concern a quite different subject-matter. I should add that it does not appear to me appropriate to proceed beyond the framework traced by the questions of the national court in order to consider a problem of such moment, since the parties to the proceedings before the national court and other persons who would be qualified to intervene have not been given the opportunity of expressing their views on this aspect of the matter. In those circumstances it may in fact be considered that there is a full, formal impediment to consideration of the point raised by the Commission.

6. For the reasons which I have set out above I suggest in conclusion that the Court of Justice should answer the preliminary questions referred to it by the College van Beroep voor het Bedrijfsleven by its order of 31 March 1978 with the following ruling:

1. Until Council Regulation No 563/76 was declared void by the Court the national agencies charged with its implementation were obliged to refuse to issue a "protein" certificate to persons who did not fulfil the conditions prescribed therefor in that regulation.

2. In the absence of specific derogative provisions, which the said regulation in fact did not contain, the national authorities could not grant any exemption from compliance with the conditions laid down in that regulation.

3. The second paragraph of Article 215 of the EEC Treaty governs the non-contractual liability of the Community for damage caused by its institutions or by its servants in the performance of their duties, whilst the non-contractual liability of the Member States towards individuals in respect of measures for which such States are responsible is governed by domestic law, even if the damage is caused by an infringement of Community law by an agency of the State.

4. Where a Member State has implemented a Community regulation before the Court has declared it void such conduct does not constitute an infringement of the Treaty nor, therefore, can the State be held liable towards injured parties, either *in solidum* with the Community or even *pro quota.*

5. In the context of national proceedings to establish the liability of the State towards individuals for damage arising from an infringement of a provision of Community law the question whether the legal costs borne by such individuals in earlier proceedings form part of the damage to be made good must be settled according to national law.