Having regard to Regulation No 1009/67 of the Council of 18 December 1967, especially Article 37 (1);
Having regard to Regulation No 769/68 of the Council of 18 June 1968;
Having regard to the Protocol on the Statute of the Court of Justice of the European Communities;
Having regard to the Rules of Procedure of the Court of Justice of the European Communities;

THE COURT

hereby:

1. **Dismisses the application as unfounded;**

2. **Orders the applicant to bear the costs.**

Lecourt Mertens de Wilmars Kutscher

Donner Trabucchi Monaco Pescatore

Delivered in open court in Luxembourg on 2 December 1971.

A. Van Houtte
Registrar

R. Lecourt
President

OPINION OF THE ADVOCATE-GENERAL ROEMER DELIVERED ON 13 JULY 1971[1]

Mr President,
Members of the Court,

The case in which I am going to give my opinion today has its origin in the following facts.
Within the framework of the common agricultural policy a common organization of the market in sugar was created by Regulation No 1009/67 of the Council of 18 December 1967 (OJ No 308/1). This is characterized by a price system by means of which the agricultural population (more precisely sugar beet and sugar cane producers) should be guaranteed a fair income. As in other market organizations there is a price framework within which the prices for white sugar and raw sugar should be determined by the market. Target prices are provided for at the upper limit. Imports are brought up to their level by means of levies based on the threshold prices which are derived from the target prices having regard to the transport costs into the most distant consumer area (Article 12 of Regulation No 1009).

1 — Translated from the German.

The intervention prices constitute the lower limit. So that the market price does not fall below it the competent national agencies are obliged to purchase sugar at this level and to sell only at prices above the level of the intervention prices (Articles 9 and 10 of Regulation No 1009/67).

This system which has replaced earlier national organizations of the market has for the main part been applied as from 1 July 1968. Since to some extent it departs considerably from the national organizations of the market and their price levels which formerly applied (in the Federal Republic of Germany, for example, fixed prices, which had to be complied with, applied for sugar[1]), Article 37 of Regulation No 1009 provides as follows: 'The Council, acting in accordance with the voting procedure laid down in Article 43 (2) of the Treaty on a proposal from the Commission shall, in respect of sugar in stock on 1 July 1968, adopt provisions concerning the measures needed to offset the difference between national sugar prices and prices valid from 1 July 1968'. This was done in Regulation No 769/68 of 18 June 1968 (OJ 1968 L 143, p. 14). If the price of white sugar (calculated in a particular way) was lower on 30 June 1968 than the intervention price for white sugar applicable from 1 July 1968 in the area having the largest surplus, then in accordance with Article 1 of Regulation No 769 the undertakings in such a country with low prices had to pay a levy which brought the price applicable on 30 June 1968 up to the amount of the intervention price for white or raw sugar. In the event of the price of white sugar (again calculated in particular manner) applicable in a Member State on 30 June 1968 being higher than the derived intervention price applicable from 1 July 1968 'increased by the difference between the intervention price and the target price' (or in other words —because the derived intervention prices, apart from in Italy and French overseas departments, corresponded to the intervention price (Cf. Regulation No 432/68 OJ 1968 L 89, p. 4) in the event of the price being above the target price), the Member State concerned was authorized under Article 2 of Regulation No 769/68 to grant a compensatory amount on the basis of the difference between the price applicable on 30 June 1968 and 'the derived intervention price for white sugar or, as the case may be, raw sugar'.

This system was important also to the applicant which processed sugar beet into raw sugar. It apparently had on 30 June 1968 73 399 Doppelzentener, that is 7 339 900 kg of white sugar in stock for which it received on selling it on 1 July 1968 a total of DM 5 941 425.56. On the basis of the former net price for raw sugar (which was not fixed by law but could be derived from the former price for white sugar) this meant a loss of altogether 38 717.97 u.a. On a comparison with the new intervention price for raw sugar there was a loss of profit of as much as 48 976.35 u.a. However, the applicant was not entitled to receive a compensatory amount, because the former white sugar price (21.31 u.a. per 100 kg for quantities in excess of 100 metric tons) was not above the level of the new intervention price (21.23 u.a.), increased by the difference between the intervention price and the target price (1.12 u.a.), that is, it was not above the level of the target price (22.35 u.a.— Regulation No 430/68, OJ 968 L 89, p. 2). Aktien-Zuckerfabrik Schöppenstedt considers this unjust, because the former raw sugar price (which the undertaking —in the Council's view, questionably— derived from the former white sugar price and reckoned at 20.765 u.a.) was more than the intervention price (which was derived from the intervention price for white sugar and amounted to 18.50

1 — Gesetz über den Verkehr mit Zucker of 5 January 1951 in the version of 3 October 1951 and 9 August 1954; price regulation of 30 July 1958 as last amended by the regulation of 5 December 1967.

u.a.—Regulation No 767/68, OJ 1968 L 143, p. 11) applicable to raw sugar from 1 July 1968. The sugar factory takes the view that the system of Regulation No 769 is incompatible with Article 37 of Regulation No 1009/67 which created an obligation to grant a compensatory amount subject to certain conditions. It is wrong in its view to make everything turn on the variations in the white sugar price and there may be said to be discrimination because different standards have been selected for levies and compensatory amounts, that is for countries with low and high prices (in the one case the intervention price and in the other the target price). Zuckerfabrik Schöppenstedt sees these circumstances as constituting a wrongful act or omission. It wrote to the Council on 3 November 1970 and requested compensation in accordance with the second paragraph of Article 215 of the EEC Treaty for the damage caused to it by the defective regulation. Since the Council rejected this in a letter dated 17 December 1970 (received by the sugar factory on 21 December 1970), the matter was referred to the Court of Justice on 13 February 1971.

In its application Zuckerfabrik Schöppenstedt first of all asked that the Council be ordered to pay a sum of 48 076.35 u.a. (this amount corresponds to the difference between the former national price and the new intervention price). In the reply this claim was reduced and all that was claimed was an order to pay 38 852.78 u.a. (that is, a sum which was claimed to represent the *actual* minimum loss on the basis of the former German price). Further it was claimed in the alternative that the Council should be ordered to compensate the plaintiff for the damage caused by Regulation No 769/68 in some other way.

Against this the Council took the view that the application should be dismissed as inadmissible. In the alternative it claimed that it should be dismissed as unfounded.

Having regard to the complex nature of the matter and a number of disputed details only questions of admissibility were discussed in the oral proceedings on 29 June 1971. Accordingly my opinion is also limited now to this subject, but owing to the absence of any precise criteria the ground which it will cover will be comparatively extensive.

1. In the application admissibility is dealt with only from the point of view of observance of the limitation period. The Council has however not made any objections on this point. This is understandable in view of the fact that according to Article 43 of the Protocol on the Statute of the Court of Justice of the EEC proceedings in matters arising from non-contractual liability are barred after a period of five years from the occurrence of the event giving rise thereto and it is also comprehensible in view of the fact that after making claims for compensation through the official channels and their express rejection (which is the case here) application must be made to the Court of Justice before the expiration of two months after the rejection. There are indeed no difficulties in the present case with regard to these time-limits as an examination of the relevant facts show (publication of Regulation No 769/68 in the Official Journal of 25 June 1968; letter from the applicant to the Council of 3 November 1970; rejection of the claim for damages by a letter of the Council dated 17 December 1970 and lodging of the application at the Court on 13 February 1971).

The relevant time-limits have thus not been disregarded and the application cannot be dismissed as inadmissible on this ground.

2. The main problems in the present case arise in truth from the fact that it is a Community *regulation* which is claimed to be the cause of the damage. The question therefore first arises whether non-contractual liability can arise at all from legislative measures.

Nothing can be gained in this respect from the wording of Article 215 of the EEC Treaty since it states quite generally that in the case of non-contractual liability, the Community shall make good any damage caused by its institutions or by its servants in the performance of their duties. All that can be inferred from this is that liability for wrongful legislative measures is not expressly excluded.

According to the system of Article 215 it must in consequence be considered whether the reference to 'the general principles common to the laws of Member States' suggests exclusion of such liability. In this respect relevant work on comparative law provides the necessary key such as, for example, that carried out at the international conference on the liability of the State for the wrongful conduct of its institutions held at the Max-Planck Institute for foreign public law and international law in 1964.[1] The study of this problem should not be confined to the genuine *primary* legislative provisions which in several Member States (France, Belgium, Luxembourg and the Netherlands) are removed from review by the courts but for which other procedures which do not exist in the Communities apply and which ensure their conformity with constitutional law. Properly understood the law arising from *regulations* should also be brought into the inquiry and the question posed in a general way whether according to the law of Member States claims for compensation can arise from *legislative* measures. Seen in this light it is apparent that liability for breach of official duty in respect of legislative measures is quite possible in France and Belgium and that also in Italy and in the Federal Republic of Germany it is not excluded on principle. The only differences are of a technical nature in the legal structures such as quasi expropriation and Aufopferung (special damage suffered for the common good).[2]

These observations should suffice for Article 215 of the EEC Treaty, since it is widely recognized that the description of the methods of discovering the law contained in it should not be taken too literally. For Community law the criterion is not only rules which exist in *all* Member States, nor is the lowest common denominator determinative, nor does 'the rule of the lowest limit' apply.[3] Rather what is indicated—as always when judicial decisions are arrived at by references to general principles—a process of assessment in which above all the particular objectives of the Treaty and the peculiarities of the Community structure must be taken into account (and in which perhaps it is appropriate that the guideline be the best elaborated national rules).[4] In the present case the fact that parliamentary control in the Community is deficient should not be the only fact which is relevant. Referece may also be made to the fact that according to the general terms of Article 34 of the ECSC Treaty compensation for damage comes into question even on the annulment of *general* decisions (that is, legislative measures). Moreover regard must be had to the fact that Community regulations are in no way completely removed under the Treaty from challenge by private individuals affected (cf. Articles 177 and 184 of the EEC Treaty). Finally, the principle repeatedly stressed in the case-law should be remembered according to which provisions relating to the protection of rights (to which Article 215 undoubtedly belongs) should not be interpreted restrictively (Case 6/60, Rec.

1 — Cf. Max-Planck Institut für ausländisches öffentliches Recht und Völkerrecht, 'Beiträge zum ausländischen öffentlichen Recht und Völkerrecht', volume 44.
2 — Cf. ibid. p. 777 *et seq.*; Goffin, Common Market Law Review, Vol. I., p. 354 *et seq.*; in German law reference may moreover be made to a judgment of the Oberlandesgericht Hamburg of 13 November 1970, Die öffentliche Verwaltung, 1971, p. 238.
3 — Cf. Much, Max-Planck Institute ibid., p. 846; Heldrich, 'Europarecht', 1967, p. 349.
4 — Cf. Zweigert in Rabels Zeitschrift, Vol. 28, p. 611.

1960, p. 1189). In the present connexion this can be significant in respect of the fact that *incidental* control of the legality of regulations is not always guaranteed by means of Articles 177 and 184.

I therefore think that although liability attaching to the administration resulting from legislative activity is not known in all Member States, it is justified to recognize the principle as part of Community law,[1] because it is widely recognized and in certain cases even includes formal laws.[2]

3. From this it may further be asked whether the making of a claim for compensation on the basis of a regulation is excluded for so long as the regulation is valid, that is, is not annulled or so long as its invalidity has not been found. It seems justified to consider this question in the context of an extensive examination of admissibility even if there is no doubt that a similar problem was discussed in the case of *Plaumann* (Case 25/62 [1963] ECR 95) when the substance of that case was considered.

In this respect there are many who take the view that with regard to the provision of Article 34 of the ECSC Treaty the question should be answered in the affirmative at least as far as undertakings having a right of action are concerned, because there is reference in the said provision to 'equitable redress for the harm resulting directly from the decision or recommendation *declared void*'. In the EEC Treaty on the other hand (I have already stressed this in my opinion in Joined Cases 43, 45 and 48/59, Rec. 1960, p. 970) there is no similar express provision. There it appears obvious in this respect too to adopt criteria by reference above all to the principles of the national legal orders.

Studies of comparative law in fact show that at least in French, Belgian and German law the making of claims on the ground of the liability of the administration in respect of measures taken by public authorities is not dependent on the prior finding of their invalidity or their annulment.[3] In other Member States such a solution is obviously not available solely because of the fact that the ordinary courts having jurisdiction in claims for compensation do not have power to declare the acts of the administration invalid.[4] Since this consideration does not apply to Community law because there is here a court having jurisdiction both in actions for liability for breach of official duty and for actions for annulment, it could be established in the present connexion too that the dependence of an action for liability for breach of official duty on a previous finding of the invalidity of the act causing the damage is not a generally binding principle under Article 215 of the EEC Treaty.

Now it is true—I have already mentioned it and the Council has stressed it—that in the judgment in Case 25/62 [1963] ECR 95, the finding was made that an administrative measure which has not been annulled cannot of itself constitute a wrongful act. The context in which the finding was made makes it clear that it was in no way meant that it relates only to cases in which a decision could have been but was not contested, for the application for annulment made at the same time was likewise unsuccessful (that is, inadmissible). Accordingly it should appear obvious to proceed in the same way when claims for compensation are alleged to have their origin in regulations which cannot be

1 — Cf. Börner, Verhandlungen des 46. Deutschen Juristentages, Vol. II, p. G 37.
2 — Cf. abovementioned publication of the Max-Planck Institut with references to French, Belgian, German and Italian law on pp. 777, 841 and 850.
3 — Cf. Goffin in Common Market Law Review, Vol. I, p. 354 *et seq.*; Much op. cit. p. 749 the same observation is made.
4 — Cf. Jänicke, Max Planck Institute's publication, p. 875, with regard to the legal position in Italy and Luxembourg.

challenged at all by private individuals (or which can only be reviewed as the result proceeding under Articles 184 and 177, a procedure which is often not available in the absence of the relevant conditions).

However, it appears to me extremely doubtful that the case-law of the Court taken as a whole necessarily leads to this view. The strong criticism from many quarters of the finding in the *Plaumann* Case is well-known. May I refer only to the opinion which Ule gave at the 46th conference of German lawyers,[1] to the observations which Börner made on this occasion,[2] to the statements of Fusz,[3] the comment by von Bülow,[4] the opinion of Ganshof van der Meersch[5] and the already mentioned exposition by Goffin.[6] Goffin, in support of his criticism referred *inter alia* to the fact that the arguments put forward in the *Plaumann* judgment resulted in a shortening of the time-limit prescribed by Article 43 of the Protocol on the Statute of the Court of Justice of the EEC and moreover that it is not impossible for damage to arise or to be known only after the expiration of the time-limit. All critics are agreed that there is no principle corresponding to that in the *Plaumann* judgment which can be found in the legal systems of the Member States or in the EEC Treaty and in this connexion they stress the fact that Article 34 of the ECSC Treaty *expressly* lays down the contrary rule. As far as regulations are concerned it must moreover be observed that a prior finding of their invalidity (in so far as this is at all possible), namely in proceedings under Article 177 of the EEC Treaty, would mean a time-wasting detour without material gain and by reason of the long duration of legal proceedings in many cases the limitation period under Article 43 of the EEC Statute could not be prevented from expiring before the Court could give a relevant ruling.

Thus it is to be welcomed that recently —perhaps under the influence of the above criticism—a certain change in the case-law (which I had already said was desirable in my opinion in Joined Cases 106 and 107/73, *Töpfer* v *Commission* [1965] ECR 405) appears noticeable. I am thinking of the judgment referred to by the applicant in Case 4/69, *Lütticke* v *Commission of the European Communities*. We read there: 'The action for damages provided for in Articles 178 and 215 of the Treaty was included as an autonomous form of action, with a particular purpose to fulfil within the system of actions, and subject to conditions on its use by its specific nature. It would be contrary to the autonomy of this action as well as to the efficacy of the general system of the forms of action established by the Treaty to regard the action for damages as inadmissible because it in certain circumstances lead to a result similar to that of an action for failure to act brought under Article 175'. Even if these findings of the autonomy of the forms of action (which moreover are similarly present in the judgment in Joined Cases 9 and 12/60, Rec. 1961, p. 424) were made in a case in which an action for failure to act was conceivable, they are nevertheless equally important, in my opinion, in the present connexion. According to the system of legal protection of the Treaty there can in fact be no difference in principle in regard to a situation in which there is a measure open to challenge adopted by a public authority and alleged to having damaging effects. As regards applications for annulment, too, it may rather be said that they are distinguishable by their

1 — Verhandlungen des Deutschen Juristentages 1966, Vol. I, p. 32.
2 — Verhandlungen des 46. Deutschen Juristentages, Vol. II, p. G 37 and 49.
3 — Europarecht 1968, p. 370, Die öffentliche Verwaltung 1964, p. 579.
4 — Außenwirthschaftsdienst des Betriebsberaters 1963, p. 246.
5 — Pasicrisie belge 1966, p. 523.
6 — Common Market Law Review, Vol. I.

aim and purpose (annulment of a measure having effect *erga omnes*—which means extensive repercussions) and by their conditions from applications for compensation, which, more narrowly limited, aim only to compensate in the individual case and moreover depend on there being a wrongful act or omission.

Having regard to the more recent case-law on a similar question and because no general principle can be deduced that liability attaching to the administration by virtue of a measure adopted by it is only possible where there has been a previous finding of the invalidity of such measure, I therefore think that merely because the regulation allegedly causing damage is still extant in law, this does not mean that the application is inadmissible (or, from another point of view, unfounded).

4. A final objection to admissibility is as follows. The applicant is seeking in fact, this is the Council's opinion, not compensation for damage but price compensation according to criteria other than those laid down in Regulation No 769/68 and to establish an obligation on the part of the Community to pay the compensation instead of authorizing the Member States to do it. Its objective is thus the annulment of an existing set of rules and its replacement by another. Since, however, according to the Council, it is not possible for it to achieve this objective by a direct challenge to the said regulation, it cannot be allowed to seek the said result by means of an application for compensation. Moreover it must be borne in mind that in no case has the Court the power to require the Council to issue a particular body of rules (cf. Article 176 of the EEC Treaty). Since, according to the applicant's argument, this would be necessary in the present case to ascertain the damage, a further ground of inadmissibility of the application may be inferred.

In the first part of its objections the Council obviously refers to the phenomenon, equally known to national law, of the *disguised application for annulment* or, as Bülow once described it (ibid. p. 246), the *artful manipulation of the forms of action* ('Erschleichung des Rechtsweges'). This is said to be the case when the only objective of an application for compensation is the avoidance of the legal effects of a measure adopted by a public authority, in French law in particular in situations in which *individual* decisions (such as on the fixing of salaries and pensions) have not been challenged and in which it is later attempted to correct the financial effects of such measures by means of actions for compensation.[1] It was the same, too, to cite a case from our own case-law, in Case 59/65 [1966] ECR 543. Further, the judgment in Case 4/67 [1967] ECR 365 may be cited in this context.

On a closer examination, however, it is apparent that the case at present to be judged can scarcely be classified in this category. It cannot be said that the applicant is concerned in fact with the annulment of Regulation No 769/68 and the avoidance of its legal effects. The applicant is certainly not interested in the annulment of Regulation No 769/68 for this result would achieve nothing for it if the damage alleged to be caused to the applicant were not compensated. It is true the applicant seeks only financial compensation with regard to the particular effects of rules which in its view are inadequate and defective. It is not, on the other hand, seeking a general recasting of the contested transitional rules and, furthermore, this is not to be thought of as the necessary consequence of a judgment for compensation in favour of the applicant and the associated incidental finding of the invalidity of the regulation laid down by the Council. I therefore think that,

1 — Cf. Goffin, ibid, 357.

properly understood, in the present case there is nothing to be gained from the argument of a circumvention of annulment proceedings and that there is no disguised application for annulment which would be ruled out by reason of the subject matter of the applicant's criticism (a Community *regulation*).

As far as the second part of the Council's objections is concerned, that is, the claim that the assessment of the damage presupposes that the Court should lay down the criteria applicable to the price compensation and thus should interfere in the legislative discretion of the Council, it seems, as does the observation that instead of an authorization of the Member States an obligation on the part of the Community should be enacted, in the main to concern the *substance* of the application. This certainly applies to the question whether the correct application of Article 37 of the basic Regulation No 1009/67 and compliance with the principles of the Treaty require that price compensation be extended to situations such as exist in the case of the applicant. But it also applies to the question whether the Member States, on receiving appropriate extensive authorization from the Council, would have made use of such a possibility and whether the Council therefore, because it has excluded the possibility, is bound to make compensation. The dispute whether the applicant has suffered damage and how it should be assessed should be decided not now in the context of considering the question of admissibility but on considering the substance of the case. Moreover, it ought to be said that in proceedings for compensation the first matter is to establish the wrongful nature of the conduct of an official body and to decide whether prejudicial effects have arisen at all, that is whether damage can have been caused. If it is afterwards shown that the exact assessment of the damage is not possible without interfering in the legislative discretion of the defendant institution it is always possible to suspend judgment and to call upon the parties to determine the extent of the damage and the payment themselves. In principle however there is no objection to making a claim for compensation in such cases.

Thus the objection I have just considered cannot ultimately succeed with the result as a whole that there is nothing deriving from an extensive consideration of admissibility which precludes an examination of the substance of the case.

5. As regards the alternative claim made by the applicant that the Council be ordered to compensate otherwise for the damage caused by Regulation No 769/68, it needs actually only to be observed that it comes into question only if the principal claim is unsuccessful. Therefore this need not yet be gone into. However, it could be suggested that the objections made by the Council are probably well founded because the subject-matter of the claim is not specified, and because no particulars thereof or grounds therefor are given. The admissibility of the application is, however, not thereby brought into question as a whole.

6. Allow me to summarize my opinion:

Contrary to the view of the Council the admissibility of the application can in my view not be challenged. The Court should decide in its discretion whether the decision on admissibility of the application should be given in a special judgment or be given at the same time as the decision on the substance.