OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 27 October 1993 *

Mr President,
Members of the Court,

1. The Court once again has before it, following the three judgments of 15 October 1980, *Providence Agricole de la Champagne, Maïseries de Beauce* and *Roquette Frères*, [1] the *Société des Produits de Maïs* judgment of 27 February 1985, [2] and the *Fragd* judgment of 22 May 1985, [3] the difficult problem of the temporal effect of a finding, in the context of a reference for a preliminary ruling, that a Community regulation is invalid.

2. In 1980 the Court, applying the second paragraph of Article 174 of the EEC Treaty by analogy in such proceedings, held that the declaration that the regulation submitted for the Court's consideration was invalid had effect only from the date of the Court's judgment; monetary compensatory amounts ('MCA') wrongly paid or received prior that date could thus not give rise to a claim for repayment.

3. That '*ex nunc erga omnes*' effect is what the Commission, supporting the plaintiff in the main proceedings, once again [4] invites the Court to reconsider. For that reason it asks the plenary court to rule on the questions referred by the Finanzgericht Dusseldorf. [5]

4. It was once again the firm of Roquette which brought proceedings in that court against the customs authorities for repayment of excess MCAs wrongfully charged on maize derived products (starch, dextrine and soluble starch).

5. The defendant in the main proceedings resisted the claim on the grounds that Commission Regulation (EEC) No 2719/75 of 24 October 1975 fixing the monetary compensatory amounts and certain rates for their application, [6] had been correctly applied in the instant case, and the Finanzgericht, in

* Original language: French.

1 — Case 4/79 [1980] ECR 2823, Case 109/79 [1980] ECR 2883 and Case 145/79 [1980] ECR 2917.

2 — Case 112/83 [1985] ECR 719.

3 — Case 33/84 [1985] ECR 1605.

4 — See the Commission's observations in the *Société de Produits de Maïs* case.

5 — For the text of those questions, see the Report for the Hearing (II, 1, *in fine*).

6 — OJ 1975 L 276, p. 7; adopted under Council Regulation (EEC) No 974/71 of 12 May 1971 on certain measures of conjunctural policy to be taken in agriculture following the temporary widening of the margins of fluctuation of the currencies of certain Member States (OJ 1971 L 106, p. 1).

view of Roquette's complaints relating to that regulation, asks the Court:

— firstly, whether the aforesaid regulation is invalid in so far as it fixes the MCAs for the derived products (1) in such a way that the sum of those charges leads to a total MCA which is clearly more than that on the corresponding quantity of the basic product, and (2) in the case of maize starch, without reducing the basis for calculating the MCAs by the amount of the refunds on production,

— secondly, if it is invalid, whether Roquette is entitled to rely on that invalidity in the present case, given that it 'has done everything legally necessary and possible to prevent the contested tax notice from remaining in force'.

6. The first question need not detain us long.

7. The Commission concedes that Regulation No 2719/75 incurs the criticisms referred to by the Finanzgericht in the first question, which were the reasons for the declarations of invalidity in the Court's three judgments of 15 October 1980. [7] It expressly acknowledges that the amount claimed and paid as MCA on the derived products amounts to a sum which is clearly more than the MCAs on the corresponding quantity of the basic product [8] and that the basis of calculation of the MCAs on maize starch had not been reduced by the amounts of refunds on production. [9]

8. The regulation under consideration should therefore be declared invalid for those reasons.

9. The Commission further considers that the declaration of invalidity should extend to certain other regulations, since they are tainted by the same irregularities with respect to the same products. [10]

10. As the Commission stated in replying to the question put to it by the Court, the provisions in question are as follows: the amending Regulations No 2829/75 of 31 October 1975, No 271/76 of 6 Febru-

7 — Commission's observations, p. 6.

8 — The MCAs on the derived products in question exceed by 23.27% the MCA on the basic product, maize, according to the observations of the plaintiff in the main proceedings, p. 3. In its judgment in Case 46/84 *Nordgetreide* [1985] ECR 3127 the Court held that the difference of 1.45% between the MCAs applicable to maize and those applicable to derived products was 'a negligible one' and did not affect the validity of the regulation in issue (paragraphs 25, 28 and 29). The difference was about 30% in Cases 4/79 and 109/79 and about 12% in Case 145/79 (paragraph 34 of the *Nordgetreide* judgment). In those three cases it was regarded as excessive enough to justify a finding of invalidity.

9 — Commission's observations, p. 6.

10 — Ibid., pages 15 and 16.

ary 1976, and No 512/76 of 5 March 1976, [11] Regulation No 572/76 of 15 March 1976, [12] which replaced the regulation in issue, [13] and Regulation No 618/76 of 18 March 1976, [14] which amended the latter regulation. All these regulations are earlier than those declared invalid by the Court's decisions of 15 October 1980.

11. The declaration of invalidity should be extended for the same reasons as those stated by the Court in the *Roquette* judgment cited above:

'The fact that that regulation is invalid renders invalid the provisions of the subsequent regulations of the Commission the purpose of which is to alter the monetary compensatory amounts applicable to the products referred to in the foregoing paragraph'. [15]

12. I come to the second question.

13. It appears to me to be essential here to begin by examining the principles governing the effects *ratione temporis* of judgments declaring a regulation invalid in the context of a reference for a preliminary ruling.

14. It appears from the Court's judgment in Case 66/80 *International Chemical Corporation* v *Amministrazione delle finanze dello Stato* [16] that such a judgment is binding on any court which has to apply the invalid act, and has effect *erga omnes*:

'... although [that judgment] is directly addressed only to the national court which brought the matter before the Court, it is sufficient reason for any other national court to regard that act as void for the purposes of a judgment which it has to give'. [17]

15. Unlike a regulation which has been annulled on the basis of Article 173 of the Treaty, which is declared null and void, the regulation thus declared invalid 'does not disappear from the legal order' [18] until it has been expressly repealed by a new act. Under Article 176 of the EEC Treaty, the institution

11 — Regulation (EEC) No 2829/75 of the Commission of 31 October 1975 altering the monetary compensatory amounts (OJ 1975 L 284, p. 1), Commission Regulation (EEC) No 217/76 of 6 February 1976 changing the monetary compensatory amounts following changes in exchange rates for the Italian Lira (OJ 1976 L 34, p. 1), and Commission Regulation (EEC) No 512/76 of 5 March 1976 altering the monetary compensatory amounts (OJ 1976 L 60 p. 1).

12 — Commission Regulation (EEC) No 572/76 of 15 March 1976 fixing the monetary compensatory amounts and certain rates for their application (OJ 1976 L 68, p. 5).

13 — Article 4.

14 — Commission Regulation (EEC) No 618/76 of 18 March 1976 altering the monetary compensatory amounts (OJ 1976 L 75, p. 1).

15 — Point 2 of the operative provisions.

16 — [1981] ECR 1191.

17 — Paragraph 13; the same formulation is used in paragraph 16 of the *Société des Produits de Maïs* judgment cited above.

18 — Masclet, J. C., 'La jurisprudence "Roquette" à l'épreuve des juridictions françaises?', *RTDE*, 1986, p. 161.

whose act has been declared void is required to take the necessary measures to put an end to the illegality which has been found. [19]

16. Whether by reason of Article 173 or by reason of Article 176, the act in question ceases to apply. [20] There is thus a close relationship between a judgment annulling an act and a preliminary ruling declaring an act invalid.

17. It is therefore inevitable that the following question should be asked: must the rule that annulment has retroactive effect, stated in the first paragraph of Article 174, and the exception in the second paragraph of that article also apply to preliminary rulings declaring an act invalid? [21]

18. Those judgments, like judgments annulling acts, in principle have retroactive effect: 'a regulation declared not to be valid is unlawful *ab initio*'. [22] Mr Advocate General Capotorti gave the principal reason in his Opinion in Case 238/78 *Ireks-Arkady* v *Council and Commission* [23]: '... a declaration of invalidity or unlawfulness with effect *ex tunc* does not, it is argued, provide any basis for claims for compensation on account of damage occurring previously; thus a reference to the preliminary ruling in which the existence of the unlawful act was established is of no avail to the persons interested in pressing such claims'. [24]

19. However, because of the *erga omnes* effect of a declaration of invalidity, retroactive effect may bring about serious consequences in that it leads to the re-opening of established legal relationships which have been entered into in good faith.

20. The possibility of prescribing *ex nunc* effect when giving a preliminary ruling is thus imperative for at least two reasons. First of all, it would be paradoxical if in contrast to annulment, which is hemmed in by strict conditions of admissibility *ratione personae et temporis* under the third paragraph of Article 173, the procedure for invalidity could be set in motion on the initiative of

19 — See paragraph 16 of the *International Chemical Corporation* judgment cited above, and the case-law referred to there. See also paragraph 44 of the *Providence Agricole de la Champagne* and *Maiseries de Beauce* judgments and paragraph 51 of the *Roquette Frères* judgment and the case-law cited there, and also my opinion in the *Société des Produits de Maïs* case, paragraph 5.

20 — On the links between proceedings on legality and preliminary references where validity is assessed, see Mertens de Wilmars, J., 'Annulation et Appréciation de Validité dans le Traité CEE: Convergence ou Divergence?' (*Mélanges H. Kutscher*, 1981, p. 283). See also paragraph 17 of the *Société des Produits de Maïs* judgment.

21 — The Court recognizes that preliminary rulings as to *interpretation* have *ex tunc* effect: see the judgments in Case 43/75 *Defrenne II* [1976] ECR 455, Case 61/79 *Denkavit Italiana* [1980] ECR 1205, at paragraphs 16 and 17, and Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, at paragraphs 9 and 10.

22 — R. Joliet, '*Le droit institutionnel des Communautés européennes — Le contentieux*', p. 226. See, for example, the judgment in Case 130/79 *Express Dairy Foods* [1980] ECR 1887, Opinion of Mr Capotorti. The MCAs collected by the national authorities on the basis of Community regulations declared invalid must be repaid. See also the solution implicit in the judgments in Joined Cases 117/76 and 16/77 *Ruckdeschel* [1977] ECR 1753, at paragraph 13 ('... the existence of several courses of action ... to make good any damage sustained by those concerned ...') and Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson* [1977] ECR 1795, at paragraph 29.

23 — [1979] ECR 2955.

24 — Ibid., p. 2991. See also the judgment in Joined Cases 256/80, 257/80, 265/80, 267/80, 5/81 and 51/81 and 282/82 *Birra Wührer* v *Council and Commission*, at paragraph 33.

any individual person, with no time-limit other than that resulting from the rules on prescription in national law, in other words, several years in certain cases after the coming into force of the rule in question. [25] Secondly, rules of Community law may effect especially sensitive sectors and declaring them invalid may entail significant consequences, including financial ones, which it is essential to be able to control. That concern is apparent in the Court's *Pinna* judgment. [26]

21. It may be noted in passing that the European Court of Human Rights followed the *Defrenne II* judgment [27] in limiting the temporal effect of its *Marckx* judgment of 13 June 1979, [28] laying down the principle of equal treatment for legitimate and illegitimate children in estate matters: '... the principle of legal certainty, which is necessarily inherent in the law of the Convention as in Community law, dispenses the Belgian State from re-opening legal acts or situations that antedate the delivery of the present judgment'. [29]

22. Nevertheless, *ex nunc* effect does raise serious difficulties. Firstly, it means that Community law is divided according to time; although declared invalid by the Court, a regulation will still have legal effect with regard to certain persons. Secondly, it resembles an estoppel; an individual will not be able to rely on the finding of invalidity for the period prior to the date of the judgment.

23. In the judgments of 15 October 1980, cited above, the Court held that:

'... it is necessary to apply by analogy the second paragraph of Article 174 of the Treaty, whereby the Court of Justice may state which of the effects of the regulation which it has declared void shall be considered as definitive, for the same reasons of legal certainty as those which form the basis of that provision'. [30]

24. However, in the *Société de Produits de Maïs* judgment the Court, no longer referring to analogy, gave as the reason for limiting the temporal effect of a declaration of invalidity 'the necessary consistency between the preliminary ruling procedure and the action for annulment ... which are two mechanisms provided by the Treaty for reviewing the legality of acts of Community institutions'. [31]

25 — See my Opinion in the *Société des Produits de Maïs* case, paragraph 11.

26 — Case 41/84 *Pinna* [1986] ECR 1, at paragraphs 26 to 30. Only employed persons who had already brought legal proceedings or made an equivalent claim prior to the date of the judgment were able to benefit from the *ex tunc* effect of the finding that Article 73(2) of Regulation No 1408/71 was invalid.

27 — Cited above; see references in note 21 above.

28 — Series A No 31.

29 — Ibid., paragraph 58.

30 — Paragraph 45 of the *Providence Agricole de la Champagne* and *Maïseries de Beauce* judgments and paragraph 52 of the *Roquette* judgment.

31 — Paragraph 17.

25. If the principles underlying the *Defrenne II* and *Denkavit Italiana* judgments [32] dealing with interpretation are applied to the field of declarations of invalidity, the Court's case-law subjects *ex nunc* effect to strict conditions:

(1) the existence of 'overriding considerations' [33] which justify restricting the temporal effects of a declaration of invalidity, such as requirements of legal certainty (the justification usually given is the financial repercussions of a retroactive decision);

(2) definition by the Court, in the judgment declaring the invalidity, of the limitation of its temporal effects. [34]

26. The greatest care is needed when having recourse to the principle of legal certainty. It is the basis of the principle of legality, but may nevertheless sometimes conflict with that principle. As I have stated on a previous occasion, it has two aspects. [35] While it aims not to call into question legal relationships which have been established in good faith, it also aims to protect the interests of economic agents who have suffered damage by reason of the invalid rule and can legitimately expect legality to be respected. As D. Simon says, 'why should the legal certainty of some be more deserving than the legal certainty of others?' [36]

27. How should this affect the plaintiff in the main proceedings?

28. While the possibility of applying the second paragraph of Article 174 to preliminary rulings of invalidity is now generally accepted, at least by national courts, that is not the case with the unconditional application of *ex nunc* effect, which has the effect of preventing the plaintiffs in the main proceedings from benefiting from the invalidity which they have had declared. This point is behind the second question of the Finanzgericht Düsseldorf in the present proceedings.

29. The three judgments of 15 October 1980 upheld the *ex nunc erga omnes* effect of the declaration of invalidity.

30. The Court considered that the finding of invalidity did not in itself bring about the consequences which the plaintiffs in the main proceedings wished for with respect to a

32 — Cited above; see references in note 21 above.

33 — Paragraph 26 of the *Puma* judgment. Compare paragraph 72 of the *Defrenne II* judgment and paragraph 17 of the *Denkavit Italiana* judgment: 'it is only exceptionally ...'.

34 — See paragraphs 17 and 18 of the *Société des Produits de Maïs* judgment. See on the point my Opinion in that case, paragraph 12. Compare paragraph 18 of the *Denkavit Italiana* judgment, cited above, and paragraph 13 of the judgment in Case 309/85 *Barra* [1988] ECR 355.

35 — See my Opinion in the *Société des Produits de Maïs* case, paragraph 11.

36 — D. Simon, 'L'effet dans le temps des arrêts préjudiciels de la Cour de justice des Communautés européennes: enjeu ou prétexte d'une nouvelle guerre des juges?', *Mélanges Pescatore*, Baden-Baden 1987, p. 663.

reduction of the amounts claimed as MCAs. In fact only the Commission, bearing in mind its discretionary powers, was in a position to determine the MCAs applicable to the various products in question in the light of the declaration of invalidity. [37]

31. It does not appear that the Court thereby challenged *in principle* the right of the plaintiffs in the main proceedings not to have an invalid regulation applied to them. The Court noted, having regard to the circumstances of the particular cases, in addition to the abovementioned technical problem, the risk of distortion in competition caused by the lack of uniformity of the relevant national legislations with regard to the reimbursement of payments wrongfully made. [38]

32. The Court's decision in *Roquette* has attracted criticism from a number of commentators: [39]

'... how ... could one not be shocked by it, since for the first time the Court refused altogether to allow even the plaintiff in the proceedings to benefit from the solution in the judgment and confined him to a purely platonic satisfaction?' [40]

33. It is significant that the Court returned to the question in the *Société des Produits de Maïs* judgment, even though it was 'irrelevant' for the particular case. [41]

34. The Court held that:

'It is ... for the Court, where it makes use of the possibility of limiting the effect on past events of a declaration in proceedings under Article 177 that a measure is void, to decide whether an exception to that temporal limitation of the effects of its judgment may be made in favour of the party which brought the action before the national court or of any other trader which took similar steps before the declaration of invalidity or whether, conversely, the declaration of invalidity applicable only to the future constitutes an adequate remedy even for traders who took action at the appropriate time with a view to protecting their rights'. [42]

35. The Court thus (i) reaffirmed the possibility of allowing the party which brought

37 — See paragraph 42 of the *Providence Agricole de la Champagne* and *Maïseries de Beauce* judgments.

38 — See paragraph 45 of the *Providence Agricole de la Champagne* and *Maïseries de Beauce* judgments and paragraph 52 of the *Roquette* judgment.

39 — D. Simon, op. cit., p. 651; J. Boulouis, commenting on a judgment by the Tribunal d'Instance, Lille of 15 July 1981, *Recueil Dalloz*, 1982, J, p. 10; H. Labayle, 'La Cour de justice des Communautés et les effets d'une déclaration d'invalidité', *RTDE* 1982, p. 484; J. C. Masclet, op. cit, p. 161.

40 — G. Isaac, 'La modulation par la Cour de Justice des Communautés européennes des effets dans le temps de ses arrêts d'invalidité', *CDE*, 1987, p. 444.

41 — See paragraph 19 of the *Société des Produits de Maïs* judgment. That company had lodged a claim for repayment after the Court's judgment of 15 October 1980 in Case 145/79 and was thus unable in any event to benefit from the possibility of obtaining repayment of the sums paid under the invalid regulations.

42 — Paragraph 18.

the action to benefit from the declaration of invalidity and (ii) made the application of *ex nunc erga omnes* effect subject to a new condition, namely that it constitutes 'an adequate remedy', which appears unlikely to be the case for the trader who starts the main proceedings after wrongly paying large sums of money.

36. I cannot refrain here from quoting Professor Everling who, commenting on the aforesaid paragraph of the judgment, writes that:

'This unusual *obiter dictum* ... indicates that the Court considered its previous position to be unsatisfactory and wished to signal to the national courts ... that it was ready to develop its case-law on the point further.' [43]

37. Since that judgment the Court has always excluded from the *ex nunc* effect of a declaration of invalidity the party which brought the action or other traders who before the date of the judgment brought legal proceedings or made an equivalent claim under the applicable national law. [44]

38. The Court's case-law here follows the same principles as those of its interpretative preliminary rulings which, if *ex nunc* effect applies, provide for a systematic exception in favour of claimants who have already brought legal proceedings or made an equivalent claim. [45]

39. This flexibility — which undoubtedly represents progress — is significant, and the Commission proposes that it should be applied in the present case.

40. The Court is familiar with the criticisms which have been made of *ex nunc erga omnes* effect. It is said to deprive persons subject to the law of the right to effective protection by the courts and more particularly to damage the useful effect of Article 177.

41. To give a declaration of invalidity *ex nunc erga omnes* effect is said to have 'the perverse effect of reducing the judicial protection which those to whom the law applies benefit from thanks to the preliminary ruling procedure, by preventing national courts from fully protecting their rights in the event of a violation of the Community legal sys-

43 — U. Everling, 'Der Ausschluß der Rückwirkung bei der Feststellung der Ungültigkeit von Verordnungen durch den Gerichtshof der EG', *Europarecht Energierecht Wirtschaftsrecht: Festschrift fur Bodo Borner*, 1992, p. 65.

44 — See the *Pinna* judgment cited above, at paragraph 29, and as the most recent authority the judgment in Joined Cases C-38/90 and C-151/90 *Lomas* [1992] ECR I-1782, at paragraph 25, which repeats word for word the text of paragraph 18 of the *Société des Produits de Mais* judgment.

45 — See the *Defrenne II* judgment; the judgment in Case 24/86 *Blaizot* [1988] ECR 379, at paragraph 28; that in Case C-262/88 *Barber* [1990] ECR I-1889, at paragraph 41; in Case C-163/90 *Legros* [1992] ECR I-4625, at paragraph 30; and in Case C-109/91 *Ten Oever*, [1993] ECR I-4879. On the connections between preliminary rulings of interpretation and judgments on validity, see W. Alexander, 'The Temporal Effects of Preliminary Rulings', *Yearbook of European Law*, 1988, vol. 8, p. 25.

tem by the institutions'. [46] Specifically 'undertakings which have paid compensatory amounts declared to have been illegally levied are thereby deprived of their right to reimbursement in respect of payments made before the date of the judgment: their sole interest in bringing their case before the Community court is to prohibit in principle the levying of MCAs in future.' [47]

42. As the plaintiff in the main proceedings stated in *Société des Produits de Maïs*, application of *ex nunc* effect may have the effect of depriving Article 177 of substance: 'For a [preliminary reference] to be admissible, the main proceedings must themselves be admissible. That might be highly doubtful if, by generalizing the provisions of the second paragraph of Article 174, a system were arrived at where the effects of invalidity applied only to the period after the declaration of invalidity. In such a system, since the regulation prescribing the monetary compensatory amounts was valid until the date of the judgment declaring it invalid with no retroactive effect, the amounts in question would not be liable to be reimbursed on the date of commencement of the proceedings in the national court. The national court, necessarily considering matters as they are at the date of commencing the proceedings, will thus have to find that the plaintiff has no interest in bringing proceedings for repayment of the sums paid. As he has no interest, the main proceedings will be inadmissible ...'. [48]

43. This argument makes an impression. The preliminary ruling procedure for assessing validity must indeed remain available as a general rule to natural or legal persons who argue that a provision of derived Community law is unlawful. [49] Such a procedure would be deprived of useful effect if declarations of invalidity, in systematic fashion and *erga omnes*, had no effect on the period before the judgment.

44. Quite apart from the paradox involved in a court laying down the criteria for lawfulness and then deciding that the rule which violates those criteria is to remain applicable to the case, the individual's fundamental rights are affected here.

45. The compatibility of such a solution with the fundamental principles was examined most acutely by the Italian Constitutional Court in its judgment of 21 April 1989 in *Fragd* v *Amministrazione delle Finanze dello Stato*. [50]

46. The Court will recall that Fragd had brought proceedings in the Tribunale di Venezia for reimbursement of MCAs wrongly paid. The Tribunale referred a question to the Court on the legality of Commission Regulation (EEC) No 1541/80 of 19 June 1980, [51] under which those amounts had been calculated.

46 — D. Simon, op. cit., p. 864.

47 — Ibid., p. 665.

48 — Observations submitted on behalf of Société des Produits de Maïs, pp. 11 and 12 of the typed version.

49 — Direct actions for annulment in particular are open to them only under strict conditions.

50 — *Rivista di diritto internazionale*, 1989, p. 103.

51 — Altering the monetary compensatory amounts (OJ 1980 L 156, p. 1).

47. The Court held in a judgment of 22 May 1985 [52] that, for the reasons stated in the *Roquette* judgment of 15 October 1980, u 'the provisions of Commission Regulation No 2140/79, as amended by Commission Regulation No 1541/80, are invalid in so far as they fix the monetary compensatory amounts applicable to exports of powdered glucose .... The fact that the provisions of Commission Regulation No 2140/79, as amended by Commission Regulation No 1541/80, have been declared invalid provides no ground for calling into question the levying or payment of monetary compensatory amounts by the national authorities on the basis of those provisions in respect of the period preceding 15 October 1980, the date on which the judgment declaring such provisions invalid was delivered'. [53]

48. Following that decision the national court raised the question whether Articles 1 and 2 of the Italian law ratifying the Treaty of Rome were constitutional 'in so far as, in introducing into the domestic legal system Article 177 of the Treaty as interpreted by the Court of Justice, they give that Court the power to limit the temporal effect of preliminary rulings on the validity of rules which require the payment of money, excluding from the effects of the declaration of invalidity legal acts accomplished prior to the judgment *even if they are the subject of the main proceedings in the course of which the reference for a preliminary ruling was made*'. [54] According to the Tribunale di Venezia, 'the rule of law which could be deduced from Article 174 in conjunction with Article 177, which in the opinion of the Court of Justice permits the use of discretion to limit the temporal effect of the judgment declaring the invalidity *even to the detriment of the traders who raised the question* by bringing the proceedings in question, would in practice entail the denial of judicial protection of the individual against rules of Community law imposing monetary payments which have been declared illegal'. [55]

49. In its judgment of 21 April 1989 the Constitutional Court stated concisely that:

'the right to protection by a court, which is in itself an inviolable human right, must be included among "the highest principles of our constitutional order, in which it is closely linked with the very principle of democracy which consists in assuring to all persons at all times, for all disputes whatever, a court and a judgment"' ('l'assicurare a tutti e sempre, per qualsiasi controversia, un giudice e un giudizio'), [56]

52 — Case 33/84, [1985] ECR 1605.

53 — Paragraph 20.

54 — Judgment of the Constitutional Court, paragraph 1 of the 'as to the facts' part, my emphasis.

55 — Ibid., my emphasis.

56 — Ibid., paragraph 3.2 of the 'as to the law' part.

and concluded that:

'In substance, the right of every person to have access to a court and a judgment for any dispute would be deprived of substance if the court which has doubts on the legality of a provision which it should apply receives from the judicial authority to which it is obliged to refer the question the answer that the provision is indeed invalid, but that that invalidity *has no effect in the dispute which is the subject-matter of the proceedings*, and that that dispute must therefore be decided by applying a provision which has been acknowledged to be illegal.' [57]

50. It was only because the proceedings in the national court had been brought after the decision of the Court of Justice on the validity of the regulation, and that the case before the Tribunale was not the case which had given rise to the declaration that the contested regulation was invalid, that the Constitutional Court held that the question referred to it was inadmissible. [58]

51. The principle of the right to effective protection by a court is not only a component part of the constitutional law of the Member States [59] and a right guaranteed by the European Court of Human Rights. [60] The case-law of the Court of Justice has declared it to be a fundamental principle of Community law. The Court has thus confirmed the existence of the right of access to a court and the right of *effective* protection [61] by a court for individuals who rely on Community law. [62]

52. As we have seen, [63] according to now settled case-law, the Court already considers that a declaration of invalidity cannot be given *ex nunc* effect with regard even to the plaintiff, unless that effect constitutes an 'adequate remedy' for him.

53. If the application is for reimbursement of sums paid in the past under the regulation which has been declared invalid, *ex nunc*

57 — Ibid., paragraph 4.2 of the 'as to the law' part, my emphasis.

58 — Paragraph 6 *in fine*.

59 — Article 19 of the German Basic Law of 23 May 1949, Article 24 of the Spanish constitution of 29 December 1978, Article 20 of the Greek constitution of 9 June 1975, Article 24 of the Italian constitution of 27 December 1947 and Article 20 of the Portuguese constitution of 2 March 1976. On the right of effective access to a court in French constitutional law, see the study by T. S. Renoux, *JCP*, 1993, I, 3675.

60 — Article 13 of the European Convention on Human Rights: 'Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ...'. See also Article 6 of the Convention.

61 — See the judgments in Case 222/84 *Johnston* [1986] ECR 1651, at paragraphs 18 and 19; Case 222/86 *Heylens* [1987] ECR 4097, at paragraph 14; Case 304/89 *Vlassopoulou* [1991] ECR I-2357, at paragraph 22; Case C-104/91 *Aguirre Borrell and Others* [1992] ECR I-3003, at paragraph 15; and Case C-19/92 *Kraus*, [1993] ECR I-1663 , at paragraph 40.

62 — The fact that the Court set great store by this principle is exemplified in its case-law on objections on the grounds of parallel remedies, which are accepted only if 'those remedies in the domestic law *effectively* ensure protection for individuals aggrieved by measures of Community institutions' (judgment in Case 20/88 *Roquette* [1989] ECR 1553, at paragraph 15, my emphasis. See also on this point my Opinion in that case, paragraph 15).

63 — See paragraph 35 above.

erga omnes effect cannot constitute an 'adequate' remedy. In such a case it in fact deprives the application of effectiveness. Such a result is contrary here to the principle of the right to an effective remedy of a judicial nature.

54. The plaintiff in the main proceedings and the Commission are united in suggesting that the Court should in the present case apply the principle of retroactive effect with respect to traders who have brought legal proceedings or an equivalent complaint prior to the judgment.

55. However, 'taking away with one hand what it gives with the other', the Commission proposes that the relevant date in this respect should be the date of the *Roquette* judgment of 15 October 1980, on the ground that the invalidity extended beyond the actual regulations then in issue and that the illegality was 'well known'. [64]

56. This argument fails to convince, for three reasons.

57. To begin with, while it is correct that in 1980 the Court held that the invalidity extended further than the particular regulation of 24 March 1976 at issue in that case, it was careful to state that the invalidity related only to regulations *subsequent* to that regulation. [65] The present proceedings, however, relate to a regulation *prior* to 24 March 1976 and its invalidity should bring about that of other regulations which are all also prior to that date. [66]

58. Secondly, the Commission's proposal would be acceptable only if the Commission had itself at the time immediately drawn all the lessons from the Court's judgments of 15 October 1980, including those relating to the provisions in issue in this case; it did not do so.

59. Finally, if the Commission's proposal were followed, that would have the effect of considerably restricting the scope for applying the exception to *ex nunc* effect. Only persons who had brought legal proceedings or an equivalent claim between 24 October 1975 and 15 October 1980 would in fact be able to rely on the finding of invalidity.

60. The proposal must thus be rejected. In the event that the Court decides to apply *ex nunc* effect while limiting its scope, the reference date would therefore have to be that of the judgment to be given.

64 — Commission's observations, pp. 14 and 15.

65 — Case 145/79 *Roquette*, point 2 of the operative provisions.

66 — See paragraph 11 above.

61. Would that be sufficient from the point of view of the right to an effective remedy before a court?

62. To be sure, the plaintiff in the main proceedings and those who brought legal proceedings or equivalent claims before that date would have their interests protected.

63. But what of traders who suffered damage as a result of the invalid regulation and did not, before the date of the judgment, bring proceedings for reimbursement of excess MCAs paid, but would still be entitled to do so from the point of view of their national procedural rules? Is it acceptable that they should be excluded from benefiting from the invalidity in question?

64. It is clear that by defining a *terminus ante quem* for bringing proceedings, the Court's judgment here would take the place of the national rules on limitation.

65. In his Opinion in the *Express Dairy Foods* case [67] Mr Advocate General Capotorti, objecting to the use of *ex nunc* effect in that case, drew attention to a passage from the *ACF Chemiefarma* v *Commission* judgment: [68] 'in order to fulfil their function of ensuring legal certainty limitation periods must be fixed in advance'. [69]

66. With reference to proceedings for reimbursement of sums wrongly paid, the Court's case-law consistently refers to national legislation which must be applied 'in a non-discriminatory manner having regard to the procedural rules relating to disputes of the same type, but purely national, and ... procedural rules cannot have the result of making impossible in practice the exercise of rights conferred by Community law'. [70]

67. We come close here to the major paradox of *ex nunc* effect, even if limited: it is *the Court's judgment* which would make it virtually impossible for a trader, who had been adversely affected by the invalid regulation and who would still have the possibility of bringing proceedings under national rules on limitation, to assert his rights.

68. Need it be demonstrated further that *ex nunc* effect can only be allowed in exceptional cases, having regard to the circumstances of each particular case?

69. The Court's concern — shared with national constitutional courts — to take account of fundamental rights, together with

67 — Paragraph 5 *in fine*.
68 — Case 41/69, [1970] ECR 683.
69 — Paragraph 19.
70 — *Express Dairy Foods* judgment, paragraph 12.

the development of its case-law in the field of *ex nunc* effect, in my opinion justifies taking a further step forward by restricting the cases and consequences of the temporal limitation of the effects of a declaration of invalidity.

70. The Commission itself states plainly in the present case: 'In the event of a declaration of invalidity (as in the case of a binding interpretation) *ex tunc* effect is the rule. Limitation of its effect to the period subsequent to the judgment must therefore be an exception to be taken narrowly, and must be applied only where absolutely essential'. [71]

71. I cannot but agree with that proposition, which ultimately takes up what I argued in my opinion in the *Société des Produits de Maïs* case, [72] although I fail to understand why, as the Commission persists in suggesting, it should apply only to parties who have brought legal proceedings or made an equivalent complaint prior to the Court's judgment.

72. Are we faced here with serious problems and necessities which require *ex nunc* effect to be adopted?

73. With reference to the traders who have wrongly received MCAs, I consider that their exceptional situation justifies an exceptional decision. In the present case the extreme lateness of the declaration of invalidity would, if given retroactive effect, be likely to have a serious effect on their financial equilibrium on the basis of legal relationships entered into in good faith. [73] As I have stated, the regulation before the Court is earlier than those declared invalid on 15 October 1980. In any event, I do not suggest that the Court should go back on *ex nunc* effect with reference to those traders.

74. However, for those who wrongly paid too much, the principle of legal certainty above all means respect for legality and the possibility for those concerned not to suffer the consequences of an invalid regulation.

75. The Court's case-law on temporal limitation on declarations of invalidity endeavours to prevent distortions in competition between economic agents. [74] It appears to me that in this case only the application in the normal way of *ex tunc* effect for the benefit of traders who have paid too much is capable of *limiting* such distortions in comparison with undertakings who have received too much.

76. Moreover, there is no technical reason which makes *ex nunc* effect necessary. To be

71 — Commission's observations, p. 11.

72 — Paragraphs 12 and 13 of the Opinion.

73 — Ibid., paragraph 13.

74 — See, for example, the *Providence Agricole de la Champagne* judgment, paragraph 45.

sure, as has been seen, declaring a regulation invalid does not *ipso facto* make it possible to determine what is owed to the traders who have suffered loss. The Commission's discretionary power to distribute MCAs among the various products derived from the basic product presupposes further action on the part of the Commission. [75] But the Commission asserts precisely that it is entirely capable of carrying out a calculation of the MCAs which should have been paid, had the regulations in question not been tainted by illegality. [76]

77. Finally, is *ex nunc* effect essential for serious reasons of financial equilibrium?

78. There is in my opinion a fundamental difference between the situations which gave rise to the *Defrenne II*, *Pinna*, *Barber* and *Legros* cases on the one hand and proceedings for reimbursement of wrongly paid MCAs, such as that pending before the Finanzgericht, on the other hand. [77]

79. The former cases concerned a large number of persons. A retroactive declaration of invalidity would have affected a large number of legal situations. The financial repercussions of retroactive effect would have been considerable.

80. In the present case the regulation will be declared invalid in so far as it concerns a very specific case: the MCAs on certain products derived from a basic product (maize) affect undertakings which are 'easily identifiable (if only because of the operations of receipt or payment to which their activities give rise)'. [78] The declaration of invalidity can give rise only to repayment of *excess payments*, not of the total MCAs paid. The plaintiff in the main proceedings has indeed understood this correctly, since it seeks not total reimbursement but partial reimbursement of the MCAs paid. [79]

81. The financial burden of invalidity will be borne by the Community via the EAGGF. The Commission has at no time argued that the consequences of total retroactive effect of the declaration of invalidity, applied to the traders who have paid too much, would jeopardize the financial equilibrium of the Community.

82. For this reason, since exceptions to the principle of *ex tunc* effect must be limited to what is strictly necessary, I reaffirm the position I adopted in my opinion in the *Société des Produits de Maïs* case, namely that 'the invalidity must take effect in the ordinary way, that is to say *ex tunc*, with regard to traders who have paid the compensatory amounts ...'. [80]

75 — See the *Maïseries de Beauce* judgment, paragraph 42.

76 — Commission's observations, p. 12. The Commission confirmed this point at the hearing.

77 — See on this point the observations of D. Simon, op. cit., pp. 663-664.

78 — See J. C. Masclet, op. cit., p. 174.

79 — See the order of the Finanzgericht, p. 5.

80 — Paragraph 13 *in fine* of the Opinion.

83. I am strengthened in this conclusion by the fact that that solution is the only one which is consistent with the requirements of the fundamental principles which, according to the Court's case-law, are an integral part of Community law.

84. One final comment. It may be that the wrongly paid MCAs have been incorporated into the prices of goods and passed on to the purchasers. In the *Just* judgment [81] the Court acknowledged that Community law did not prevent a national legal system from refusing to grant repayments of charges improperly made if that would involve unjust enrichment. It is noteworthy that the Court used this as one of the reasons for refusing a request for limitation of the temporal effect of a judgment. [82]

85. I therefore propose that the Court rule as follows:

(1) The provisions of Commission Regulation (EEC) No 2719/75 of 24 October 1975 which fix the monetary compensatory amounts on starch, dextrine and soluble starch are invalid

— in so far as they fix the monetary compensatory amounts applicable to all the different products obtained by the processing of a given quantity of the same basic product, maize, in a specified manufacturing process at a figure appreciably higher than the compensatory amount fixed for that given quantity of the base product,

— in so far as they fix the compensatory amounts applicable to maize starch on a basis other than that of the intervention price of maize after deduction of the production refund on maize starch.

(2) This invalidity means that the provisions of Regulations (EEC) Nos 2829/75, 271/76, 512/76, 572/76 and 618/76 are invalid in so far as they relate to the products referred to in the preceding paragraph.

81 — Case 68/79 *Just* [1980] ECR 501, at paragraph 26. See also the *Express Dairy Foods* judgment, paragraphs 13 and 14, and the judgment in Case 199/82 *San Giorgio* [1983] ECR 3595, at paragraph 13. See also my Opinion in the *Société des Produits de Maïs* case, paragraph 13.

82 — Judgment in Joined Cases 142/80 and 143/80 *Essevi and Salengo* [1981] ECR 1413, at paragraph 35.

(3) While traders may, after determination by the Commission of the new monetary compensatory amounts and to the extent of the damage actually suffered, rely on the invalidity of the abovementioned provisions of those regulations, that invalidity does not permit the re-opening of the payment of monetary compensatory amounts by the national authorities on the basis of those provisions for the period prior to judgment in this case.