29 The applicant has failed in its submissions.

30 It must therefore be ordered to bear the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application as inadmissible;**
2. **Orders the applicant to bear the costs.**

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 5 May 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 22 MARCH 1977 [1]

Mr President,
Members of the Court,

The case with which we are dealing today is concerned with rules relating to the grant of subsidies, so-called production refunds, on the manufacture of a product obtained from maize, common wheat and potato starch, namely glucose with a high fructose content.

Article 11 of Council Regulation No 2727/75 on the common organization of the market in cereals (OJ L 281 of 1. 11.

1 — Translated from the German.

1975, p. 1) lays down such a system of refunds; it provides that:

'A production refund may be granted:

(a) for maize and common wheat used in the Community for the manufacture of starch;

(b) for potato starch;

(c) for maize groats and meal used in the Community for the manufacture of glucose by direct hydrolysis.

.....'

In view of the special situation of the market in the said starch products, and in order to keep the processing industry in the Community competitive in relation to the products of third countries and substitute products, this system of refunds seeks to ensure that the basic products used by the said industry can be obtained at prices lower than those resulting from the Community system.

Rules implementing this regulation were adopted by Council Regulation No 2742/75 of 29 October 1975 (OJ L 281 of 1. 11. 1975, p. 57). Moreover, Regulation No 2742/75 fixed the amounts of the refunds. They were between 10 and 16·30 units of account according to the basic product used.

This regulation was amended by Council Regulation No 1862/76 of 27 July 1976 (OJ L 206 of 31. 7. 1976, p. 3). On the one hand, having regard to the new cereal prices, the amounts of the refunds were increased to between 14 and 20 units of account. On the other hand, Article 2 of Regulation No 1862/76 provides however that the refund for the 1976/77 marketing year is to remain unchanged in respect of the abovementioned product, namely the manufacture of glucose having a high fructose content. Moreover it is provided that *this* refund shall no longer be granted as from the 1977/78 marketing year. In practice this is so arranged that although the starch manufacturers receive the refunds generally laid down, the Member States, as provided for in Article 5a (3) of Regulation No 2742/75 as amended, recover from manufacturers of glucose having a high fructose content such part of the refund which relates to the subsidized basic products used for the manufacture of glucose having a high fructose content and exceeds the rates in Regulation No 2742/75. As from the 1977/78 marketing year the whole of the refund granted is to be recovered from the abovementioned producers in accordance with Article 5a (1) (b) of Regulation No 2742/75.

On 31 August 1976 the Commission adopted Regulation No 2158/76 (OJ L 241 of 2. 9. 1976, p. 21) laying down rules for the application of Regulation No 2742/75. This provides that the manufacturers of glucose with a high fructose content must give regular information about their production and produce specific documents to the competent authorities of the Member States. Moreover the regulation lays down when the competent authorities of the Member States must fix the total amounts to be recovered from the individual manufacturers and the latest dates on which this repayment must be made.

The Koninklijke Scholten Honig undertaking which, with its subsidiaries, is a manufacturer of glucose with a high fructose content, considers the new system illegal for various reasons. On 20 October 1976 it accordingly brought the matter before the Court and claimed that Article 2 of Regulation No 1862/76 and Regulation No 2158/76 should be declared null and void.

Both the Council and the Commission have applied under Article 91 of the Rules of Procedure for a decision on a preliminary objection concerning the admissibility of these proceedings, which they consider as inadmissible.

Since as a result of these applications only the admissibility of the proceedings was dealt with on 1 March 1977, I have to give my opinion today on this question alone.

Since in the oral procedure the Council has dropped its obviously unjustified objections that the application was lodged out of time which were raised with regard to the contested regulation of the Council, there remain two objections. They originate essentially from the Council, because the Commission has on the whole referred to the Council's submissions in defence since no special arguments have been put forward in respect of the implementing regulation issued by the Commission. On the one hand the application is accordingly alleged to be inadmissible under Article 173 of the EEC Treaty because the contested measures are genuine regulations which cannot be said to be of individual concern to the applicant. On the other hand it is impossible to accept that they are of direct concern to the applicant.

I have the following particular observations on this:

1. On the question whether the contested measures are genuine regulations or whether they in part conceal individual decisions which are of individual concern to the applicant, the defendants allege that the scope of the regulation is defined according to the product in question and the regulation accordingly applies to a particular class of manufacturers. Accordingly it cannot be said that a fixed and known number of undertakings is affected. The applicant on the other hand takes the view that the contested regulations in fact contain in part individual decisions. Obviously only a small and ascertainable number of undertakings in the Community producing glucose with a high fructose content is affected; this is particularly clear if the concept of an undertaking as in competition law is applied and not that of business premises or subsidiaries, in other words, if parent company and subsidiaries which are mutually dependent are regarded as a unit. It is significant in addition that the number of those affected cannot be increased over a short period, in particular not during the course of the current and following marketing years. In order to establish business premises considerable investment is required and advanced technology is necessary which at present and for the coming year is still protected by patents and licences. It is indisputable that after the knowledge was gained several years passed before it was possible to put the knowledge into practice. In addition it must be recognized that the contested system with the deterioration of the conditions of production which it involves deters potentially interested parties and therefore, whatever is intended, keeps the class of those concerned closed. Accordingly, and in this respect the applicant relies on the findings in the judgment in Case 25/62, *Plaumann* v *Commission* [1963] ECR 95 with regard to the characteristics of individual concern, it may be said that the applicant is individually concerned by reason of the factual situation in which it finds itself and by reason of certain attributes peculiar to it.

In this dispute there are two observations which may be made at the outset without any difficulty.

The dispute as to the number of undertakings or business premises existing in the Community which manufacture the product for which the contested system grants only a reduced refund for the 1976/77 marketing year and no refund at all for the 1977/78 marketing year, is unimportant. In other words it does not matter whether at the present time, as is stated in Annex 5 to the application, there are four such undertakings or, as appears from another annex, there may be said to be twenty-three producer firms. If they are individually concerned, then the admissibility of the application is not affected by the fact that there is a considerable number to whom it is of concern, as is shown by the judgment in Joined Cases 41 to 44/70, *NV International Fruit Company and Others* v *Commission* [1971] ECR 411.

In the same way it is not important that the number of those to whom it was of concern could be determined when the measures were adopted, for which reason, and the applicant has stressed this, the invitation to consultations with the Commission which took place in October 1976 was not in the form of an open invitation but addressed individually. This possibility of determining those affected when a regulation is adopted or enters into force exists also in the case of measures which are clearly legislative. This was referred to for example in the judgment in Case 6/68, *Zuckerfabrik Watenstedt GmbH* v *Council* [1968] ECR 409.

It is much more crucial for the necessary delimitation and classification under Article 173 of the EEC Treaty whether the contested measures are in fact of a legislative nature, that is whether, and these findings are contained in the judgment in Joined Cases 19 to 22/62, *Fédération Nationale de la Boucherie* v *Council* [1962] ECR 491, it applies to an unidentifiable category of persons concerned and is addressed to an abstract class of persons or whether it is in truth directed to a closed and restricted category of persons affected which does not change while the measure is in force, that is whether the class of persons concerned is clearly and definitely ascertainable as in Case 30/67, *Industria Molitoria Imolese and Others* v Council [1968] ECR 115 and Joined Cases 106 and 107/63, *Alfred Toepfer and Getreide-Import Gesellschaft* v *Commission* [1965] ECR 405 and Case 100/74, CAM v *Commission* [1975] ECR 1393.

With regard to this central issue it is apparent that the contested rules are expressed in a general manner, that is, and this is typical of legislative provisions, they apply to everyone who engages in a particular production activity. On the other hand it is not to be denied that considerable weight must be attached to the applicants' submissions concerning the difficulties of increasing the class of those concerned having regard to the necessary costs of investment and the technical knowledge.

In judging such an obviously borderline case it is in my view useful to bear in mind two previous decided cases, namely Case 1/64, *Glucoseries Réunies* v *Commission of the EEC,* judgment of 2 July 1964, [1964] ECR 413 and Case 6/68, *Zuckerfabrik Watenstedt GmbH* v *Council of the European Communities,* judgment of 11 July 1968, [1968] ECR 409. Case 1/64 was concerned with a decision of the Commission authorizing France to levy countervailing charges on the importation of glucose (dextrose) from other Member States. In this case the Court did not consider as decisive the reference to the fact that the applicant in that case, a Belgian undertaking, was 'the only Belgian undertaking with an economic interest in the matter and both willing and able to export glucose from Belgium to France in significant quantities during the period of validity of the contested decision'. On the contrary, in view of the general economic scope of the contested decision it was held not to be of individual concern to the applicant and the application was therefore rejected as inadmissible. Case 6/68, which is also relevant in the present connexion, was concerned with the fact that the intervention rules for raw beet sugar were limited in point of time. Regulation No 1009/67 adopted on 18 December 1967 provided that they were no longer to apply after 31 December 1969; this meant that the sales guarantee for some thirty undertakings in the Community which manufactured the said product was to be abolished from 1 January 1970. This particular feature caused my predecessor, Mr Advocate-General Roemer, to suggest that this should be spoken of as laying down rules for an individual case or as a 'specific case'. He considered, and the applicant in the present case has particularly stressed this, that it was necessary to accept that the

applicant in that case, a producer of crude sugar, was individually concerned because in view of the economic situation at the time and the legal position created by the contested regulation it had to be regarded as quite unlikely that the number of those affected could increase. The Court did not however adopt the argument that there was practically a closed class of those affected. It assumed the existence of a genuine legislative provision no doubt because it was impossible to exclude *with certainty* a change in the number of those affected and it accordingly held that there was no right of action pursuant to Article 173 of the EEC Treaty.

In view of this case-law it will be especially difficult to share the applicant's view in the present case that it is of individual concern to the applicant. It must certainly be admitted that it is quite unlikely that the class of manufacturers of glucose having a high fructose content will change very much in the coming years. This cannot however be ruled out with certainty. In this respect it is interesting that the applicant, so far as the legal position is concerned, has not claimed that because of existing patent rights and licences it is impossible in the coming years for new producers of the said products to appear, perhaps using similar manufacturing processes. In the same way it is of interest that apparently even the contested system now applicable does not prevent every interested party from making new investments. In this respect reference may be made to the documents produced before this Court, for example the answer of the Federal Government to a question in Parliament, or to other documents which refer to planned capacities, research centres or projects which were being studied in certain Member States. Moreover the letter of a French producer of 29 October 1976 is revealing because it speaks of the relevant product's being manufactured as from 1 August 1977 in spite of the new refund system. This shows that the contested system in no way prevents the manufacture of glucose having a high fructose content.

I am therefore of the opinion that there can be no question that the contested system, which applies not only for a short period but entails a basic change of position for the future, is of concern only to the present manufacturers of the said product, that is a closed class, in the same way as the persons to whom an individual decision is addressed. Even if, as already stated, it is a borderline case, a borderline case which, it is true, because of the existing possibility of legal protection before the national courts does not appear particularly awkward, it must however ultimately be recognized that although a specific product is involved there is a genuine legislative provision. If however the fact that the contested measure is in the nature of a regulation is beyond doubt, then it follows at the same time that it is not of individual concern to the applicant and that for this reason there is no right of action.

2. There is accordingly no need to go into the question whether it is of direct concern to the applicant. I will however give my opinion briefly on the matter since it has been dealt with in the proceedings.

In this respect, let me say it at once, I consider the applicant's view and not that of the Council to be correct.

The fact that the contested provisions are directed to the Member States and require national implementing measures, in particular the recovery of the amounts of refund, is not decisive. What is important is that the Community provisions 'penetrate' as it were through the national sphere to the undertakings, for the national authorities have no discretion but must on the contrary adopt measures of implementation which are precisely laid down. This appears clearly from the wording of Article 2 of

Regulation No 1862/76, which without any proviso at all states that: 'the Member States shall recover from manufacturers of glucose having a high fructose content .... Commission Regulation No 2158/76 is drafted in the same way. It also contains precise directions to the authorities of the Member States to adopt purely implementing measures without providing for any discretion on their part.

The Council is accordingly wrong in thinking that the Member States are simply authorized to recover the amounts of refund and that in consequence it is only the national measures which are of direct concern to the undertaking. Moreover the Council must be told that is is confusing the relevant concepts when it considers that an undertaking can be directly concerned only if it is concerned in a specific manner and because of a particular factual situation. In truth these are the criteria which determine whether it is of *individual* concern to a person, whereas in situations such as the present it simply depends on the type of State intervention provided for whether it is of direct concern and not, on the other hand, on the fact that the Community provisions require national measures in addition.

Because however, as shown, it cannot in the present case be accepted that the applicant is individually concerned and because Article 173 of the EEC Treaty does not suffice when only one of the two requirements discussed is fulfilled, there is no escaping the finding that the application must be dismissed as inadmissible.

3. Since this appraisal applies both to the Council regulation and to the Commission regulation, which has the same scope, I can only propose that the application as a whole should be dismissed as inadmissible and that the applicant should be ordered to bear the costs under Article 69 of the Rules of Procedure.