OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 13 OCTOBER 1981 [1]

Mr President,
Members of the Court,

1. The cases which form the subject of this opinion arise from actions seeking compensation for damage brought against the Council and the Commission under Article 178 of the EEC Treaty by a number of Italian undertakings which are producers of maize groats or broken rice intended for the brewing industry (also one of the applicants is a company which manufactures beer and acts as an assignee of the right to the production refund due to its supplier of maize groats and broken rice). The applicants claim that damage was sustained as a result of the abolition of production refunds for these two agricultural products during the period from August or September 1975 to 19 October 1977. It should be recalled in that regard that the refunds were abolished by Regulations (EEC) Nos 665 and 668/75 of the Council of 4 March 1975 — with effect from 1 August 1975 in the case of maize groats and 1 September 1975 in the case of broken rice — and that the Court by a judgment of 19 October 1977 in Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson and Société Coopérative "Providence Agricole de la Champagne"* [1977] ECR 1795 held that the provision contained in Regulation No 665/75 which abolished the refund was incompatible with the principle of equality and that it left to the institutions the task of putting an end to the discrimination. Consequently, the Council, by Regulations (EEC) Nos 1125, 1126 and 1127/78 of 22 May 1978 (Official Journal 1978, L 142, p. 21 et seq.), provided for the reintroduction of the refunds in question but only with effect from the date of the judgment. The applicants claim compensation for the loss suffered during the period which elapsed between the adoption of the measures abolishing the refunds (or in three cases from a subsequent date) and the date on which Community aid was restored.

The defendant institutions have raised preliminary objections that the applications are inadmissible because they are out of time. Since the Court has decided to consider those objections separately, the present opinion is confined to the question of admissibility.

2. The provision which the Commission and the Council rely upon in support of their case is Article 43 of the Protocol on the Statute of the Court of Justice annexed to the EEC Treaty. The first sentence of that article provides as follows: "Proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto". Consequently, it is a question in this case of determining which event gave rise to the applications by the undertakings or more precisely which event gave rise to the non-contractual liability of the Community and enabled the injured parties to bring proceedings under Article 178 of the EEC Treaty.

1 — Translated from the Italian

The defendant institutions take the view that that event was the publication of the two regulations which abolished the production refunds for maize groats and broken rice. The date on which the period of limitation started to run was therefore 20 March 1975. Since it is established that all the applications were lodged after 20 March 1980, they are time-barred. The applicants claim, however, that since non-contractual liability presupposes that damage has occurred, the date from which the limitation period started to run must be taken to be that on which the damage was sustained, that is to say, the date of failure to pay the refunds due to undertakings which had produced maize groats or broken rice.

3. I would observe first that in my opinion no argument to support the defendants' view can be deduced from the wording of Article 43 cited above. The defendants have sought to assign particular importance to the fact that the provision in question refers to the event which gives rise to the liability and not to the infliction of financial loss on the injured party. The event envisaged by Article 43 is therefore the occurrence which is the cause of the damage.

Strictly speaking, however, the provision refers to the event which gives rise to the proceedings seeking compensation for damage (that is particularly evident in the Italian text) and therefore leaves open the question whether or not the damage must have been sustained before proceedings can be instituted. The same problem arises, however, even if the view is taken that irrespective of its wording the article intended to refer to the event which gave rise to the liability: it is indeed beyond question that the duty to compensate the damage presupposes not only wrongful conduct but also that that conduct has injurious effects on the aggrieved party; but must the injury have been sustained or is it sufficient that the wrongful act is accompanied by the *expectation* of damage?

4. The Court's decisions on this point have not followed a consistent line. In a passage in the judgment of 14 December 1962 in Joined Cases 46 and 47/59 *Meroni* [1962] ECR 411 (see in particular p. 420) the view was accepted that the period of limitation laid down by Article 40 of the Statute of the Court of Justice of the ECSC could not start to run unless there was damage which was certain and finally quantifiable. That article corresponds exactly to Article 43 of the Protocol of the Statute of the Court of Justice of the EEC. However, in its judgment of 2 June 1976 in Joined Cases 56 and 60/74 *Kampffmeyer* [1976] ECR 711 the Court stated that "Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed" (paragraph 6 of the decision). In that case by applications lodged in July 1974 a number of German milling undertakings had sought a declaration that the Community was bound to make good the damage which they had suffered during the 1974/75 cereal marketing year — and therefore future damage — by reason of the rules on prices and aid relating to durum wheat contained in a group of regulations published between May and June 1974.

The defendant institutions had objected that Community law recognized only an action to establish liability to make good damage which had actually been sustained. The Court rejected that objection and held that "as soon as the Community rules in question were published and before they were put into effect the applicants were justified in bringing before the Court the question whether and to what extent these rules were such as to put them at a disadvantage in relation to their French competitors and if so whether these rules were for this reason contrary to the principle of equal treatment" (paragraph 8 of the decision). Finally the judgment of 2 March 1977 in Case 44/76 *Milch-, Fett- und Eier-Kontor GmbH* [1977] ECR 393 confirmed that it was possible to apply for a declaration that the Community was non-contractually liable even for future damage provided that it was imminent and "foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed".

The defendants draw the conclusion from the judgments in the *Kampffmeyer* and *Milch-, Fett- und Eier-Kontor GmbH* cases that it was possible for the applicants to institute legal proceedings from the date on which the regulations abolishing the refunds for maize groats and broken rice were published. Consequently, it is to that date that reference must be made in order to determine the beginning of the limitation period for the actions for damages in question. One of the objections put forward by the applicants against that view is that the right to claim compensation for future damage has no bearing on the setting in motion of the period of limitation referred to in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. According to that contention, whilst in its judgment in the *Kampffmeyer* case the Court acknowledged the right of aggrieved parties to institute legal proceedings as soon as the measure causing the damage had been published, it did not state that they were obliged to bring an action immediately, if they were not to run the risk of the expiry of the period of limitation. However, it must not be forgotten that all periods of limitation for legal actions start to run on the date from which the right of action accrues: that consequence arises from the very concept of a limitation period. Only if an action to establish liability to make good future damage were to be regarded as a different form of legal remedy from an application seeking compensation for damage which has already occurred (for example, as a form of precautionary protection against the mere risk of sustaining damage) would it be possible to envisage a separate period of limitation for each action. Moreover, that view is incompatible with Community law which provides for a single type of action in matters of non-contractual liability intended to establish liability and compensate the injured party. Consequently, it seems to me that in so far as it is considered that proceedings under Articles 215 and 178 of the EEC Treaty may be instituted even in respect of future damage, for any action intended to establish the liability of the Community on the basis of the same injurious event, the date on which the period of limitation starts to run is the date from which the right of action accrues.

5. The point which it is essential to clarify in order to come to a decision on the question at issue concerns the identification of the wrongful act which in the applicants' view gives rise to the Community's liability. Is that act in fact *merely the adoption* of the measures abolishing the production refunds for maize groats and broken rice, that is to say, the adoption of the measures as distinct from their entry into force? The reply must be in the negative: if for any

reason the measures had not entered into force, there would have been no wrongful act.

That conclusion — one which in my view is valid in any case where non-contractual liability arises from a legislative measure — is particularly compelling in this case. In the judgment of 19 October 1977 in the *Moulins et Huileries de Pont-à-Mousson and Société Coopérative "Providence Agricole de la Champagne"* case the Court held that "the situation created by Article 3 of Regulation (EEC) No 665/75 ... is incompatible with the principle of equality" and that "it is for the competent institutions of the Community to adopt the necessary measures to correct this incompatibility" (paragraph 28 of the decision). Furthermore, it was stated in the same judgment that there existed "several courses of action which enable the two products in question once again to be treated equally". Consequently, the wrongful act for which the EEC is alleged to be liable is in fact the *discriminatory state of affairs* created by the measures abolishing the refunds. That state of affairs exists as from the date on which the measures are applied. It could never have arisen if in the few months which elapsed between the adoption of the measures abolishing the refunds and the entry into force thereof the Community authorities had also provided for the abolition of refunds for starch, the similar product treated in a different manner. One of the ways of restoring the equal treatment of the two products compared (starch and maize groats used in the manufacture of beer) was in fact to discontinue the system of Community aid for both. I scarcely need to add that another method of preventing the discrimination from occurring might have been to repeal the measures abolishing the refunds before they took effect. Moreover, that course of action was less likely to be taken and it is known that a judgment of this Court was required to persuade the Community institutions to take the decision to restore the abolished refunds.

For those reasons it may be concluded that even by exercising the right to bring a claim to establish liability to make good future damage the applicants could have taken no action between 20 March 1975 and the date on which the provisions abolishing the refunds came into force, for the simple reason that the wrongful state of affairs had not yet arisen.

6. I may usefully make a number of other remarks appertaining to the nature of the wrongful act, in the form in which I believe that I have been able to identify it. A discriminatory state of affairs is not a momentary but a continuing wrong which endures and gradually produces harmful effects which become increasingly conspicuous. If my view is shared that the wrongful state of affairs in this case arose at the date on which Regulations Nos 665 and 668/75 entered into force, the result — as far as the date on which the period of limitation started to run is concerned — is the same as that arrived at by the applicants on the basis of the fact that the damage began to occur from the date on which the refunds could have been claimed under the system abolished by the measures.

However, even accepting that assertion that the wrongful state of affairs first arose on the date on which the above-mentioned regulations were adopted, that does not alter the fact that the situation remained wrongful until 19 October 1977, the date from which the refunds again became payable. The preclusion of actions for damages therefore took place progressively as in any case involving a continuing wrong, and only claims for any damage occasioned, as a result of the discriminatory state of affairs, in the period prior to the five years preceding the bringing of the action must be considered as time-barred.

It must, moreover, be emphasized that if it were held in this case that a continuing wrongful state of affairs arose from the date on which the measures abolishing the refunds were adopted, it would have to be concluded that the aggrieved parties were not entitled to bring an action to establish liability to make good future damage in the period from March 1975 to the date on which those measures came into force. I have shown in fact that according to the judgment in the *Kampffmeyer* case the future damage must be "foreseeable with sufficient certainty" at the time when the action is brought. However, a sufficient degree of certainty did not exist so long as the Community institutions were in a position to entirely prevent the injurious effects of the provision adopted by taking one of the two courses of action which I have already described (abolition of the refunds for starch as well or repeal of the measures in good time).

Finally, still on the subject of the foreseeability of the damage, there is a further point to be considered. As we have seen, the right to receive the production refunds in question was subject both in the case of maize groats and in that of broken rice to the condition that they should be used for the manufacture of beer. That means that the risk of incurring damage occasioned by a failure to pay the refunds was affected by the choices made by the producer undertakings regarding the market for their products and the policies adopted by the purchasers concerning the use of maize groats and broken rice. In circumstances such as I have described, it is hard to accept that at the time when the refunds for the two products were abolished all the undertakings potentially affected were able to foresee with sufficient certainty that they would have sustained damage (unless the Court were to go so far as to hold that an action to establish liability to make good future damage may be brought by any person belonging to a category which as a whole may *potentially* be injured by a Community measure!).

7. Counsel for the Commission, in support of the thesis that the wrongful act in this case is of an isolated and not a continuing nature, put forward the view during the hearing that the damage consisted in the fall in value of the undertakings which occurred immediately following the publication of the measures abolishing the refunds. However, it seems to me that the nature of the wrongful act cannot be inferred from the alleged nature of the damage sustained by the undertakings: the reserve approach would be the more logical one. Even if it were considered that the wrongful act in question took the form of discrimination which arose as soon as the measures abolishing the refunds were adopted, it would in theory still be possible that the harmful effects of the undertakings (which could,

moreover, be measured by calculating the effect which the failure to receive the expected refunds had on the value of the undertaking's assets. However, the point at issue is the admissibility of particular actions and it must not be forgotten, first that those actions were brought after the non-receipt of the refunds, owing to their abolition, had become an established fact, and secondly that the damage for which the applicants claim compensation is that occasioned by the abolition of and failure to restore the refunds for maize groats and broken rice during a specific period which has already elapsed. Consequently, I do not find the Commission's view at all convincing and remain persuaded that the original wrong consists in the discriminatory state of affairs which extended from the date on which the measures abolishing the refunds were applied until 19 October 1977, and the injurious effects of which were gradually felt as payment of the refunds continued to be refused.

8. In support of that thesis I would point to the anomalous consequences which have followed from the development of the opposite view. The applicant undertaking in Case 257/80 (Mangimi Niccolai) did not start producing groats and meal intended for the brewing industry until March 1976, that is to say, in a period subsequent both to the adoption and to the entry into force of the measures which abolished the refunds for that category of products. Nevertheless, the defendant institutions consider that even in that case the period of limitation began to run from the date on which Regulations Nos 665 and 668/75 were published. That amounts to a submission that the period from March 1975 to March 1976, during which the undertaking clearly had no right to claim compensation for damage connected with the discrimination against the producers of groats for the brewing industry, must also be included in the five-year period of limitation just as if it were merely a case of a person failing to exercise his right of action (unless it is held that the undertaking concerned could bring an action for damages even before it began producing the goods which were subject to discrimination). In order to overcome that difficulty the Council relied on the judgment of this Court of 4 October 1979 in Joined Cases 241, 242 and 245 to 250/78 *DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others* [1979] ECR 3017; in paragraph 19 of the decision, the Court considers the case of an undertaking which was founded and commenced production of gritz in February 1976, that is to say some months after the adoption of the measure abolishing the refunds for gritz. The Court held in that case that the damage suffered by the undertaking was not indemnifiable and it appears that the Council proposes the same solution in this case. However, in the above-mentioned case the Court was concerned not with the ending of the period for bringing an action for damages — which is the only matter to be considered at this stage — but with a quite different point of substantive law, namely the existence of liability on the part of the Community. It seems to me, therefore, that the reference to that case is inapposite.

9. Let us now turn to the facts of the individual cases with which the Court is concerned to determine whether, and if so within what limits, the individual actions were brought within the period required and are therefore admissible. I would observe that for that purpose

account must be taken of the dates on which the claims seeking compensation for damage were submitted to the Commission. Indeed, Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, after laying down the five-year period of limitation considered above provides that "the period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community. In the latter event the proceedings must be instituted within the period of two months provided for in Article 173 ...". However, if that provision is applied literally, only claims for compensation under Article 215 of the EEC Treaty duly made against the Community authorities can have an interruptive effect. I do not in fact believe to be well-founded the view put forward by Counsel for the applicants that claims addressed to the national authorities also had interruptive effect because those authorities were bound to forward them (or did in fact forward them) to the Community authorities. In my view the national authorities, by transmitting claims for damages addressed to them in error to the Community authorities, are probably merely fulfilling an informative function (and not an obligatory one) within the scope of the cooperation established between the national and Community authorities in administrative matters. This is therefore something quite different from the rules governing the limitation of actions.

Having clarified that point, I would recall that the claims for damages were lodged in respect of the production of maize groats on 18 August 1980 by Birra Wührer (applicant in Case 256/80), on 15 March 1980 by Mangimi Niccolai (applicant in Case 257/80), on 27 March 1980 by De Franceschi, Pordenone (applicant in Case 265/80), on 15 April 1980 by De Franceschi, Monfalcone (applicant in Case 51/81), and in respect of the production of broken rice, on 8 August 1980 by Riseria Modenese (which brought the action in Case 267/80) and on 2 September 1980 by Riserie Angelo e Giacomo Roncaia (applicant in Case 5/81). Consequently, in view of the fact that the discriminatory state of affairs (the event giving rise to liability) arose on 1 August 1975 in the case of producers of maize groats and on 1 September 1975 in that of producers of broken rice, it follows that the companies Mangimi Niccolai, De Franceschi, Pordenone, Riseria Modenese and De Franceschi, Monfalcone, lodged their claims — and their ensuing actions before the Court — before the expiry of the five-year period of limitation. That makes it unnecessary to consider separately the position of the company Mangimi Niccolai which, as we have seen, did not begin to produce maize groats for the brewing industry until 16 March 1976. In the case of the other two undertakings (Birra Wührer and Riserie Roncaia) the principle valid in the case of wrongful acts of a continuing nature must be applied, under which claims for compensation and the ensuing legal actions are time-barred to the extent of the damage sustained more than five-years before the individual claims were submitted.

10. In conclusion I propose that the Court should:

(a) Declare admissible the actions brought against the Commission and the Council of Ministers of the European Communities by Mangimi Niccolai SpA, by De Franceschi Marino & Figli SpA, whose registered office is in Pordenone, by Riseria Modenese Srl and by De Franceschi SpA, whose registered office is in Monfalcone;

(b) Declare admissible to the extent of the damage incurred after 18 August 1975 the action brought against the Commission and the Council of Ministers by Birra Wührer SpA;

(c) Declare admissible to the extent of the damage which occurred after 2 September 1975 the action brought against the Commission and the Council of Ministers by Riserie Angelo e Giacomo Roncaia.