

other national court to regard that act as void for the purposes of a judgment which it has to give. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier.

2. To the extent to which Community law has not provided otherwise, disputes relating to the refund of amounts collected on behalf of the Community fall within the jurisdiction of national courts and should be settled by those courts by applying their own national law, both procedural and substantive.
3. The existence during the period in which Council Regulation No 563/76 was applied of a scheme specially designed with a view to spreading the economic effects of the obligations which it imposed destroys the basis of

an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone. In this regard it does not matter whether the operator has actually passed on the charge or whether he has decided not to do so for reasons connected with the financial policy of his undertaking. Recovery is in itself ruled out *a fortiori* if the operator was not himself bound to pay the charge in question which he advanced voluntarily or refunded to his suppliers.

4. The third subparagraph of Article 8 (1) of Regulation No 192/75 covers only the case of a compound product which, as such, is not capable of attracting export refunds but contains certain components which are so capable. That provision does not therefore relate to the case of a compound product which as such, that is to say in its entirety, attracts an export refund. In that case it is the first subparagraph of Article 8 (1) which governs the conditions for the grant of the refund; consequently all components of a product must have originated in the Community or have been released into free circulation there.

In Case 66/80

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunale Civile di Roma for a preliminary ruling in the action pending before that court between

SPA INTERNATIONAL CHEMICAL CORPORATION, Rome,

and

AMMINISTRAZIONE DELLE FINANZE DELLO STATO [Italian Finance Administration],

on the interpretation on the one hand of Article 17 of the EEC Treaty with particular regard to the effects of the declaration of nullity of Council Regulation (EEC) No 563/76 of 15 March 1976 on the compulsory purchase of skimmed-milk powder held by intervention agencies for use in feedingstuffs (Official Journal L 67, p. 18), in particular in relation to the amounts paid but not legally due under that regulation and on the other hand on the interpretation of various Council and Commission regulations concerning the export refunds for compound feedingstuffs,

THE COURT

composed of: J. Mertens de Wilmars, President, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans (Presidents of Chambers), A. O'Keefe, G. Bosco, A. Touffait, O. Due and U. Everling, Judges,

Advocate General: G. Reischl

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Council Regulation (EEC) No 563/76 of 15 March 1976 (Official Journal L 67, p. 18) imposed an

obligation upon producers of feedingstuffs to purchase skimmed-milk powder held by intervention agencies with a view to its use after denaturation in the manufacture of feedingstuffs. The provision of a security was required in order to ensure compliance with that obligation; it was forfeited in the event of the failure to fulfil the obligation in question. That regulation made the grant to the producers concerned of Community aids for certain vegetable foodstuffs (colza and rape seeds and soya beans) subject either to proof of purchase and of the denaturation of a certain quantity of skimmed-milk powder or to the prior provision of a security to guarantee the later performance of the obligation to purchase. With the same aim in view the entry into free circulation in the Community of imported vegetable foodstuffs was made subject to the delivery of a "protein certificate" proving either that the obligation to purchase skimmed-milk powder had been fulfilled or that a security had been provided to guarantee a later purchase. If the obligation to purchase was not complied with the security was forfeited.

2. By different judgments given on 5 July 1977 in Cases 114/76, 116/76 and Joined Cases 119 and 120/76, *Bela-Mühle and Others* [1977] ECR 1211, the Court of Justice declared that Regulation No 563/76 was null and void because the obligation to purchase milk powder at a price three times higher than its value as fodder constituted a discriminatory distribution of the burden of costs between the various agricultural sectors and was not necessary to achieve the disposal of stocks.

3. The plaintiff in the main action, S.p.A. International Chemical Corporation, in certain cases itself provided securities at the time of the importation from non-member countries of certain vegetable foodstuffs which it uses to produce compound feedingstuffs to secure the obligation to purchase referred to above. It further states that in a certain number of other cases it has returned to its suppliers the securities which they had provided for the same purpose.

All these securities were forfeited because the obligation to purchase was not complied with. Consequently, in order to avoid the obligation to provide securities for vegetable foodstuffs which it obtained outside the Community, instead of importing and putting the said products into free circulation the plaintiff in the main action availed itself of the opportunity offered by Article 10 (2) of Regulation No 677/76 (Official Journal L 81, p. 23), laying down detailed rules for the application of Regulation No 563/76, by applying for and obtaining their admission to the temporary importation procedure (inward processing traffic). It was under that procedure, therefore, and under customs control that the plaintiff began mixing those products with cereals (Community cereals or cereals in free circulation) which it had for the purpose of producing the compound feedingstuffs which it placed on the market. The plaintiff affirms that it was only to avoid the obligation to provide a security that it had recourse to that expedient as the vegetable foodstuffs in question entered the Community freely without payment of either customs duty or levy. The compound feedingstuffs produced in those circumstances come under sub-heading 23.07 B of the Common

Customs Tariff. By virtue of the fact that they had been manufactured under the temporary importation procedure, they necessarily had to be exported. Upon effecting such exports the applicant applied for *export refunds* provided for by Article 16 of Regulation No 2727/75 of the Council on the common organization of the market in cereals. It was refused those refunds because in the opinion of the competent administration and the Commission departments consulted by it the exported goods neither originated in the Community nor were they in free circulation there as required by Article 8 (1) of Regulation No 192/75 of the Council of 17 January 1975 (Official Journal L 25, p. 1) laying down detailed rules for the application of export refunds in respect of agricultural products.

4. Following the judgments of the Court declaring Regulation No 563/76 to be null and void the plaintiff thought that such a declaration should extend to operations effected by it prior to the said judgments. That meant that the securities forfeited should be returned because they had been required only to guarantee an obligation incompatible with Community law. It likewise followed, the plaintiff thought, that the export refunds which it had been refused should be granted. Consequently it sued the competent Italian administration — which in fact was acting on behalf of the Community — for the payment of:

- (a) LIT 61 057 544 by way of refund of securities provided by it and forfeited as well as sums paid by it to its suppliers and which were equivalent to the amount of the securities provided by them and likewise forfeited.
- (b) LIT 173 494 317 representing the amount of the export refunds for the

exports to non-member countries effected between 4 August and 1 October 1976 in regard to compound feedingstuffs produced under the temporary importation procedure described above.

5. Before the national court the parties to the main action argued principally about three problems:

- (a) the effects of the preliminary rulings of 5 July 1977 given in actions between other parties in regard to the legal position of the plaintiff in the main action;
- (b) the existence, from the time of the judgment establishing nullity, of a legal basis allowing securities to be refunded and export refunds to be demanded, and
- (c) the interpretation of the provisions of Regulation No 192/75, especially Article 8 thereof, and No 677/76, especially Article 10 (2) thereof, relied on by both sides to demand or refuse the payment of the export refunds in question.

6. Having decided that the dispute raised problems concerning the interpretation of Community law the national court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

- “1. Under Article 177 of the Treaty is a declaration that a Community regulation is null and void effective *erga omnes* or is it binding only on the

court *a quo*; more particularly, in that case may the principle contained in the judgment of 27 March 1963 in Joined Cases 28, 29 and 30/62 be extended to a declaration of nullity?

2. Again in the latter case, is Regulation No 563/76 of 15 March 1976 null and void for the same reasons as those set out in the judgments of 5 July 1977 in Cases 114, 116 and Joined Cases 119 and 120?

3. If the said regulation is null and void, must the principles on which the Community legal order is based be held to allow or not to allow or to allow upon certain terms and within certain time-limits the refund to an individual of a payment which was not due, and if so does the declaration of nullity give the individual himself the right to claim back under the national law of the various States the amount that he has previously paid on the basis of the rule which has been declared null and void and, if so, is this subject to specific terms or time-limits or to given conditions, especially having regard to the case in which the claim is for the reimbursement of sums paid by the plaintiff to his suppliers?

4. With reference to Community law, and in particular to the Commission's Regulations No 192/75 of 17 January 1975, No 2727/75 of 29 October 1975, No 2743/75 of 29 October 1975, No 677/76 of 26 March 1976, No 1871/76 of 30 July

1976, No 2141/76 of 31 August 1976 and No 2372/76 of 30 September 1976, must a refund be held to be payable on exports of compound feedingstuffs in respect of the cereal components alone and does it conflict with the general principles derived from the said provisions for the refund to be granted on exports of compound products and only in respect of certain of their components where the other components were imported only temporarily?"

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities written observations were submitted by the plaintiff in the main action, SpA International Chemical Corporation, represented for that purpose by Nicola Catalano, a member of the Rome Bar, by the Italian Government, represented for that purpose by Arnaldo Squillante, acting as Agent, assisted by Ivo Braguglia, *Avvocato dello Stato*, by the Council of the European Communities, represented for that purpose by Bernard Schloh, Adviser in the Council's Legal Department, acting as Agent, assisted by Tito Gallas, a member of its Legal Department and by the Commission of the European Communities, represented for that purpose by Giancarlo Olmi, Deputy Director-General of its Legal Department, acting as Agent, assisted by Guido Berardis, a member of its Legal Department.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — *Observations of SpA International Chemical Corporation*

The plaintiff in the main action first recalls the facts giving rise to the dispute. It specifies the amounts which it had to pay for the securities which it had to provide (LIT 25 204 944) and those (LIT 34 852 560) for the refund to its suppliers of the cost of the "protein certificates". It states that between 4 August and 1 October 1976 it exported to non-member countries consignments of compound feedingstuffs consisting mainly of cereals with the addition of other products including, up to 20 % on average, soya beans or ground-nut meal imported from non-member countries under the temporary importation procedure to avoid having to provide a security. Upon exportation it submitted an application for a refund pursuant to Article 16 of Regulation No 2727/75 of the Council of 29 October 1975 but that application was rejected and its appeal to the Italian Ministry of Finance remained unanswered.

Questions 1 to 3

The plaintiff in the main action examines these questions together. It first points out the differences and the analogies between a judgment establishing nullity and a judgment providing interpretation given under Article 177 of the Treaty, and then goes on to compare the effects of a judgment establishing nullity and

those of a judgment establishing failure to fulfil an obligation given under Article 169 or providing an interpretation pursuant to Article 177 in cases where they show that a national provision is incompatible with Community rules.

According to the plaintiff, the assertion that a lower court is not bound to refer questions of validity to the Court — on the ground that it is not bound to do so in cases concerning a question of interpretation — and that it consequently may itself set aside provisions of Community regulations, is wrong.

After analysing Articles 177 and 189 of the Treaty the plaintiff deduces from them that a lower court may refuse to refer to the Court questions of validity which are obviously unfounded, but it may not declare a Community provision to be null and void without referring it to the Court of Justice; higher courts, on the other hand, are bound in any event to refer questions of validity to the Court.

As regards the effects of a declaration of nullity, according to the plaintiff in the main action it is necessary to distinguish actions for damages from those for the recovery of a payment not legally due. Although the Court in its judgment of 4 October 1979 given in Case 238/78 *Ireks-Arkady* [1979] ECR 2955 has held that a finding of unlawfulness is not by itself sufficient to justify an action for damages, it has not yet ruled on a case in which a recovery action is brought following the setting aside of a Community regulation. On the other hand there is a national precedent, namely the judgment given by the Court of Appeal, Lyon, on 13 November 1978 (Dalloz 1979, Jur. 374) after the judgment of the Court of Justice of 20 April 1978 in joined Cases 80 and 81/77 *Ramel* [1978] ECR 927. The national

court upheld the application for the entire refund of charges improperly levied and rejected the plea that the importers in question had passed on to their buyers the burden of the charges which they had paid.

According to the plaintiff the same way of resolving the issue should be applied in regard to payments wrongly made in relation to the Communities' own resources. This is justified by three types of consideration:

- (a) logical argument,
- (b) moral considerations and
- (c) the fact that the collection of Community income is carried out, according to Article 6 of Council Decision of 21 April 1970 (Official Journal, English Special Edition 1970 (I), p. 224), in accordance with national provisions imposed by law, regulation, or administrative action.

As to (a):

In its judgments given on 27 March 1980 in Case 61/79 *Denkavit* [1980] ECR 1205 and Joined Cases 66, 127 and 128/79 *Salumi and Others* [1980] ECR 1237 the Court affirmed that the effect of its judgments providing interpretation given on the basis of Article 177 was purely declaratory. There is no reason to hold otherwise in regard to judgments declaring a provision of a Community regulation to be null and void.

As to (b):

It is unacceptable that the consequences of levying payments unlawfully by reason of a breach of Community rules may vary depending on whether the sums levied are to go to a State treasury or towards Community funds.

As to (c):

The fact that in any one Member State the outcome is different depending on whether national or Community income is involved is all the more paradoxical since in both cases the same provisions and procedures of the national legal systems are applied. Although it is a drawback and some harmonization is desirable it must be accepted that divergencies existing between the different national regulations and procedures are inevitable.

It follows that in Italy an action for the recovery of Community resources wrongly acquired should be brought on the basis of Article 2033 of the Italian Civil Code just like an action relating to the recovery of charges having an equivalent effect. The plea that the charges have been "passed on" may not be raised.

On the basis of those considerations the plaintiff proposes that the questions referred to the Court should be answered as indicated below.

Question 1

The reply to be given must be that the case-law in *Da Costa* (Joined Cases 28 to 30/62, cited above) should be extended to judgments on validity.

Question 2

The plaintiff leaves it to the discretion of the Court as to whether it is again necessary to declare expressly that Regulation No 563/76 is null and void.

Question 3

An individual who has wrongly paid a certain sum pursuant to a provision later held null and void should be able to recover, under the national law of the various Member States, what he has previously paid. He may likewise take action by way of subrogation in regard

to sums which have been wrongly paid by his suppliers. In so far as an action in the name of another should fall under Community law the plaintiff refers to the judgment of 4 October 1979 (Case 238/78 *Ireks-Arkady*, cited above) in which the Court held that an action by an assignee to whom the right of recourse had been transferred was admissible. Limitation periods for recovery actions are determined by national law.

Question 4

According to the plaintiff in the main action Question 4 was framed from two angles in order to allow for a reply using two different approaches.

(a) The first approach starts on the dual assumption that Regulation No 563/76 is null and void and that the possibility of using the expedient of temporary importation was contemplated and written into Article 10 (2) of Regulation No 677/76 for the sole purpose of enabling the obligation to purchase and the attendant financial consequences (provision of a security) to be avoided. Once the obligation to purchase was held to be unlawful that meant that no trader would need to have recourse to that expedient. He would simply put the oil-seeds, which he imported from non-member countries, into free circulation so that when feedingstuffs made with those products were exported he would receive export refunds. He would therefore be entitled to them because it would have been unlawful to have imposed upon him a method of importation which deprives him of those refunds. The plaintiff in the main action further contends that the declaration of

the nullity of Regulation No 563/76 means that the regulations adopted for its application, in this case Commission Regulation No 677/76, as null and void and that the Court may automatically declare the latter null and void.

(b) The second approach is entirely independent of the question whether Regulation No 563/76 is valid or not. It is based upon an interpretation of the various regulations cited in regard to Question 4 and mainly on the interpretation of Article 8 (1) of Regulation No 192/75, Article 16 (2) of Regulation 2727/75 and Article 10 (2) of Regulation No 677/76. Article 8 of Regulation No 192/75 (Official Journal L 25, p. 1), which the defendant administration relies on to justify its refusal, is intended, says the plaintiff, to stipulate that the "refund" may be granted only in the case of products originating in the Member States or of products imported from non-member countries on which any customs duties and Community levies have been paid in full.

The rule in the first subparagraph of paragraph (1) of Article 8 cited above is however relaxed in regard to compound products, that is to say, those partly containing raw materials (in this case cereals) from the Community or in free circulation and partly raw materials from non-member countries, in this case oil-seeds, imported under the temporary importation procedure.

It seems that the plaintiff is relying on two different rules concerning relaxation.

(1) It first asserts that the animal feedingstuffs which it has exported contained "more than the maximum

percentage of cereals allowed for the grant of the refund so that it is entitled to the payment of the whole of the refund because the percentage of (Community) agricultural products incorporated justifies the grant of that refund in any event, irrespective of the treatment for customs purposes of the oil-seeds incorporated”.

The plaintiff in the main action does not state the legal basis for its view particularly in regard to the percentages which it gives. It seems that it is relying on Article 16 (2) of Regulation No 2727/75 of the Council (common organization of the market in cereals) and Article 7 (1) of Regulation No 2743/75 of the Council on the system to be applied to cereal-based compound feedingstuffs whereby at the time when the refunds are determined account should in any event be taken of the need to strike a balance between the use (for the manufacture of products for which refunds are granted) of Community basic products and the use of products from non-member countries allowed into the inward processing traffic system. That would mean that the amount of the refund would itself rectify any compound nature of the products for which that refund is given. Moreover, since the two regulations cited (Nos 2727/75 and 2743/75) are regulations of the Council, they take precedence over the conflicting provisions of regulations of the Commission, especially over Article 8 of Regulation No 192/75 of the Commission which was relied upon to justify the refusal to grant the refunds. The plaintiff in the main action concludes from this that it is entitled to the whole of the export refund provided for (compound) feedingstuffs.

seems, on another relaxation of the rule stated in the first subparagraph of Article 8 (1) of Regulation No 192/75 of the Commission which restricts the refunds to exported products originating in the Community or in free circulation therein, and which follows from the third subparagraph of the same article. According to that third subparagraph “when compound products qualifying for a refund fixed on the basis of one or more of their components are exported, that refund shall be paid only in so far as the component or components in respect of which the refund is claimed come within the terms of Article 9 (2) of the Treaty” [that is to say, originating in the Community or in free circulation]. The plaintiff concludes from that that it is at least entitled to the refunds on the cereal components in the feedingstuffs which it has exported. On the basis of all those considerations it proposes as a reply to Question 4 that “the refund is payable on the export of feedingstuffs solely in regard to the cereal components notwithstanding the fact that the other components (oil-seeds) have been imported from non-member countries under the temporary importation system for the sole purpose of acquiring exemption from the requirement of securities provided for by Regulation No 563/76 which has been declared null and void”.

B — Observations of the Italian Government

Questions 1 and 2

(2) The plaintiff in the main action further relies, as an alternative claim it

The Italian Government points out that the problem of the effect *erga omnes* or

inter partes of a judgment declaring a provision of Community law to be null and void has been discussed at length by academic writers and broached by Mr Advocate General Gand (Case 16/65 *Schwarze* [1965] ECR 877 at p. 899), by Mr Advocate General Warner (Cases 112/76, 22/77, 32/77 and 37/77, *Manzoni and Others*, [1977] ECR 1647, at p. 1661) and Mr Advocate General Capotorti (Case 64/76 *Dumortier Frères and Others* [1979] ECR 3091, at p. 3119).

In the judgment of 1 December 1965 in Case 16/65 *Schwarze* although not expressly dealing with the problem, the Court stressed that although it could not "declare such a measure void" under Article 177, it could, however, rule on its validity. The Italian Government infers therefrom that the Court considers that its judgment does not relate only to the instant case but also concerns the act in its objective context. In other words the Court inclines rather towards the effect *erga omnes* than towards the effect *inter partes* of preliminary rulings which declare null and void an act of one of the institutions. That reference is confirmed by the judgment of 13 February 1979 given in Case 101/78 *Granaria* [1979] ECR 623. The Court in fact decided that any regulation adopted in accordance with the Treaty must be assumed to be valid as long as no competent court has declared it null and void which means *a contrario* that once the competent court has declared a regulation to be null and void all those subject to Community law must no longer have regard to it. That conclusion should normally imply that later references for preliminary rulings on the validity of a regulation already declared to be null and void by the Court are inadmissible and the Italian Government argued that point of view in Case 22/77 *Mura* [1977] ECR 1699. However, in

that case and on other occasions (Case 112/76 *Manzoni*), the Court has thought it necessary to re-examine thoroughly the question of validity of an act already declared to be null and void.

In conclusion, from the date of the pronouncement of the judgment of the Court, a regulation declared to be null and void should no longer be observed or applied by those subject to the law and by the national courts of the Community even if it is admitted that national courts are competent to ask the Court to re-examine that question. In the light of the answer proposed the Italian Government thinks that Question 2 has no purpose.

Question 3

Question 3, which relates to the effects of the declaration of nullity of Regulation No 563/76 on the position of the individual, raises various questions which should be examined separately.

(a) It is suggested that a declaration of nullity pursuant to Article 177 of the Treaty has an effect *ex tunc* as in the case of judgments providing interpretations (judgment of 27 March 1980, Joined Cases 66, 127 and 128/79 *Salumi and Others* [1980] ECR 1237) save that its effects do not extend to the legal relationships which, according to the national law, must be considered to be at an end (judicial decisions acquiring force of *res judicata*, acquiescence, prescription, laches, and so forth).

(b) As regards the obligation on the Member States to refund amounts collected for the account of the Community, the Italian Government, whilst having due regard to the judgment given on 27 March 1980 in Cases 66, 127 and 128/79 cited above (*Salumi and Others*), thinks that it is necessary to re-examine the arguments put forward in the observations submitted in the course of Case 826/79, *Mireco* (judgment of 10 July 1980 [1980] ECR 2559) and to which it refers. It maintains that the obligation to return forfeited securities causes a disparity of treatment to the detriment of a trader who has obtained the "protein certificate", that is to say, the trader who has gone ahead and bought milk powder as against a trader who, like the plaintiff in the main action, confined himself to providing a security. Those two traders are in the same situation and it is unacceptable that the latter may have his security returned after the declaration of nullity of Regulation No 563/76 whilst the one who bought milk powder, thus contributing the most to the purpose of disposing of the surpluses, cannot receive any compensation for the damage suffered as a result of the compulsory acquisition of milk powder. The opportunity for him to obtain damages was in effect removed by the judgment of the Court of 25 May 1978 (Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL and Others* [1978] ECR 1209). That situation is contrary to the principle of equal treatment which is at the heart of the Community legal system.

(c) As regards the recovery of sums which the plaintiff in the main action has returned to its suppliers, the Italian Government thinks that the question does not arise if the problem of the effects of the declaration of the nullity of Regulation No 563/76 were resolved in the manner which it proposes. If it were

not, it would moreover not then be a case of recovery of payments not legally due, but of the compensation for the damage suffered for which the Community only should be sued and not the Member State.

Question 4

The Italian Government merely states that its administration has complied with the instructions given by the Commission on 27 July 1976.

C — Observations of the Council

After outlining the background to the dispute the Council says that it wishes to restrict its observations to Questions 1 and 3.

Question 1

The Council thinks that a ruling by the Court of Justice that a regulation is null and void given in the course of proceedings to obtain a preliminary ruling pursuant to Article 177 of the Treaty is binding only on the Court *a quo*. This follows from the specific nature of the procedure provided for by Article 177 which unlike that under Article 173 consists of a special form of cooperation between the Court of Justice and the national courts. To give a judgment of the Court of Justice under Article 177 an effect *erga omnes* would be incompatible with the second paragraph

of Article 173 of the Treaty as private persons would thus obtain by means of Article 177 that which Article 173 expressly denies them.

Another national court, in a fresh action and in regard to other parties would however have the right to rely on the declaration of invalidity. It could also submit a fresh reference for a preliminary ruling, not only in the form of questions on interpretation but also in the form of questions on validity. The principle brought out in the judgment of 27 March 1963 (Joined Cases 28 to 30/62 *Da Costa*, cited above) therefore applies to questions on validity too.

Question 3

The Council thinks that a judgment containing a declaration of nullity has an effect *ex tunc*. The Court has already expressly held that annulling judgments have an effect *ex tunc* in its judgment of 31 March 1971 (Case 22/70 *AETR* [1971] ECR 263), and there is no reason to draw a distinction in this respect between the procedure under Article 173 and that under Article 177. There are however exceptions to that principle. Without going into the considerations relating to the legal foundation of those exceptions — the second paragraph of Article 174, Article 176 (1) or the judgment of 8 April 1976 in Case 43/75, *Defrenne* [1976] ECR 455 — the Council draws attention to the special importance of the judgments of 13 February 1979 (*Granaria*) and of 25 May 1978 (*HNL and Others*) in regard to the resolution of the problem of the consequences of a declaration of nullity. The obligation to purchase was introduced by Community law and the regulation was declared null and void for being in breach of Community principles. From that it follows that any possible consequences

should also be determined according to Community law, either according to the written law or according to the principles laid down by the Court of Justice. The principle of equal treatment requires that the settlement of the issue of the consequences of nullity is done uniformly in accordance with the Community law and in a common way. The fundamental rules have already been established in this regard (*Granaria* judgment, Case 101/78, cited above). State authorities must accept the full validity of a regulation so long as the Court has not ruled thereon; the securities were therefore lawfully provided in the course of 1976 and the undertakings which passed on the burden of them have not suffered any damage and unless the contrary is proved they are not entitled to be indemnified. If subsidiary questions should still remain they must be settled by the national court in accordance with the national law applicable and without offending against the general principles of Community law.

In conclusion the Council thinks that the Court should reply as follows to Questions 1 and 3:

- “1. The finding in a reference for a preliminary ruling under Article 177 of the EEC Treaty that a Community regulation is null and void is binding only on the court *a quo*. Another national court may act on the principle that the regulation is not valid but it may at any time also submit the question for the decision of the Court of Justice.
2. National authorities are bound to recognize the full effect of a regulation subsequently declared to be null and void so long as it has not been declared null and void by a competent court.

The return of the security must not take place in accordance with national law or in accordance with the principle of the *condictio indebiti*. Rather is it governed by Community law and by the principles applicable in Community law. In the absence of Community provisions it is alternatively determined according to the national law".

D — Observations of the Commission

Question 1

1. *The effect erga omnes*

Having indicated the uncertainties in academic writings on the problem of the effects — *erga omnes* or *inter partes* — of preliminary rulings, the Commission points out that the essential aim of Article 177 is to ensure the uniform interpretation of Community law which is absolutely necessary in order to secure its uniform application in all the Member States by the national courts. It is established, first, that the decision of the Court is binding on the court *a quo* (judgment of 27 March 1963, Joined Cases 28 to 30/62 *Da Costa*, cited above, and judgment of 3 February 1977 *Benedetti/Munari* [1977] ECR 163) and, secondly that the Court makes a binding decision of a judicial nature when it consequently gives an absolutely definitive answer to the questions referred to it. The problem is to determine what happens in the context of other actions where the same problem arises.

Although the Court has allowed other national courts to refer again a question of interpretation which has already been resolved (judgment of 27 March 1963, Joined Cases 28 to 30/62 *Da Costa*, cited

above, and judgment of 24 June 1969, Case 29/68 *Milch-, Fett- und Eier-Kontor* [1969] ECR 165), that is not to say that the interpretation given by the Court may not have force in regard to all national courts. In effect it is apparent from those authorities that

- (a) courts of last instance are exempt from the obligation to make a reference by the force of the interpretation already given which removes any ground for the obligation to make a reference provided that they adopt that interpretation.
- (b) by virtue of the principle of the force of the matter interpreted lower courts lose the power to resolve a preliminary question by departing from the interpretation given by the Court without referring the case to it.

The case-law of the Court in this field is based on the purpose of preliminary references, on the participation of Member States and institutions in the procedure and, finally, on the absence of parties in the strict sense.

The fact that the judgment of the court refers to legal relations created before the judgment is not relevant (judgment of 27 March 1980, Case 61/79 *Denkavit* [1980] ECR 1205 and Joined Cases 66, 127 and 128 *Salumi and Others* [1980] ECR 1237). The validity *ex tunc* of the interpretation arises from the essentially declaratory nature of the judgments in question. An exception is made to that rule only when the retroactive application of an interpretation would mean serious economic or social consequences (judgments of 27 March 1980, cited above).

According to the Commission the principles recounted above apply also, if not *a fortiori*, to preliminary rulings on the validity of Community acts. Article 177 of the Treaty and Article 20 of the Statute of the Court of the EEC govern proceedings for an interpretation and those to determine validity in the same way. The requirement of the uniform interpretation and application of Community law applies in the same way in relation to the validity of Community acts. It follows that a judgment of the Court on the validity of a Community act also has force in regard to all national courts. All those courts, including those which are not of last instance, are bound to comply with the decision of the Court save where a fresh reference has been made to it.

laws pronounced by the Italian or German constitutional courts which have an effect *erga omnes* in the sense that they annul the law held to be unconstitutional: that effect *erga omnes* results however — and this must be emphasized — from an express provision of the national law concerned.

Despite those arguments the Commission thinks that there is no reason to apply to a judgment determining validity a solution different from that adopted for decisions or interpretation.

As regards any fresh reference, it is necessary to distinguish between the case where the Court has held the act to be valid and the converse case. If the Court has not found a ground of nullity on the basis of the objections made against the act, it may be that at any time when called upon to rule again, the Court will be moved to find the act null and void on other grounds. The converse case is more difficult. If an act has been declared null and void any subsequent decision declaring it to be valid would imply a clear change in case-law. Accordingly, there is in practice a temptation to give declarations of nullity an effect *erga omnes* since there is a close analogy between decisions based on Article 177 and decisions on nullity pursuant to Article 173. It is logical that the effect of the two types of decisions should be the same, as is the case with declarations of the unconstitutionality of

(a) A decision as to validity also carries force in regard to parties to future disputes before the court. The Court moreover adopted that reasoning when recalling its own declarations on nullity in later judgments upon actions to establish liability brought by other parties on account of the nullity found to exist (judgment of 25 May 1978, Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL and Others* and judgment of 24 March 1979, Case 90/78 *Granaria*, cited above). Moreover, the obligation to regard a regulation as valid so long as the competent court (here the Court of Justice) has not declared it null and void is accompanied by the obligation not to apply it from the time when that nullity has been declared.

(b) A fresh reference to the Court is not barred even if the Court has already held the act in question to be null and void (see the judgments in *Petroni* of 21 October 1975, Case 24/75 [1975] ECR 1149; *Strebl* of 3 March 1977, Case 62/76 [1977] ECR 211 and *Giuliani* of 20 October 1977, Case 32/77 [1977] ECR 1857). In the two last-mentioned judgments, at the request of the national courts, the Court re-examined the validity of a provision of Regulation No 1408/71 which it had previously declared null and void in the *Petroni* judgment.

2. *As to the effect ex nunc or ex tunc of judgments establishing nullity*

Judgments which uphold or set aside the validity of a Community act likewise have, the Commission says, an effect *ex tunc*. The arguments in support of that proposition are the same as those relating to judgments providing interpretation. The Commission refers in this regard to the opinion of Mr Advocate General Capotorti in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères* [1979] ECR 3091.

On the other hand the Commission thinks that the capacity of the Court of Justice to declare that certain effects of acts declared to be null and void are not eliminated and must be regarded as definitive should not be regarded as exceptional, as has been the case until now as regards judgments providing interpretation (judgment of 8 April 1976, Case 43/75 *Defrenne* [1976] ECR 455). In the case of an action to determine the validity of an act that power of the Court of Justice might in fact be founded upon the application by analogy of the second paragraph of Article 174 of the

Treaty. The parallel between Articles 173, 174, 184 and 177 has been brought out by the Court and in particular in the judgment given in Case 101/78 *Granaria*, cited above.

Question 2

According to the Commission the court in the instant case has not called in question the declaration of nullity of Regulation No 563/76 in regard to its substance. That question is asked only in the alternative and in the light of the conclusions drawn from an examination of Question 1 it has lost its purpose.

Question 3

According to the Commission the effect of the case-law of the Court is that as long as Community law has not directly regulated the matter in question it is for the national legal systems of each Member State to draw up the legal procedures for the protection of the rights of individuals. It refers in this regard to the judgments given on 16 December 1976 in Case 33/76 *Rewe* [1976] ECR 1989, on 22 March 1977 in Case 74/76 *Iannelli* [1977] ECR 477 and on 26 June 1979 in Case 177/78 *Pigs and Bacon Commission* [1979] ECR 2161. Those authorities nearly all concern *national* monetary charges imposed in breach of Community law. However the judgment given on 28 March 1980 in Joined Cases 66, 127 and 128/79 *Salumi and Others* (cited above) clearly extended the same principles to Community funding.

According to the Commission the case-law of the Court logically belongs to a stage at which the existence of the

right to recovery is not challenged. That right may be found to exist only with respect to Community law and it is only from then on that, in the absence of Community provisions, the national law applies within the limits laid down by the Court. Cases could arise in which by virtue of Community law the very existence of a right to recovery might not be recognized so that the precondition for the application of national law would not be fulfilled.

The Commission recalls the aims pursued by Regulation No 563/76 and the measures provided for attaching penalties to the obligation to purchase. It points out that Article 5 of the regulation in question provides that "in the case of current contracts" the burden of the costs arising under the arrangements which it introduced shall be borne by the successive buyers of the products concerned. The passing down the line of the burden of the financial costs in that way arises therefore from the regulation itself and according to the Commission constitutes one of the essential elements of the mechanism established by Regulation No 563/76. It relates to both the costs arising from the actual purchase of milk powder (the difference between the price of the latter and the lower price which the producers would have paid for substitute products) and the costs arising in other cases from the loss of security by the traders who chose not to buy the milk powder. It was a matter of avoiding the damaging and clearly unfair consequences which the introduction of the new system would otherwise have had on existing contractual relations. In the case of contracts concluded after the regulation had entered into force they would automatically have been adapted to the new circumstances.

Those factual circumstances were discussed and not contested in the course of actions for damages which became the subject-matter of the judgment of 25 May 1978 in Joined Cases 83 and 94/76, 5, 15 and 40/77 *HNL and Others* (cited above). Since the Court dismissed those applications for damages the Commission thinks that no right exists in the present case to the return of the securities which were paid and forfeited.

After outlining the Danish national system for recovery of a payment not legally due in cases where the person who made it was able to pass on the burden thereof and after pointing out the consequences which the Court has drawn therefrom in its case-law, the Commission concludes that whenever Community regulations make express provision themselves for the financial costs which they impose to be passed on, the structure of the legal relations created between the successive contracting parties *a fortiori* excludes any right to the recovery of the sum wrongly paid. Since the amount of the security was approximately equivalent to the financial costs arising from the obligation to purchase, it could be said that the passing on of those costs to the successive buyers has had the same effect.

The Commission observes that the Court has even rejected the action for damages brought by the buyers of compound feedingstuffs, that is to say, the livestock breeders to whom were transferred the financial costs falling upon the feeding-stuff manufacturers and arising from the compulsory purchase of milk powder or from the loss of securities.

In such circumstances the Commission thinks that it is inequitable that the securities may be allowed to be returned to the feedingstuff manufacturers with the result that they are treated more favourably than their competitors who did make compulsory purchases of milk powder and, equally unjustifiably, are enriched at the expense of those having rights of action against them to whom the burden of costs had been transferred and who have not succeeded in their actions for damages.

Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères* [1979] ECR 3091 the Commission thinks that the Court's pronouncements on the passing on of the burden in the context of actions for damages should likewise apply to the restitution of sums wrongly collected especially where the passing on of the burden is one of the essential elements of the system introduced by the regulation which has been declared null and void; for although those different legal actions are at different levels they belong in the same judicial and economic context.

According to the Commission the system created by Regulation No 563/76 has existed and has produced a number of effects to which it is impossible not to have regard. In an economic context of this complexity the necessary requirement of legal certainty would be seriously prejudiced if the principle of non-recovery of sums wrongly paid were not regarded as being embodied in any Community regulations in cases in which such restitution would create unjust enrichment and cast uncertainty on an incalculable number of legal relations. The general principles of equity and good faith by which no one may require repayment of a sum wrongly paid if it is not intended to make good damage which has been suffered but rather leads to unjust enrichment are very much a part of the legal systems of all the Member States as well as of the Community system itself (judgments of 28 March 1979, Case 90/78 *Granaria* and of 25 May 1978, Joined Cases 83 and 94/76, 4, 15 and 40/77 *HNL and Others*, already cited). Relying on the judgment given on 4 October 1979 in

Should the Court not approve that line of argument it is always open to it to have regard to the criteria of equity and legal certainty by applying by analogy the second paragraph of Article 174. In the case of an action to determine validity the limitation in time on the effects of the judgment is expressly referred to in the Treaty. The principle applied by the Court in judgments 61/79 and 66, 127 and 128/79 (cited above), according to which the limitation on the effects of a judgment providing interpretation must be decided in the same judgment which rules on the interpretation asked for, does not apply, the Commission says, in the case of proceedings to determine validity. The essential point is that the limitation is pronounced by the Court which might very well use another opportunity to fill in the gaps in its decision and to define the scope of the nullity as often the consequences of nullity can be determined only after the judgment of the Court has been given.

Question 4

According to the Commission a reply to this question requires full consideration of the Community regulations applicable especially in regard to the method of fixing the refunds and the conditions on which they are granted.

Article 16 (1) of Regulation (EEC) No 2727/75 on the common organization of the market in cereals provides that an export refund may be granted to enable the products listed in Article 1 thereof to be exported in the state referred to therein or in the form of goods listed in Annex B to the regulation.

The first subparagraph of Article 8 (1) of Regulation (EEC) No 192/75 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal L 25, p. 1) provides that a refund shall be granted only in respect of products which come within the terms of Article 9 (2) of the Treaty, that is to say, products originating in the Community or in free circulation there. The third subparagraph thereof provides a relaxation to that rule by stipulating that "when compound products qualifying for a refund fixed on the basis of one or more of their components are exported, that refund shall be paid only in so far as the component or components in respect of which the refund is claimed come within the terms of Article 9 (2) of the Treaty". This last provision, however, concerns agricultural products exported in the form of goods which do not come under Annex II to the Treaty (cf. Article 16 (1) of Regulation No 2727/75 in Annex B to which the products in question are listed).

Compound feedingsuffs (coming under subheading 23.07 B of the Common Customs Tariff) do not belong to that category. In their case, although the refund is calculated according to their content of cereal products, it is fixed for the product as a whole and not on the cereal constituents which it contains (cf., for example, Regulation (EEC) No 1871/76, Official Journal L 206, p. 23). It follows that it is the first subparagraph of Article 8 (1) of Regulation No 192/75 already cited which is applicable and the refund may not be granted when one of the components is not of Community origin or has not been put into free circulation in the Community.

Since the vegetable products used to make the feedingsuffs were imported into the Community without any difficulty as they were not subject either to customs duties or levies, that situation did not create any problems up to the time of the entry into force of Regulation No 563/76.

After the entry into force of that regulation the putting into free circulation in the Community of any imported vegetable foodstuffs was made subject to the delivery of a "protein certificate". By virtue of Article 10 (2) of Commission Regulation No 677/76 laying down detailed rules for the application of the system for compulsory purchase of skimmed-milk powder provided for in Regulation No 563/76, the responsible authorities of the Member States "may authorize the import of the products referred to in Article 3 (1) of Regulation No 563/76 with a view to processing them under a system of customs control if these products are intended to be exported outside the customs territory of the Community wholly or in part in the form of compensatory products".

Traders therefore had two choices, they could:

- (a) put vegetable foodstuffs into free circulation by providing a security or by buying the corresponding quantity of milk powder which would enable them to receive the export refund if they later exported the compound feedstuffs produced in that way;
- (b) import those same products under the system of customs control (inward processing traffic) which would enable them to avoid the obligations referred to above but which in the case of exportation would deprive them of the refunds.

Following complaints made by many traders and in order broadly to offset the loss of the security resulting from the putting into free circulation of the vegetable products in question from May 1976 the Commission raised the amount of the actual refund in regard to the products coming under subheading 23.07 B (cereals) to the level of the theoretical amount of refund calculated on the basis of the levy applicable to maize (Regulation (EEC) No 1913/69, Official Journal, English Special Edition 1969 (II), p. 403), although as a general rule that actual amount is fixed by applying a reduction to the theoretical amount to take account of the state of the world market and to avoid disturbances in the Community market.

In that context the fact that International Chemical Corporation had recourse to the temporary importation system rather than to the system of putting goods in free circulation represents, according to

the Commission, an economic choice for which it alone is responsible.

On the basis of those considerations the Commission proposes that the Court reply to the questions referred to it as follows:

- “1. Although not barring the possibility of a fresh reference being made to the Court of Justice a preliminary ruling which declares a regulation to be null and void goes beyond the instant case and affects all cases of the same nature which are submitted to other national courts and which relate to legal relations created and constituted before or after the preliminary ruling.
2. In the light of the conclusions drawn from the examination of Question 1, Question 2 loses its purpose.
3. When a Community charge is held to be unlawful in the context of a ruling declaring the Community act which imposed it to be null and void the consequences thereof must first of all be determined with regard to Community law, especially as regards the *existence* of the right of an individual to the recovery of the payment not legally due. Once the right to recovery has been established the various national laws apply to the enforcement thereof.

In the instant case the principles of Community law admit of such actions to recover a security only on condition that evidence is adduced to show that the financial charges in question could not have been passed on to the successive purchasers.

4. Products coming under tariff sub-heading 23.07 B of the Common Customs Tariff obtained at the time of the events at issue from vegetable protein products imported under the system of customs control referred to in Article 10 (2) of Regulation (EEC) No 677/76 and from cereals originating in the Community market may not benefit from export refunds."

Rome Bar, the Italian Government represented by I. M. Braguglia, acting as Agent, the Commission of the European Communities, represented by G. Olmi, assisted by G. Berardis, acting as Agents, and the Council of the European Communities, represented by B. Schloh, acting as Agent, presented oral argument at the sitting held on 2 December 1980.

III — Oral procedure

The plaintiff in the main action, represented by N. Catalano, of the

The Advocate General delivered his opinion at the sitting on 21 January 1981.

Decision

- 1 By order of 21 January 1980 which was received at the Court on 3 March 1980 the Tribunale Civile di Roma referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions as to the interpretation of Article 177 and as to the interpretation or the validity of various Council or Commission regulations, one concerning the compulsory purchase of skimmed-milk powder held by intervention agencies and the others export refunds on compound feedingstuffs.
- 2 Those questions have been raised in the context of a dispute between the Italian Finance Administration and the plaintiff in the main action, a manufacturer of compound feedingstuffs, which is claiming from that administration, first, the restitution of securities which it has provided or at any rate paid for on behalf of its suppliers and which the Administration has declared forfeit and, secondly, the payment of export refunds which were refused at the time of the exportation of certain compound feedingstuffs.
- 3 In order to reduce stocks of skimmed-milk powder by increasing the use of that product in animal feedingstuffs Council Regulation No 563/76 of

15 March 1976 (Official Journal L 67, p. 18) made the grant of certain Community aids in respect of the use of protein products and the release into free circulation in the Community of certain products used in the manufacture of compound feedingstuffs dependent on the obligation to purchase certain quantities of skimmed-milk powder held by the intervention agencies. To secure compliance with that obligation the grant of aids and release into free circulation were made subject either to proof of purchase of skimmed-milk powder or the prior provision of a security which was forfeited in the event of non-performance of the obligation to purchase.

- 4 The plaintiff in the main action first provided securities and in addition paid for those provided by certain of its suppliers. It thus obtained the aids provided for but as it has not complied with the obligation to purchase skimmed-milk powder those securities have not been released by the competent Italian administration. At a later date in order to avoid having to provide a security it imported, under the temporary importation procedure rather than under the procedure for release into free circulation, products from non-member countries which it uses in the manufacture of compound feedingstuffs. The upshot was that when those feedingstuffs came to be exported to non-member countries and the plaintiff applied for the payment of the export refunds provided for in Article 16 of Regulation No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal L 281, p. 1) those refunds were refused on the ground that the feedingstuffs contained products which had never been in free circulation in the Community and the condition for the grant of refunds is that those raw materials should originate in the Community or at least be in free circulation there.
- 5 By various judgments given on 5 July 1977 in Cases 114/76, 116/76 and Joined Cases 119 and 120/76 [1977] ECR 1211 the Court held when ruling on questions put to it by various national courts that Council Regulation No 563/76 was not valid because the price at which the milk powder had to be compulsorily purchased was set at a level so disproportionate in comparison to the conditions on the market that it constituted a discriminatory distribution of the burden of costs between the various agricultural sectors and because moreover such an obligation was not necessary in order to attain the objective in view, namely, the disposal of stocks of skimmed-milk powder.

- 6 The plaintiff in the main action, which was not a party to the actions which led to reference being made to the Court, accordingly took the view that the securities which it had provided or paid for could not be required or *a fortiori* declared forfeit since they served only to ensure the performance of an obligation which had been unlawfully imposed. It further believes that since it was for the sole purpose of avoiding the provision of those securities that it imported from non-member countries certain compound feedingstuffs which it manufactures under a temporary importation procedure rather than under a procedure whereby products are released into free circulation, it should be entitled to export refunds on those compound feedingstuffs as if they were in free circulation in the Community. Finally, on an alternative basis, it argues that it is entitled in any event to refunds on the cereal components, which are of Community origin, contained in the products which it exported. It is claiming from the Italian administration the refund or payment of the amounts equivalent to the securities forfeited and the refunds which have been refused.

- 7 In order to settle this dispute the national court referred the following questions to the Court:
 - "1. Under Article 177 of the Treaty is a declaration that a Community regulation is null and void effective *erga omnes* or is it binding only on the court *a quo*; more particularly, in that case may the principle contained in the judgment of 27 March 1963 in Joined Cases 28, 29 and 30/62 be extended to a declaration of nullity?

 2. Again in the latter case, is Regulation No 563/76 of 15 March 1976 null and void for the same reasons as those set out in the judgments of 5 July 1977 in Cases 114, 116 and Joined Cases 119 and 120?

 3. If the said regulation is null and void, must the principles on which the Community legal order is based be held to allow or not to allow upon certain terms and within certain time-limits the refund to an individual of a payment which was not due, and if so does the declaration of nullity give the individual himself the right to claim back under the national law of the various States the amount that he has previously paid on the basis of the rule which has been declared null and void and, if so, is this

subject to specific terms or time-limits or to given conditions, especially having regard to the case in which the claim is for the reimbursement of sums paid by the plaintiff to his suppliers?

4. With reference to Community law, and in particular to the Commission's Regulations No 192/75 of 17 January 1975, No 2727/75 of 29 October 1975, No 2743/75 of 29 October 1975, No 677/76 of 26 March 1976, No 1871/76 of 30 July 1976, No 2141/76 of 31 August 1976 and No 2372/76 of 30 September 1976, must a refund be held to be payable on exports of compound feedingstuffs in respect of the cereal components alone and does it conflict with the general principles derived from the said provisions for the refund to be granted on exports of compound products and only in respect of certain of their components where the other components were imported only temporarily?"

- 8 Those questions basically raise three issues. The first concerns the effect of the preliminary rulings given by the Court on 5 July 1977 on third parties, be they private individuals, institutions or national courts (Questions 1 and 2). The second concerns the consequences, in both the legal systems of the Community and of the Member States, of a judgment declaring a regulation void as regards what happens to charges previously imposed on commercial operators by the said regulation (Question 3). The third issue, put in the alternative and which is more specific in nature, concerns particular features of the rules on export refunds for certain agricultural products (Question 4).

Questions 1 and 2

- 9 Article 177 of the Treaty provides that the Court shall have jurisdiction to give preliminary rulings on the interpretation of the Treaty and on the validity and interpretation of acts of the institutions of the Community, including regulations of both the Council and the Commission. The second and third paragraphs of that provision go on to state that national courts may or must, as the case may be, bring such matters before the Court where they need a decision on that issue in order to give their judgment.

- 10 The scope of judgments given under this head should be viewed in the light of the aims of Article 177 and the place it occupies in the entire system of judicial protection established by the Treaties.
- 11 The main purpose of the powers accorded to the Court by Article 177 is to ensure that Community law is applied uniformly by national courts. Uniform application of Community law is imperative not only when a national court is faced with a rule of Community law the meaning and scope of which need to be defined; it is just as imperative when the Court is confronted by a dispute as to the validity of an act of the institutions.
- 12 When the Court is moved under Article 177 to declare an act of one of the institutions to be void there are particularly imperative requirements concerning legal certainty in addition to those concerning the uniform application of Community law. It follows from the very nature of such a declaration that a national court may not apply the act declared to be void without once more creating serious uncertainty as to the Community law applicable.
- 13 It follows therefrom that although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void 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.
- 14 That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need in particular if questions arise as to the grounds, the scope and possibly the consequences of the invalidity established earlier.

- 15 If that is not the case national courts are entirely justified in determining the effect on the cases brought before them of a judgment declaring an act void given by the Court in an action between other parties.
- 16 It should further be observed, as the Court acknowledged in its judgments of 19 October 1977 in Joined Cases 117/76 and 16/77, *Ruckdeschel and Diamalt* and Joined Cases 124/76 and 20/77, *Moulin de Pont-à-Mousson* and *Providence Agricole* [1977] ECR 1753 and 1795, that as those responsible for drafting regulations declared to be void the Council or the Commission are bound to determine from the Court's judgment the effects of that judgment.
- 17 In the light of the foregoing considerations and in view of the fact that by its second question the national court has asked, as it was free to do, whether Regulation No 563/76 was void, the answer should be that that is in fact the case for the reasons already stated in the judgments of 5 July 1977.
- 18 The first and second questions should therefore be answered as follows:
 - (a) Although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void 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;

that assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier.

- (b) Council Regulation No 563/76 of 15 March 1976 is void for the reasons already stated in the judgments of 5 July 1977 in Cases 114, 116 and Joined Cases 119 and 120/76.

Question 3

- 19 The third question basically seeks to determine whether rules of Community law govern legal actions brought by commercial operators before a national court in order to obtain repayment of Community charges due and paid pursuant to a Council or Commission regulation even though that national court is bound to refrain from applying that regulation as a result of a judgment of the Court declaring it to be void. Owing to the particular circumstances of the dispute in the main action that question also covers the case in which the sums being reclaimed were not paid by the plaintiff in the main action but by its suppliers to whom the plaintiff refunded those amounts.
- 20 Article 10 (2) of Regulation No 563/76 states that any security forfeited shall be used to offset the intervention expenditure for which no unit amount is fixed under Regulation No 804/68 of the Council on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176). It follows that the corresponding amounts constitute the Communities' own resources within the meaning of the first subparagraph of Article 4 (1) of the Council Decision of 21 April 1970 on the replacement of financial contributions from Member States by the Communities' own resources (Official Journal, English Special Edition 1970 (I), p. 224).
- 21 By Article 6 of that decision the Community resources referred to in Articles 2, 3 and 4 are to be collected by the Member States in accordance with national provisions imposed by law, regulation or administrative action. Consequently disputes relating to the refund of amounts collected on behalf of the Community fall within the jurisdiction of national courts and should be settled by those courts by applying their own national law, both procedural and substantive, to the extent to which Community law has not provided otherwise.

- 22 Regulation No 563/76, as it applied before it was declared to be void, should therefore be examined in order to ascertain whether it contained provisions affecting the recovery of sums received by the Community authorities or by national authorities acting on their behalf pursuant to that regulation.
- 23 It should be observed in this regard that Article 5 of Regulation No 563/76 expressly provided that "in the case of contracts concluded before the date of entry into force of this regulation, the successive buyers of the products referred to in Articles 2 and 3, or of protein products processed therefrom, shall bear the burden of the costs arising under the arrangements laid down in this regulation". That provision implies a unilateral amendment if need be of commercial contracts previously entered into in order, as the fifth recital to the regulation indicates, equitably to share the burden of the compulsory purchase of skimmed-milk powder among all the operators. It follows that operators subject to the obligations to purchase skimmed-milk powder and for that reason exposed to the risk of losing their security should not suffer any loss owing to the charge imposed because in the case of contracts prior to the entry into force of the regulation the charge was automatically passed on to the successive buyers. That system implied that in the case of contracts made after the entry into force of the regulation the same result was achieved by the operation of the market and freedom of contract. As the amount of the securities to be provided broadly corresponded with the burden arising from the obligation to purchase, the financial effect of their loss was, in the case of commercial operators electing to forego the security, itself equal to that to which the performance of the obligation to purchase would have led in their case.
- 24 The existence during the entire period in which Council Regulation No 563/76 was applied of a scheme specially designed with a view to spreading the effects of a measure of economic policy destroys the basis of an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone. In this regard it does not matter whether the operator has actually passed on the charge or whether he decided not to do so for reasons connected with the financial policy of his undertakings. Recovery is in itself ruled out *a fortiori* if the operator was not himself bound to pay the charge in question which he advanced voluntarily or refunded to his suppliers thus

demonstrating that they do actually have the opportunity of passing on the charge.

- 25 That legal consequence is not to be dismissed by the consideration that since Regulation No 563/76 has been declared void it could not have any legal effect. It is a matter here of examining the economic effects linked to the application of the system established by the regulation so far as it effectively governed the conduct of the commercial operators concerned. The assertion that the scheme made provision for operators actually to be able to pass on the charge imposed on them to subsequent stages of the economic process leads to the conclusion that in a situation such as that which is at issue in the main proceedings an action for the recovery of the payment wrongly made has no legal foundation.
- 26 The answer to the third question should therefore be that the existence during the period in which Council Regulation No 563/76 was applied of a scheme specially designed with a view to spreading the economic effects of the obligations which it imposed destroys the basis of an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone.

Question 4

- 27 The answer to the fourth question should help to resolve the issue of whether the plaintiff in the main action is entitled to export refunds in respect of compound feedingstuffs which consisted in part of products from non-member countries referred to in Article 3 (1) of Regulation No 563/76 and which were imported and processed into compound feedingstuffs under a system of customs control, that is to say without having been released into free circulation in the Community.
- 28 That course of action by the plaintiff in the main action was made possible by Article 10 (2) of Commission Regulation No 677/76 of 26 March 1976 laying down detailed rules for the application of the system for compulsory

of skimmed-milk powder provided for in Regulation No 563/76 (Official Journal L 81, p. 23). That provision states that “the competent authorities of the Member States may authorize the import of the products referred to in Article 3 (1) of Regulation (EEC) No 563/76 (that is to say products which are allowed into free circulation only on the performance of the obligation to purchase a certain quantity of skimmed-milk powder) with a view to processing them under a system of customs control if these products are intended to be exported outside the customs territory of the Community wholly or in part in the form of compensatory products”. That provision was intended to exempt manufacturers of feedingstuffs who imported certain components of feedingstuffs from non-member countries (those listed in Article 3 of Regulation No 563/76) from the obligation to present a “protein certificate”, that is to say from the obligation to purchase skimmed-milk powder, on condition that the feedingstuffs of which those components formed a part were exported to non-member countries.

- 29 However, the first subparagraph of Article 8 (1) of Regulation No 192/75 of the Commission of 17 January 1975 laying down detailed rules for the application of export refunds in respect of agricultural products (Official Journal L 25, p. 1) provides that an export refund is to be granted only in respect of products which were in free circulation in the Community before they were exported.
- 30 The combined provisions of Article 10 (2) of Regulation No 677/76 and of Article 8 (1) of Regulation No 192/75 enabled manufacturers of feedingstuffs to choose between two possibilities. Either they obtained release into free circulation of the components which they imported by paying the security or by purchasing the specified quantity of skimmed-milk powder, which enabled them to receive export refunds if they then exported the feedingstuffs in question. Or they could import the same products under a system of customs control, in this case the inward processing arrangements, which enabled them to escape the obligation to purchase skimmed-milk powder or to provide security but in that case Article 8 (1) of Regulation No 192/75 precluded their being granted export refunds.
- 31 The fourth question primarily seeks to determine whether in view of the fact that the plaintiff opted for the system of importation under customs control made possible by Article 10 (2) aforesaid simply in order to escape the obligation to purchase which had been declared to be unlawful, the

conclusion must be that the plaintiff is still entitled to export refunds as if the requirement contained in Article 8 (1) had been fulfilled on its own.

- 32 That part of the fourth question calls for a negative answer. In fact neither the invalidity of Regulation No 563/76 nor even the possible invalidity of Regulation No 677/76 adopted to implement it can impair in any way whatever the binding force of Article 8 (1) of Regulation No 192/75 whereby a refund is to be granted only in respect of products which were in free circulation in the Community before they were exported.
- 33 The fourth question seeks to determine secondly whether, regardless of any considerations as to the consequences of the invalidity of Regulation No 563/76, the plaintiff in the main action was not entitled to export refunds on the basis of the third subparagraph of Article 8 (1) of Regulation No 192/75 which states that "when compound products qualifying for a refund fixed on the basis of one or more of their components are exported, that refund shall be paid only in so far as the component or components in respect of which the refund is claimed come within the terms of Article 9 (2) of the Treaty" (that is to say they are in free circulation).
- 34 The plaintiff in the main action claims that owing to that provision it is entitled to an export refund at least in respect of those components of compound feedingstuffs which it exported, which were not imported from non-member countries, but which originated in the Community, in this case in respect of the cereal components of those feedingstuffs.
- 35 That interpretation of the third subparagraph of Article 8 (1) must be rejected. That provision covers only cases in which compound products are exported which, as such, do not attract export refunds but which contain certain constituents which do. That is made plain by the very wording of the provision in question which expressly refers to refunds fixed on the basis of one or more of the components of the compound product.

- 36 That provision does not therefore cover the case of a compound product which, as such, that is to say as a whole, attracts an export refund. In that case it is the first subparagraph of Article 8 (1) which governs the conditions for the grant of the refund; consequently all components of a product must have originated in the Community or have been released into free circulation there.
- 37 Compound animal feedingstuffs come under subheading 23.07 B of the Common Customs Tariff. Although the export refund is calculated on the basis of the cereal product content, as far as those cereal products are concerned it is fixed in respect of the product as a whole in such a way that it is the requirement in the first subparagraph of Article 8 (1) that the product must meet in order to attract an export refund.
- 38 The answer to the fourth question should therefore be:
- (a) The fact that Regulation No 563/76 has been declared void does not justify either an individual or a general derogation from the rule stated in the first subparagraph of Article 8 (1) of Regulation No 192/75;
 - (b) The third subparagraph of Article 8 (1) of Regulation No 192/75 covers only the case of a compound product which, as such, is not capable of attracting export refunds but contains certain components which are so capable. It does not cover the case of a compound product which as such attracts a refund and to which the condition stipulated in the first subparagraph of Article 8 (1) applies.

Costs

- 39 The costs incurred by the Italian Government, the Council of the European Communities and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable; as the proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT

in answer to the questions submitted to it by the Tribunale Civile di Roma by order of 21 January 1980, hereby rules:

1. Although a judgment of the Court given under Article 177 of the Treaty declaring an act of an institution, in particular a Council or Commission regulation, to be void 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. That assertion does not however mean that national courts are deprived of the power given to them by Article 177 of the Treaty and it rests with those courts to decide whether there is a need to raise once again a question which has already been settled by the Court where the Court has previously declared an act of a Community institution to be void. There may be such a need especially if questions arise as to the grounds, the scope and possibly the consequences of the nullity established earlier.
2. Council Regulation No 563/76 of 15 March 1976 (Official Journal L 67, p. 18) is void for the reasons already stated in the judgments of 5 July 1977 in Cases 114, 116 and Joined Cases 119 and 120/76.
3. The existence during the period in which Council Regulation No 563/76 was applied of a scheme specially designed with a view to spreading the economic effects of the obligations which it imposed destroys the basis of an action for the recovery of securities which have been provided and declared forfeit even if a similar action could be successfully brought under national law alone. In this regard it does not matter whether the operator has actually passed on the charge or whether he has decided not to do so for reasons connected with the financial policy of his undertaking. Recovery is in itself ruled

out *a fortiori* if the operator was not himself bound to pay the charge in question which he advanced voluntarily or refunded to his suppliers.

4. The fact that Regulation No 563/76 has been declared void does not justify either an individual or a general derogation from the rule stated in the first subparagraph of Article 8 (1) of Regulation No 192/75.
5. The third subparagraph of Article 8 (1) of Regulation No 192/75 covers only the case of a compound product which, as such, is not capable of attracting export refunds but contains certain components which are so capable. It does not cover the case of a compound product which as such attracts a refund and to which the condition stipulated in the first subparagraph of Article 8 (1) applies.

Mertens de Wilmars	Pescatore	Mackenzie Stuart	Koopmans	O'Keeffe
Bosco	Touffait	Due	Everling	

Delivered in open court in Luxembourg on 13 May 1981.

A. Van Houtte

Registrar

J. Mertens de Wilmars

President

OPINION OF MR ADVOCATE GENERAL REISCHL
DELIVERED ON 21 JANUARY 1981¹

*Mr President,
Members of the Court,*

In the proceedings for a preliminary ruling to be dealt with today we once again have to consider problems which have arisen in connexion with the application of Council Regulation No 563/76 of 15 March 1976 on the

compulsory purchase of skimmed-milk powder held by intervention agencies for use in feedingstuffs (Official Journal L 67 of 15 March 1976, p. 18).

It is generally known that the arrangements introduced by that regulation were aimed at reducing the

¹ — Translated from the German.