OPINION OF MR ADVOCATE GENERAL MANCINI
delivered on 19 November 1985 *

Mr President,
Members of the Court,

1. The Court is called upon to judge an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty brought by Krohn & Co., of Hamburg, against the Commission of the European Communities. The applicant seeks reparation for the damage caused by the refusal of the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets], on the Commission's instructions, to deliver import licences which it had requested for a consignment of roots or tubers of manioc originating in Thailand.

It may help a better understanding of the dispute to summarize the relevant Community rules in force at the material time. Those rules are contained in: (a) the Cooperation Agreement on manioc production, marketing and trade between the Community and the Kingdom of Thailand approved by Council Decision No 82/495/EEC of 19 July 1982 (Official Journal 1982, L 219, p. 52); (b) Commission Regulation (EEC) No 2029/82 of 22 July 1982 laying down detailed rules for its implementation (Official Journal 1982, L 218, p. 8). As is stated in its preamble, the Cooperation Agreement was made in recognition of two facts: Thailand's economy is dependent on manioc production, which, besides, is concentrated in the poorest and most politically sensitive areas of the country; on the other hand, increasing imports of manioc into the Community are creating problems for the common market.

In the light of those constraints, Thailand undertook to manage its exports (namely exports falling within subheading 07.06 A of the Common Customs Tariff) in such a way as to ensure that they did not exceed the agreed quantities, which were 5 million tonnes per year for the years 1983 and 1984 and 4.5 million tonnes for the two following years (Article 1). In return, the Community undertook to limit the levy applicable to imports to a maximum amount of 6% *ad valorem* and to ensure that Thailand enjoyed most-favoured nation treatment with respect to the rate of the levy (Article 3). The rules for the management of exports provide that: (a) Thailand is to ensure that export certificates are not issued for any quantities above the limit laid down in the agreement; (b) the Community is to make the necessary arrangements to issue import licences for manioc originating in Thailand, subject to the presentation of an export certificate issued by the relevant authority in Bangkok. The import licence is to be issued within seven days from presentation of the export certificate. The date of issue of the export certificate determines the year to which the quantities shipped are to be attributed (Article 5).

We now come to Regulation No 2029/82. For our purposes, the most important provisions are Articles 7 (1) and (2), 9 and 10. Article 7 provides:

'(1) The import licence shall be issued on the fifth working day following the day

* Translated from the Italian.

on which the application was lodged, except where the Commission has informed the competent authorities of the Member State by telex that the conditions laid down in the Cooperation Agreement have not been fulfilled. In the event of non-observance of the conditions governing the issue of the licence, the Commission may, where necessary, and following consultation with the Thai authorities, adopt appropriate measures.

(2) At the request of the party concerned, and following communication of the Commission's agreement by telex, the import licence may be issued within a shorter period.'

Article 9 provides:

'The Member States shall communicate to the Commission each day by telex the following information concerning each application for a licence: the quantity for which each import licence is requested, the number of the export certificate submitted . . . , the date of issue of the export certificate, the total quantity for which the export certificate was issued, the name of the exporter indicated on the export certificate.'

Finally, under Article 10, those provisions are to apply only to export certificates issued by the Thai authorities from 28 July until 31 December 1982.

Regulation No 2029/82 remained in force until the end of 1982. At that date the Commission replaced it by Commission Regulation (EEC) No 3383/82 (Official Journal 1982, L 356, p. 8), which was amended several times subsequently.

2. On 16 November 1982 Krohn, an importer and distributor of cereals and feedingstuffs, requested the Bundesanstalt for five import licences covering a total of 54 895 5472 kg of roots or tubers of manioc from Thailand. In accordance with the provisions I have just referred to, Krohn joined to its request several export certificates granted by the Thai authorities on 18 August 1982 (for a consignment of 380 tonnes), and on 7 September 1982 (for the remainder). The export certificates indicated that the goods were bound for Europe aboard the *Assimina*, the *Valdivia* and the *Daiko Maru*. The Bundesanstalt passed on the names of those vessels to the Commission on the day it received the request in accordance with Article 9 of Regulation No 2029/82.

It will be noted, however, that whereas ocean transport from Thailand to Europe usually takes between four and six weeks the periods which elapsed between the delivery of the export certificates on 18 August and 7 September and the lodging of the request on 16 November was three months in the first case and two and a half in the second. Moreover, the Commission became aware that in autumn 1982 a German undertaking sought to import into the Community about 60 000 tonnes of manioc for which it did not have the requisite export certificate from Thailand. On being alerted to that coincidence the Commission in Brussels informed the Bundesanstalt by telex on 23 November that it was necessary, by virtue of Article 7 of Regulation No 2029/82, to ascertain whether Krohn in fact satisfied the conditions for the issue of import licences, and in particular whether it had notified the date of shipment in Thailand, the names of the vessels on which the goods were carried, and the place and date of customs clearance on import into the Community.

By telex messages dated 23 November and 7 December 1982 the Bundesanstalt informed Krohn that it could only be issued with the import licences it had requested if it gave the name of the vessel or vessels used and the place of customs clearance of the manioc in the Community. Krohn replied by telex on 24 November 1982 with the

relevant details for a consignment of 500 tonnes covered by Export Certificate No 3840/1982; it requested an export licence for that consignment, reserving the right to provide the remaining information subsequently. On 10 December 1982, however, Krohn declared itself unable to provide the remainder of the information. It added that it was not required to do so since the provisions then in force did not make the issue of import licences subject to production of such information.

On 21 December 1982, after being informed of that reply, the Commission again telexed the Bundesanstalt to communicate its view that the production of Export Certiciate No 3840/1982 did not entitle Krohn to an import licence. It stated that the ship named by Krohn did not correspond to that in the export certiciate delivered in Thailand and that in addition an unreasonable time had elapsed between the grant of the export certificate and the request submitted to the German authorities by Krohn. By a notice dated 23 December 1982, on the basis of those directions, the Bundesanstalt rejected both the general request of 16 November covering 55 000 tonnes and the supplementary request of 24 November covering 500 tonnes only. Krohn objected to that decision by telex on 24 January 1983. It subsequently gave reasons for its objection in a letter dated 7 March 1983.

Manwhile, Krohn had chartered another ship, the *Equinox*; the manioc tubers were loaded on board at some time between January and March 1983, and on 15 April it reached Rotterdam where the goods were cleared through customs and put into free circulation in the Community. The damage alleged by the applicant arose at that point. Because the Thai authorities did not issue it with export certificates for the first quarter of 1983 (the relevant quota had already been exhausted), and since the Bundesanstalt had refused its requests, Krohn was not permitted to pay import levy at the preferential rate. It sought to mitigate the damage by purchasing import licences covering a total of 33 000 tonnes at DM 85 per tonne from Peter Cremer, an undertaking in Hamburg, but was unable to produce a licence covering the remainder (21 895 tonnes) and was therefore compelled to pay the full rate of import levy.

On 27 April 1983, the Bundesanstalt rejected Krohn's objection, citing Article 7 (1) as the reason for its decision; it added that the Commission had opposed the issue of the import licences because, in the absence of the information it had requested, it was not satisifed that valid export certificates had been produced.

On 25 May 1983, Krohn brought an action before the Verwaltungsgericht [administrative court] Frankfurt am Main, seeking (a) the annulment of both the Bundesanstalt's decisions (the refusal of the request and the requiring of the complaint) and (b) an order requring the Bundesanstalt to issue the import licences requested at a rate of levy of 6%. In a defence lodged on 17 January 1984, the Bundesanstalt relied on an opinion of the Commission in which the Commission explained the steps it had taken and confirmed that it had received information that Krohn had sought to introduce into the Community 60 000 tonnes of manioc by using certificates issued by the Thai authorities in respect of other consignments which could be imported only under the procedure known as advance fixing of import levies. The Commission argued further that the manioc was not covered by the Cooperation Agreement

between the Community and Thailand because it had been transported on board a different ship from the one indicated on the export certificate presented and most of it (50 000 tonnes) had been shipped without a valid certificate. In conclusion of its defence the Bundesanstalt requested the Verwaltungsgericht to join the Commission to the proceedings as the source of the instructions on which it had acted in adopting the contested decision.

Besides bringing an action before the national court, Krohn on 6 June 1983 requested the Commission for compensation for the damage incurred as a result of what it called the Commission's illegitimate pressure upon the Bundesanstalt to refuse the grant of import licences. That request was refused in a letter of 28 July 1983. Approximately a year later, Krohn brought this action for non-contractual damages before the Court. The action was filed at the Registry on 4 July 1984.

3. The dispute centres on the information concerning the names of the ships used for the transport of the manioc and the place where it was cleared through customs which was requested from the applicant by the Bundesanstalt on instructions from the Commission. According to Krohn, the provisions in force at the material time did not authorize such a request. The Commission maintains that although the information was not required to be provided under the relevant rules it could be demanded where that was clearly in accordance with the spirit and purpose of the EEC-Thailand Cooperation Agreement and Regulation No 2029/82.

I might briefly mention the amount of damages involved. Krohn assesses it at DM 3 305 000, 2 805 000 of which relate to the acquisition of import licences from the Peter Cremer undertaking, 319 795.01 to the payment of import levies at the full rate, 80 294.99 to losses arising from the loss of cargo — as a result of the impossibility of carrying out the importation originally envisaged — and 100 000 to loss of profit. The Commission contests the first two amounts on grounds of insufficient proof and the third because it was first claimed in the reply following the defence and must therefore be regarded as a fresh issue within the meaning of Article 42 of the Rules of Procedure.

I shall not, however, be dealing with those points. At the Commission's suggestion, the Court decided at the close of the oral procedure to rule of its own motion upon the admissibility of the action (Article 92 of the Rules of Procedure). I shall therefore be confining my remarks to that aspect of the case and reserve my opinion on the substance for the event that the Court should declare the action admissible.

4. As I have said, the Commission has questioned the admissibility of the action, albeit without raising a formal objection. Its doubts are expressed in three arguments, two principal arguments and one in the alternative: (a) the contested decision was adopted by a national authority; (b) not having previously exhausted all national legal remedies, Krohn was not entitled to bring an action for damages before the Court; (c) Krohn has not in terms asked for the measures from which it allegedly suffered damage, namely the instructions contained in the Commission's telex messages to the Bundesanstalt, to be declared void.

In support of its first argument the Commission refers to three judgments of the Court in which it was stated that an application for compensation under Article 178 and the second paragraph of Article 215 of the EEC Treaty does not enable the Court

to examine the validity of decisions taken by national agencies within the framework of the Common Agricultural Policy or, *a fortiori*, to assess the financial consequences of any invalidity established (Case 12/79 *Wagner* v *Commission* [1979] ECR 3657; Case 133/79 *Sucrimex* v *Commission* [1980] ECR 1299; Case 217/81 *Interagra* v *Commission* [1982] ECR 2233). It argues that in this case the refusal to grant the import licences unquestionably proceeded from a national authority; it is not relevant that the national authority referred to telex messages from the Commission in the grounds of its decisions. In fact, in the telex messages referred to, the Commission had merely expressed its views on the rules to be applied to the case in the spirit of co-operation which characterizes its relations with the national bodies responsible for giving effect to the Community rules.

In reply to that argument, Krohn contends that the above-mentioned judgments relied upon by the Commission are out of point because there is an obvious difference between the facts of those cases and the present one. In the cases cited, far from seeking to influence the course adopted by the intervention agencies, the Commission had confined itself to indicating the general principles governing the provisions at issue, leaving it to the intervention agencies to apply them. In this case, however, we are presented with two instruments — the EEC-Thailand Cooperation Agreement and the implementing regulation — which confer a true power of decision upon the Commission; therefore it is the Community authority which decides on specific cases while using the national body as a 'secular arm'.

5. The second main argument is based on the fact that an action for the annulment of the Bundesanstalt's decision is pending before the competent national court. In bringing that action, the Commission observes, Krohn has acted in accordance with the Court's judgments in *Sucrimex* and *Interagra*. In addressing itself to this Court, however, it did not abide by the principles set out in those judgments, which excluded any concurrent jurisdiction between national courts and the Court of Justice and gave precedence to the former in order to avoid the possibility of conflicting decisions on the same issue. The applicant will only be entitled to seek a decision from this Court when it has exhausted all internal legal remedies, and then only upon a reference for a preliminary ruling on the interpretation of the relevant provisions after the national court of last instance has declared invalid the decision adopted by the Bundesanstalt with the Commission's assent. As things stand, therefore, Krohn's action constitutes a misuse of the system of judicial protection provided for by the Treaty.

Krohn naturally resists that charge. Beyond that, it merely repeats that its action is for compensation for the damage caused by the failure to issue it with the import licences and that the damage it has suffered is attributable to the Commission.

6. In the alternative, the Commission contends that this case is covered by the principle established in the *Plaumann* judgment (Case 25/62 *Plaumann* v *Commission* [1963] ECR 95) in which it was held that the Court cannot by way of an action under Article 178 and the second paragraph of Article 215 nullify the legal effects of a decision which has not been annulled. In so far as the telex messages

form the basis of the contested national decision they may be regarded as decisions which, although not addressed to the applicant, are of direct and individual concern to it. Krohn should therefore have brought an action to have them declared void within the period laid down by Article 173 of the EEC Treaty, which in this case ran from 27 December 1982, the date on which Krohn learnt of the Bundesanstalt's decision and the part played in its adoption by the Commission's instructions. Since it did not do so, Krohn's present application for damages is merely an expendient designed to circumvent the effects of its own negligence.

Krohn's answer to that argument is essentially to emphasize that it is at odds with the two preceding arguments: in order to maintain that the contested decision may only be challenged before the national court, the Commission reduces the effect of its own intervention to the level of an 'opinion', while its argument that an action under Articles 178 and 215 would not comply with the requirements laid down by Article 173 promotes the communication to a veritable 'decision'. In any event, Krohn was not in a position to know that the Commission's intervention amounted to a decision and took effect as such. The Bundesanstalt's notice dated 23 December 1982 did not refer to it, although it indicated that an appeal would lie before the Verwaltungsgericht Frankfurt following a complaint to the Bundesanstalt.

Krohn adds that the *Plaumann* judgment has been superseded by subsequent judgments of the Court stating that the application for compensation is an independent form of action within the system of legal remedies established by the EEC Treaty. Finally, Krohn states that a specific action to have the measure declared void (which might have been brought in January or February 1983) would have served no purpose even if it had been successful. Krohn argues that by that time the damage had already occurred and could not have been repaired by the issue of the refused import licences.

7. I should say at once that the Commission's main arguments to the effect that the judgments in *Sucrimex* and *Interagra* are applicable to this case must be upheld if only for practical reasons. It is worth examining in detail the arguments put forward by the parties on this point. The Commission points out that in both the cases cited its departments exerted a degree of influence upon the national intervention agencies by sending them telex messages which were ultimately followed in the intervention agencies' decisions. Nevertheless, in both the judgments the Court held that the intervention agencies' decisions were the sole source of the damage of which the importers complained. Such telex messages, the Court held, merely reflect the necessary cooperation between the Commission and the national bodies, and that cooperation cannot make the Community liable to individuals (*Sucrimex*, cited above, at paragraphs 22 and 23 of the decision; *Interagra*, cited above, at paragraphs 8 and 9).

As I have said, Krohn disagrees. It argues in essence that the Court made its findings in *Sucrimex* and *Interagra* on the basis that the Commission's communications were not binding on the national bodies, whereas in this case the Commission is much more closely involved in the procedure laid down for the issue of import licences and its

powers are sufficient to enable it to restrict the national body's freedom of action by means of a telex message. Krohn's argument is indisputably correct. The most that can be said against it is that even in this case it is the national body which decides on the importer's request and its power to do so cannot in all probability be denied it. The present degree of Community integration does not seem sufficient to deprive the Member States of their powers with regard to the implementation of an agreement such as that between the EEC and Thailand.

Do these essentially formal considerations suffice to establish the inadmissibility of the action as they did in the two judgments cited? I am not altogether convinced that that is so. It remains the case, however, that the opposite conclusion gives me still greater cause for doubt. Suppose that, as Krohn advocates, the Court were to determine the issue of jurisdiction in the light of the specific rules applicable in each case by assessing either the powers which they confer upon the Commission and the national body or the actual exercise of those powers by each of them. It is obvious what the outcome would be: should the Commission's telex messages be framed as mere suggestions, the national court would have jurisdiction; yet the injured party would be compelled to come before this Court if he succeeded in proving that the national body's measure was merely the embodiment at national level of a decision imputable to the Commission.

For my part, I can scarcely imagine a worse solution. It would require those concerned to pore over every document in the procedure leading to the measure adversely affecting them in order to establish whether the national body or the Commission made the greater contribution to its adoption. Clearly it would be difficult to reconcile the need for such an inquiry — which in any event might not yield a reliable answer because it is rare for the terms of the dilemma to be as clearly posed as in the case I have put — with the principle of legal certainty which requires that all rules, and rules conferring jurisdiction most of all, be defined in a clear and intelligible manner. On the other hand, the greatest degree of clarity and simplicity would be achieved if the Court were to decide that the decisions of national bodies are *always and in every case* the liability of the Member States and that the determination of liability falls within the *exclusive* jurisdiction of the national courts.

In the result we are presented with two possible courses, one of which may seem excessively formalistic whilst the other, although theoretically more plausible, has disastrous practical consequences. As I have said, I would opt for the former, partly also because the difficulties to which it gives rise are in the last analysis surmountable. I have in mind of course cases where the Commission has the power to bind national authorities so that it would appear unjustified or indeed unjust to hold the Member States liable. In fact there is a remedy in such cases: the Member State may recover the money either in an action brought *ad hoc* against the Commission or, more conveniently, in the context of the auditing of EAGGF accounts. As far as I know, no legal provision or pronouncement of the Court stands in the way of such a procedure.

One further point, which is drawn from the Commission's second argument, militates unequivocally in favour of the inadmissibility of the action. As the Court is aware, the Bundesanstalt's decision has been challenged before the Verwaltungsgericht, and that court's forthcoming judgment may

contain an interpretation of the Community rules applicable to this case differing from the one which would be given by the Court of Justice. Anomalies of this kind would not be compatible with the system of the Treaty and in order to avoid them the Court has held, as it happens in the *Sucrimex* and *Interagra* judgments, that 'a review of administrative acts of Member States in applying Community law is *primarily* a matter for national courts without prejudice to their power to refer questions for a preliminary ruling . . .' (*Sucrimex*, cited above, at paragraph 24; *Interagra*, cited above, at paragraph 10). In saying 'primarily', it seems to me that the Court implied that an action under Articles 178 and 215 of the EEC Treaty has an essentially subordinate role in relation to the legal remedies available at the national level, unless — and as the facts show, this is not the case here — it is the only form of legal protection open to the applicant.

8. The Commission's alternative argument, however, is in my view without foundation. The decision in *Plaumann*, it is true, states that 'an administrative measure which has not been annulled cannot of itself constitute a wrongful act on the part of the administration inflicting damage upon those whom it affects. The latter cannot . . . claim damages by reason of that measure. The Court cannot by way of an action for compensation take steps which would nullify the legal effects of a decision [which remains in force]' (cited above [1963] ECR 108). However, as Krohn rightly points out, that remains an isolated statement. Since its judgment in *Schöppenstedt* (Case 5/71 *Zuckerfabrik Schöppenstedt* v *Council* [1971] ECR 975) the Court has in fact accepted the admissibility of actions for compensation for damage due to a measure which has not been annulled and has therefore regarded them as an independent form of action.

The Commission's rejoinder to that argument is that the decision in *Plaumann* remains applicable where the applicant is able to seek to have the measure declared void; hence, at least in this case, an action for compensation for the damage represents a misuse of procedure. I do not think that I can endorse that objection, however. There is no intermediate solution between *Plaumann* and *Schöppenstedt*. To put it in another way, either an action for compensation is an independent right of action or it is not; if it is, it is not apparent why the choice of that means of legal recourse, with its more limited effects, should be regarded automatically as a means of circumventing the procedure for declaring a measure void. In a specific case, of course, that may be so; for instance, it may be a covert means of bringing an action under Article 173. However, it would be necessary to prove such a state of affairs and here such proof is lacking.

9. In the light of all the foregoing considerations, I propose that the Court declare inadmissible the action brought by Krohn against the Commission of the European Communities by application lodged on 4 July 1984.

In view of the fact that the issues submitted to the Court were difficult and in part novel, I propose that the Court should not apply the rule that the unsuccessful party pays the costs but order each party to bear its own costs.