OPINION OF MR ADVOCATE GENERAL MANCINI DELIVERED ON 13 JANUARY 1983 [1]

Mr President,
Members of the Court,

1. The Court is asked to rule upon a claim for compensation for damage brought against the European Economic Community by an undertaking which processes and deals in cereals and which complains that it has not received the export refunds applicable to the production of maize gritz in 1976 and 1977. This case forms part of a series of proceedings on the same subject-matter, in the context of which the Court has already delivered several judgments affirming the non-contractual liability of the Community (see the judgments, of like content, given on 4 October 1979 in Joined Cases 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955; Joined Cases 241, 242 and 245 to 250/78, *DGV and Others* (including the present applicant) v. *Council and Commission* [1979] ECR 3017; Joined Cases 261 and 262/78 *Interquell Stärke-Chemie* v *Council and Commission* [1979] ECR 3045; Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *Dumortier and Others* v *Council* [1979] ECR 3091), and defining several aspects of that liability (see for example the judgment of 27 January 1982 in Joined Cases 256, 257, 265, 267/80 and 5/81, *Birra Wührer and Others* v *Council and Commission* [1982] ECR 85, dealing with limitation periods; and the judgment of 19 May 1982 in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier and Others* v *Council* [1982] ECR 1733 on the date to which reference must be made for the quantification of damages).

In this particular case the Court has only to determine the quantum of damage. However this limited aspect raises complex problems concerning the rules governing the assignment of claims resulting from an unlawful act of the Community. The case really turns on these problems: the essential point is to determine whether, by what means and within what limits the Community system regulates the assignment of such claims. The point of reference for the purpose of the inquiries will be the judgment, which I mentioned earlier, in the *Ireks-Arkady* case; in point of fact, the Court there stated that the assignee may prosecute a claim for compensation for damages, as long as there is no "cause to believe that the assignment may have led to an abuse".

I will summarize the facts.

By an originating application dated 10 November 1978, Contifex & Co. KG, a limited partnership, sued the European Economic Community before this Court, claiming that it should be ordered to pay approximately DM 312 000 by way of compensation for damage as well as interest at 6% to run from the date on which the application was lodged. The claim relates back to a default on the part of the Commission, which, although it was obliged to do so, did not pay Contifex any export refunds. In an interlocutory judgment given on 4 October 1979 in Joined Cases 241, 242 and 245 to 250/78, *DGV and Others* v *Council and Commission* [1979] ECR 3017, the Court ordered the Community to pay the applicants, and thus Contifex

1 — Translated from the Italian.

as well, "the amounts equivalent to the production refunds on maize gritz used by the brewing industry which each of those undertakings would have been entitled to receive if, during the period from 1 August 1975 to 19 October 1977, the use of maize for the production of gritz had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch". Furthermore, at the same time the Court ordered that the parties should "inform the Court within 12 months from the delivery of [the] judgment of the amounts of compensation arrived at by agreement" and that "in the absence of agreement the parties [should] transmit to the Court within the same period a statement of their views, with supporting figures".

That period was extended several times until, by notice given to the Court on 7 October 1981, the Commission, with the agreement of the Council, acknowledged that it owed Contifex the compensation claimed by the latter in its application of 10 November 1978. However, in the same document, the Commission objected that, as against Contifex, it was entitled in its turn to a debt relating to the recovery of sums wrongly paid to Contifex by the authorities of the Federal Republic of Germany (Principal Customs Office at Hamburg-Jonas) during 1976 and 1977 in respect of export refunds. That amount, much greater than the debt owing to Contifex, had been paid to the latter by the German authorities on 10 August 1981. On this basis the Commission asserted that its own liability to Contifex must be considered extinguished by setting off its larger claim against Contifex.

In a pleading dated 17 November 1981, the applicant reacted to the raising of a set-off by claiming that, on 18 March 1978 and therefore before this case was brought, it had assigned its claim for compensation (which was still contingent at that time) to Curavest, a company having its registered office in Curaçao in the Netherlands Antilles. It therefore disputed the alleged set-off and asked the Court to order the Community to pay the amount of the damages directly to Curavest in its capacity as assignee of the claim. Curavest, for its part, in a telegram dated 15 January 1982, asked the Court to be allowed to be substituted for Contifex (known as DEKA since 13 January 1979) as the applicant in the present proceedings. In addition it asked that the Community be ordered to pay it the sum of DM 312 000 and the appropriate interest. Finally, by order of 22 September 1982 the Court rejected that request and reserved for the final judgment its decision on the claim by Contifex that the Community should be ordered to compensate Curavest directly.

2. I will first examine the procedural aspects of the case. The Commission objects to the admissibility of the application and states that when it made its originating application, Contifex was not entitled to the claim against the Community. I repeat that in March 1978 that debt, which was at that stage merely speculative, was assigned by Contifex to Curavest. Well then, says the Commission, the action relates back to 10 November 1978 at which time, therefore, the applicant was seeking the enforcement of the right of a third party. Hence its lack of capacity to bring proceedings.

This objection is groundless. The fact is that by the interlocutory judgment of 4 October 1979 the Court not only recognized the admissibility of the claim, albeit by implication, but also ordered the Community to pay compensation for damage to Contifex. In brief, the Court had already made its decision on the existence of the debt in favour of the applicant. So the issues remaining at this stage of the proceedings are the quantification of the debt and, if necessary, consideration as to the existence of grounds by virtue of which the obligation is extinguished. On quantum the parties are agreed: the debt amounts to approximately DM 312 000. As we know, however, the Commission objects that this debt has been extinguished by way of set-off and that the substance of the case resides in establishing whether it has been extinguished. That being the situation, an objection based upon lack of entitlement to the right at the time of the application cannot succeed; to allow it would be equivalent to disregarding the authority of the decision.

3. A second procedural problem arises from Contifex's pleading of 17 November 1981. In it the applicant company asks that the Community be ordered to compensate Curavest, the assignee of the claim, directly, and in response to that the Commission puts forward three different submissions in defence. In the first place it points out that according to the first sentence of Article 42 (2) of the Rules of Procedure "No fresh issue may be raised in the course of proceedings unless it is based on matters of law or fact which come to light in the course of the written procedure", and the conclusion which it draws from this is logical. It observes that if the claim for the Community to be ordered to compensate a person other than the one in whose name the action has been brought were considered to be a "fresh issue", that issue would be prohibited and thus inadmissible. In the present case the amendment of the application is based upon a state of affairs which existed from the commencement of the proceedings so the exception provided for by Article 42 is not applicable.

It seems to me that it is possible to accept that argument. It is indisputable that Contifex assigned its own claim to Curavest some months before it embarked on this case. It is true that one could object that the assignment in March 1978 was only notified to the Commission after the proceedings had been initiated; and if one could infer from this that, if such notification were necessary in order to plead the assignment as against the defendant, we would be confronted with a new situation and therefore with the possibility of the raising of "fresh issues" as permitted by the procedural rule already mentioned. However, this objection cannot be considered at present, for it presupposes expressing a view on the legal device of the assignment of claims, that is to say, on a problem essentially relating to the substance of the case.

Furthermore, it must be asked whether the fact that a different recipient of the payment has been named really constitutes a fresh issue rather than a genuine amendment of the application. Now, supposing that the second alternative is valid, it cannot fail to be apparent that the Rules of Procedure prescribe neither the conditions nor the forms of such an amendment. The result

of this, as the Commission has pointed out, is that preference should be given to the proposition which at least as a general rule precludes the permissibility of the amendment. I am also of this opinion. Furthermore, the prerequisite for the existence of the amendment in question is constituted by the assignment of the claim at issue by Contifex to Curavest and this, as I have already observed, goes to the root of the issue on which the substance of the case centres. Thus, even the objection now under consideration is too closely connected to the substance of the case (as was pointed out by the Court itself in its order of 22 September 1982) for it to be opportune to deal with it at this point.

Let us allow however that the two formal obstacles to which I have referred can be overcome; there would still remain a third, namely the binding effect of *res judicata.* We have already seen that the interlocutory judgment of 4 October 1979 (limited essentially to the *an debeatur)* recognizes the claim as being vested in the applicant. A judgment making an order for payment and defining the quantum of damages in which that order is made in favour of a different person would disregard the authority of that interlocutory judgment which, I repeat, has already specified the person entitled to the compensation.

4. I now turn to the substance of the case. As we know, the Court is asked to decide whether the claim for compensation upheld in the interlocutory judgment of 4 October 1979 must be considered extinguished by way of set-off against the other and greater claim which the Commission makes against Contifex.

By way of defence the applicant disputes that there can be a set-off and maintains that two factors combine to prevent it from operating to extinguish the debt:

(a) the assignment of the claim for compensation by Contifex to Curavest and

(b) the impossibility for the debtor under the assigned claim (the Commission) to raise against the assignee (Curavest) the plea of set-off which it could assert in regard to the assignor (Contifex).

I would remind the Court that the claim which, it is maintained, cannot be pleaded as against Curavest is that which arose from the dispute between Contifex and the German customs authorities and which was transferred by them to the Commission.

The Commission rebuts this line of defence by asserting that the assignment by Contifex to Curavest is null and void. If such nullity were proved Contifex could never have lost its entitlement to the claim at issue and could be met with a plea by way of set-off of the claim which is brought against it by the Commission and which the latter acquired from the German customs authorities. Thus, in the view of the Commission, the sole obstacle which, according to the applicant's argument, prevents a set-off, collapses: namely the position of third party occupied by the person entitled to the claim for compensation with regard to the parallel relationship which binds the Commission as assignee of the second claim and Contifex as the debtor under that claim.

So the assignment is said to be a nullity. But to what cause must this be ascribed?

The Commission maintains that Contifex has "abused" the relevant mechanism, using it in such a way as to harm the interests of its own creditors and in particular those of the Community. In my opinion, this submission raises two kinds of problems: it is first necessary to establish whether the alleged nullity has a Community or a national basis and then to determine the contents of the rules — either Community or national — which are applicable in the present case.

5. On the first question the Commission maintains that the abuse of the mechanism of the assignment to the detriment of one's own creditors falls within the scope of non-contractual liability and thus within the ambit of Article 215 of the EEC Treaty. That proposition contains a grain of truth, but it must be more closely defined by reference to the features of the particular case. It is worth recalling that in this case the claim which is relevant to the determination of the law applicable to the validity (or to the effectiveness) of the assignment is that raised by way of set-off by the defendant and not that raised against it by the applicant. We must ask ourselves (a) whether the assignment of the claim for compensation has jeopardized the recoverability of the debt relating to the recovery of the refunds which was assigned to the Commission by the German customs authorities and (b) whether, and if so under what conditions, this has a bearing upon the fate of the contract by which the claim for compensation was transferred. Now, in order to determine the law, Community or national, under which the validity (or effectiveness) of the contract is to be ascertained, it is necessary to establish whether the claim for the recovery of the refund which was paid wrongly or irregularly is subject to the Community system. I think that it has a Community basis and, consequently, that the grounds which invalidate an assignment are to be sought in the principles of the Community system. The Commission's argument must therefore be rectified in the light of these considerations.

As I was saying, the subject-matter of the claim raised by way of set-off by the defendant is the recovery of export refunds. Its Community origin can be traced in the provisions of the regulations on the basis of which the payments were made (albeit erroneously) by the national authorities and, as far as the recovery is concerned, in Article 8 of Regulation No 729 of the Council of 21 April 1970.

Let us examine that provision. In the first sentence of paragraph (1) it is provided that "The Member States in accordance with national provisions laid down by law, regulation or administrative action shall take the measures necessary to ... recover sums lost as a result of irregularities or negligence". In this case, the customs authorities of the Federal Republic, after paying export refunds to Contifex in the period 1976 to 1977 because they had been misled as regards the nature of the product by the fraudulent conduct of the recipient, decided to recover them by applying that provision. Now according to the firmly established case-law of this Court, the authorities of the Member States which, in administering the Community agricultural intervention systems, have the

task of recovering sums wrongly paid, must have regard to their respective national laws "only in so far as it is necessary for the implementation of provisions of Community law and in so far as the application of those rules of a national law does not jeopardize the scope and effectiveness of that Community law": see the judgment of 6 May 1982 in Joined Cases 146, 192 and 193/81 *BayWa AG and Others* v *Bundesanstalt für landwirtschaftliche Marktordnung* [1982] ECR 1503.

In that case the Court had to decide whether the Community provisions on the recovery of sums wrongly paid under the common agricultural policy (see Article 8, already mentioned) imposed upon Member States the duty to carry out such a recovery, or whether they simply give the option "[making] it possible for the laws of the Member States to leave individual cases to the appropriate national authorities" (paragraph 27 of the decision). The Court held that the Community rule "expressly requires the national authorities ... to recover sums unduly or irregularly paid" and that they could not "exercise a discretion as to the expediency of demanding repayment of Community funds ... "(paragraph 30 of the decision). Underlying this view is the principle of equality and the rule requiring that Community law be applied in a uniform manner. The Court explained that "The opposite interpretation would lead to an erosion both of the principle of equal treatment between undertakings from different Member States and of the application of Community law which must, so far as possible, remain uniform throughout the Community" (last sentence of paragraph 30 of the decision). Those words are clear and they represent the most recent expression of what is by now a firmly established line of approach; I would recall, amongst others, the earlier judgments of 5 March 1980 in Case 265/78, *Ferwerda* v *Produktschap voor Vee en Vlees* [1980] ECR 617; 12 June 1980 in Case 130/79, *Express Dairy Foods* v *Intervention Board for Agricultural Produce* [1980] ECR 1887; 12 June 1980 in Joined Cases 119 and 126/79, *Lippische Hauptgenossenschaft* [1980] ECR 1863.

However, in its judgment of 28 June 1977 in Case 118/76 *Balkan-Import-Export GmbH* v *Hauptzollamt Berlin-Packhof* [1977] ECR 1117 the Court offered a further argument in support of my reading of Article 8. Ruling on the division of functions between the Community and Member States concerning the passing on of monetary compensatory amounts, the Court stated that a national administration could not apply a domestic rule when "its effect would be to modify the scope of the provisions of Community law" (paragraph 5 of the decision). The Advocate General expressed himself in like terms in his opinion in the *BayWa* case, pointing out that the application of a national rule is forbidden when it "would alter the effect of the Community rules".

It may therefore be inferred from all these indications, taken as a whole, that the claim raised by way of set-off is, in part, governed by Community rules, that

is to say by a set of rules which, as is generally known, takes priority over national provisions which are inconsistent with it. The rules which are relevant in this case and which may be summarized as the expression of the duty of national authorities to recover sums wrongly or irregularly paid answer the objective of ensuring equal implementation of Community claims in all the Member States. In brief, they seek — as I have already said with reference to the Court's thinking on the subject — to guarantee equality of treatment of all traders concerned by means of the uniform application of the law.

So what is the effect of these principles so far as the problem before us is concerned? It seems to me that they require that a claim arising under Community law should be endowed with the same degree of recoverability throughout the common market. It is well known that a person who is under an obligation to make a monetary payment offers his creditors a kind of general guarantee in the form of his assets. The same concept is commonly expressed by saying that the debtor is in a subordinate position in regard to his own assets, in the sense that, if he does not pay, he must submit to their expropriation by the creditor. This is a general rule common to the systems of the various Member States; in principle therefore it must also be applied in relation to claims which have their basis in Community law. If it were not so applied, and not so applied uniformly throughout the Community, the very substance of the claim would be jeopardized.

However, one thing is certain: the recoverability of a claim can be jeopardized by disposals made by the debtor. And this is what has happened in the case before the Court. By assigning the claim for compensation against the Commission, Contifex has deprived itself of one of its own assets and has rendered it more difficult, if not actually impossible, for the Commission to recover the sum in respect of which it, Contifex, was in its turn the debtor. Having said that, however, it is necessary to stress the effect upon the enforcement of claims which have their basis in Community law resulting from the differences which may exist between the national systems as regards the protection afforded to those entitled to such claims in the face of disposals made by the debtor. For it is conceivable that such differences may give rise to inequalities in the treatment of debtors and on the other hand prevent the uniform application of the Community rules on the recovery of sums wrongly or irregularly paid.

Now, in the case of one particular kind of disposal, namely the assignment of a claim, the discrepancies which have been referred to appear to be especially clear and telling. It is well known that, while some legal systems (for example those of Italy and France) require that the assignment be notified to the debtor under the original claim for it to be effective against him, others (such as that of the Federal Republic) consider it valid as against the debtor without providing for any form of notice. Under systems of the first kind, therefore, the debtor under the transferred claim may raise the same objections against the assignee that he could have raised against the assignor, as long as those objections are based on rights acquired after the assignment but before he received notice of it. Under the

second kind, on the contrary, the debtor under the transferred claim may not, at least as a general rule, raise any objection based upon rights acquired after the transfer. The conclusion is obvious: the debtor under the assigned claim who is at the same time a creditor of the assignor is not protected in the same way in Germany as he is in Italy and in France. If, then, the claim vested in him is of Community origin, it is equally obvious that this different form of protection ultimately affects the very enforceability of his right.

It therefore seems to me to be essential to ask ourselves whether the Community system lays down a limit to the application of national laws, derived from the general principles common to them and such as to avoid the difficulties which I have pointed out. The case-law of this Court has provided a pointer in this direction in the judgment of 4 October 1979 (Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955). The applicant in that case was asserting a claim for compensation against the Commission and the Council (a claim deriving, like the one raised in this case, from export refunds owed but not paid), which had been assigned to it by another party. The Commission challenged the admissibility of the application, maintaining that such an assignment was not permitted in view of the abuses to which it could give rise. The objection was rejected because it emerged that the assignment had been executed in favour of a company belonging to the same group and "following a measure of reorganization within the group"; but the Court declared, and did so in general terms, that "there is no reason to prevent a right to compensation from being claimed and enforced by the assignee [when there is no] cause to believe that the assignment may have led to an abuse" (paragraph 5 of the decision).

For the purposes of our point of view, it is of great significance that the Court has seen in the risk of abuse a limit to the assignment of claims, without deriving that principle from the system of one particular Member State based upon the connecting factors proper to private international law. In my opinion, it must be concluded that, in formulating the passage which I have cited, the Court intended to refer to a "Community" concept of abuse, inferable from the principles common to the systems of the Member States. In this way the *Ireks-Arkady* judgment confirms the connection between the Community basis of the claim and the other Community principles intended to guarantee its recoverability.

It is advisable however to make it clear that to draw up a Community system for the assignment of claims from those premises is too great a step. It is necessary to distinguish between specific rules applicable to assignments (requirements as to form and substantive provisions) and general rules designed to ensure the satisfaction of a claim arising under the Community system. The former can only be sought in the domestic law of each State. On this point I would recall what Mr Advocate General Capotorti had to say in his Opinion in the *Ireks-Arkady* case (see in particular pages 2986 and 2987): the fact that the subject-matter of the assignment

is the right to a claim originating in an unlawful act of the Community, is not sufficient, he stated, " to establish such a close and direct relationship between the assignment ... and the unlawful act ... as to bring the contractual act of disposing of the right between individuals within the provisions on the non-contractual liability of the Community". (ibid. foot of page 2986). As I was saying, however, the situation is different in this case: our problem is to identify the fundamental principles which ensure the recoverability of claims in the Member States and in particular those which protect the creditor from disposals by which the debtor reduces his own assets.

Finally I would like to add that there is another argument of a general nature which supports the Community solution adopted here. The contrary solution, which relies on national law alone to ascertain the validity (or effectiveness) of an assignment, would in fact oblige the institutions to have recourse, for the purpose of such determinations, to the courts of the various States, thus preventing the exercise of the jurisdiction of this Court. And in my opinion this is a view which should not be favourably considered, not only because of the well-known principle of the avoidance of a multiplicity of actions, but also because the national courts would be called upon to consider definitively a subject which has, as I have already pointed out, a twofold basis in Community law: by reference to the claim brought before the Court (based upon Article 215 of the EEC Treaty) and also in regard to the larger claim raised by way of set-off.

6. It now remains to establish, bearing in mind, of course, the particular facts of this case, what are the common principles which, for the purpose of protecting creditors, limit recourse to disposals of assets and in particular to the assignment of claims.

In this regard there is one matter which, in my opinion, deserves special attention: fraud to the detriment of creditors. The result of this is that disposals by the debtor to the disadvantage of his creditors, may be challenged by means of the recovery, or "Paulian", action and be declared inoperative. This device is common to all, or almost all, of the legal systems of the "Napoleonic" family. I would refer to Article 1167 of the French Civil Code which enables creditors to "contest acts done by their debtors in fraud of their rights"; the articles of the Civil Codes of Belgium and Luxembourg, which have the same number and are in the same terms as the article I have just cited; Article 2901 of the Italian Civil Code according to which "the creditor may seek a declaration that a disposal of assets whereby the debtor causes damage to the interests of the creditor is inoperative in regard to the latter". However, the recovery action, endowed with similar features, also exists in Danish, Netherlands and Greek law whilst the German system provides for a remedy which is substantially the equivalent. I refer to paragraph 3 (1), point 1, of the Anfechtungsgesetz [German statute relating to claims against debtors other than in bankruptcy proceedings] which provides that acts done by the debtor which, to the knowledge of the other party, are intended to prejudice his own creditors are voidable.

Nor does the English system differ from this model. Under that system, transfers of claims (and of other assets) carried out with the intent to defraud creditors are voidable at the suit of the person who has suffered the damage.

Naturally, in citing these instances, I am not seeking to set up a sort of general prohibition of assignments or to find the highest common denominator among the rules governing recovery actions. It is common knowledge that under the Community system the transfer of claims is allowed, even claims deriving from an unlawful act. It is sufficient to recall the *Ireks-Arkady* judgment which I have cited several times. As for the Paulian action, it is also well known that this is an instrument which may be used only before a national court and which is governed by national law. My purpose, therefore, is different and much more limited. What concerns me is to identify the fundamental principles from which that remedy is drawn and to take them into account for the purposes of resolving the present case. In other words, I propose to establish within what limits (taking care that they are limits which can be found within the Community system) parties may have recourse to the assignment of claims.

Now the fundamental principle upon which the recovery action and the analogous actions in English and German law are based is the well-known one expressed in the maxim *fraus omnia corrumpit.* However, two conditions are necessary for it to operate: (a) in effecting the disposal the debtor must at least be aware of the harm which he is causing to the creditor's interests; (b) the assignee must also share this awareness (or *scientia damni).* The rule *fraus omnia corrumpit* finds its limit in the need to protect a third party acting in good faith.

7. Let us apply these principles to this case. As we shall see, an examination of the documents leads to the conclusion that, in assigning its own claim for compensation to Curavest, Contifex knew that it was compromising the interests of its creditors and in particular those of the German revenue authorities (later replaced by the Commission). Similar, if not identical, knowledge can be attributed to the assignee company.

I am led to this conclusion by a large number of evidential factors, all broadly consistent and all highly eloquent. To ascertain them it is helpful to recount once again the history of Contifex, its activities and its links with Curavest, in the light of the documents before the Court and of the information provided by the parties at the hearing.

Incorporated prior to 1973 (as Contifex Getreideprodukte GmbH & Co. KG) the undertaking at the centre of this case is concerned with the milling of and wholesale dealing in cereals. Its legal form is that of a limited partnership: the partner with unlimited liability is a limited company (called Contifex Getreideprodukte GmbH) and the partners with limited liability are two natural persons, Dietrich Kirstein and Rudolf Kirstein. The latter hold the partnership capital of DM 1 000 000 in the ratio of 50% each, while the third partner, namely the limited company, has no share in the capital. On 3 March 1978

the undertaking decided to go into liquidation and appointed Dietrich Kirstein as liquidator: the accounts for 1977 and the annexed auditor's report (annexed to the applicant's pleading of 28 October 1982) show in fact that from 1973 it suffered considerable losses (DM 1 655 000 in 1976 and DM 2 264 000 in 1977). The liquidator entered into an out-of-court arrangement with the undertaking's creditors involving the relinquishment of rights in assets which satisfied their claims only to the extent of 25%. It can be inferred from the letter dated 31 July 1978 from Rechtsanwalt Jakob, the professional adviser who negotiated the arrangement on behalf of the liquidator:

(a) that there were found to be 77 creditors claiming an aggregate debt of about DM 1 267 000;

(b) that by 31 July they had all accepted the arrangement under which they would receive 25% of the amounts owing to them; and

(c) that the payments would be made by 31 October of that year.

There is no reason to doubt that the payments were actually made.

Among the undertaking's creditors was Curavest. Its directors had lent Contifex HFL 900 000 in 1976 (a copy of an extract from the relevant contract was produced by the applicant: see the annex to the pleading of 28 October 1982). Curavest however does not appear among the 77 creditors who accepted the arrangement. Contifex came to a settlement with Curavest in a different way. On 18 March 1978 it assigned the debt (which at that time was still contingent, as I have already remarked) which it claimed from the Commission for compensation for damage resulting from the non-payment of export refunds. In the deed of assignment the claim was estimated to amount to DM 260 000 (see the letter from Rechtsanwälte Lassner and Wübbena of 26 October 1982). It is unnecessary to repeat that it was that claim which is the subject of the present proceedings.

However the life of Contifex is marked by a further and complex series of events. In 1976 and 1977 it succeeded, by fraudulent means, in obtaining export refunds to which it was not entitled from the German customs authorities amounting to about DM 5 000 000. This is shown *inter alia* by a letter from the German Minister of Finance addressed to the Commission dated 26 August 1981 (annexed to the Commission's pleading of 7 October 1981). Having discovered these facts the competent officers of the Public Prosecutor's Department began an investigation of Dietrich Kirstein as the person in charge of Contifex. The outcome was a criminal trial and a conviction. The relevant judgment given by the Landgericht [Regional Court], Oldenburg, is dated 20 February 1981 and was produced by the Commission at the hearing. For their part, the German customs authorities decided on 18 March 1980 to recover the sums wrongly paid to Contifex. Then, on 10 August 1981, they transferred the claim to the Commission. Here again it would be superfluous to state that that was the claim raised by way of set-off against the applicant's claim for compensation.

8. All the facts and circumstances which I have so far described

demonstrate beyond all possible doubt the *scientia damni* if not also the *animus nocendi* of Contifex. In assigning its own claim for compensation to Curavest it was knowingly compromising the interests of the German revenue authorities which, having discovered that it had been the victim of a fraud, would sooner or later have claimed back what it had unduly paid. Although both the validity and the amount of the claim were still uncertain, it still constituted the only significant asset owned by Contifex, if the sums paid to the 77 creditors who accepted the out-of-court arrangement are excluded (and it may be noted, as was pointed out by the representative of the Commission at the hearing, that it is likely that those sums consisted of the fraudulently obtained export refunds). Divesting itself of that claim — and thus, I repeat, of the only substantial asset on which it could count — therefore considerably reduced the solvency of Contifex. The revenue authorities could not fail to be adversely affected by this conduct.

However, as the representatives of the Council and Commission have stressed, the bad faith of Contifex appears above all from the criminal proceedings which resulted in the conviction of Mr Kirstein. He was convicted for having obtained by fraud, namely by substituting samples of goods to be subjected to analysis, export refunds for products which did not have the characteristics which they required for the relevant right to accrue. Thus Kirstein and his company were well aware that, by assigning the claim, they would prevent the Commission (as potential successor in title to the German customs authorities) from raising a plea of set-off as between the claim for payment by Contifex and the claim for recovery of wrongly paid refunds.

Furthermore, the conduct of Curavest in this case displays a number of highly questionable features which, I believe, confirm the bad faith which also invalidates the assignment to Curavest. A first example of duplicity: although it had already assigned its claim for compensation (on 18 March 1978), the applicant instituted proceedings against the Commission (on 10 November 1978) and presented the claim in its own name. Only later, to be exact on 3 April 1981, did it decide to inform the defendant that it had made the assignment. Why these two years of silence, or to put it more bluntly, of concealment? Why such equivocal procedural conduct? I can see only one reasonable explanation: Contifex was hoping to recover its claim without having raised against it by way of set-off the Community-based claim of the German authorities; and when it saw this possibility disappearing because the criminal investigation had been opened and was taking its course, it decided to give notice of the assignment. It did so because it was plainly convinced that the second claim, even if assigned to the Commission, could never be raised by the latter against Curavest.

It is known that in German law a debtor under an assignment of a claim can object to a set-off only if his debt arose before the assignment or, at most, before he had knowledge of it (see paragraph 406 of the Bürgerliches Gesetzbuch [German Civil Code]); and that is not the case here since the Commission

acquired its claim on 18 August 1981, whilst the assignment involving Curavest dates from 18 March 1978 and the Commission knew of it on 4 April 1981. That is also the date to which one must refer in order to determine the moment from which Curavest must be regarded as the party entitled to the new claim also *vis-à-vis* the debtor under the assigned claim. It should be remembered however that, unlike what happens under the Napoleonic systems — the French, as is obvious, but also the Belgian and above all the Italian — in German law the assignment may be raised against the debtor without the need for notice or other steps (see paragraph 398 of the Bürgerliches Gesetzbuch).

There is a second and no less substantial ambiguity. We know that Contifex was put into liquidation on 3 March 1978. Now that situation was made known neither in the originating application (in presenting itself in the case the company failed to add to its proper name the letters "i. L." which stand for "in liquidation") nor subsequently. Only after the interlocutory judgment of 4 October 1979 did it give notice in the proceedings of the above-mentioned situation. It may be added that Contifex changed its name to "DEKA" with effect from 13 January 1979, but the Court was not made aware of this until much later, to be precise by the pleading of 17 November 1981. It seems to me that these instances of reticence, this lack of clarity and sincerity also prove that the real purpose of the assignment to Curavest was to defraud the creditors and in particular the revenue authorities of the Federal Republic. Why keep quiet about its being in liquidation if not in order not to alert the German authorities to which the Commission, involved in the matter if only because of the Community origin of their claims, could have passed on the information? Why not inform the Court of the new business name if not for the same or similar reasons?

It must therefore be concluded that Contifex, in assigning its claim for compensation from the Community, acted with the intention or at least with the knowledge of reducing its estate and, by this means, of damaging the interests of its creditors.

9. I will now examine the position of Curavest, beginning with the loan which the assignment was intended to discharge. As I have already said, it was granted in August 1976 and amounted to HFL 900 000. That is shown by an extract from the relevant contract, an extract which moreover — and this is the first shadow cast on the genuineness of the transaction — raises a number of questions. As the Council and Commission have pointed out, it is incomprehensible (and it has not been explained) why the contract was not produced in its entirety. Furthermore the date it was entered into has not been stated unequivocally: 25 August 1976 in the auditor's report on the accounts for 1977 and 24 September 1977 in the pleading lodged by the applicant on 28 October 1982.

However the really worrying aspects of the matter lie elsewhere. The first is obvious. The financial state of the

borrower — we know that from 1973 it was accumulating increasingly serious losses — ought at least to have discouraged such a large loan. But that is not all. The loan was granted in extraordinarily risky circumstances. It appears from the auditor's report on the 1977 balance sheet that all that the lending company had by way of security were plant and machinery valued at DM 569 984. And that was a third-ranking security because two credit institutions, the "Bremer Landesbank" and the "Bank für Gemeinwirtschaft" had priority claims over the same assets. Furthermore: as far as the terms of repayment are concerned, we may note that in the contract (or at least in the extract produced in the proceedings) they do not set out the dates for repayment of the principal; they are limited to fixing interest at the rate of 9 % and stipulating that it be paid quarterly. It is a fact however that the aforementioned accounts include the Curavest loan among the medium-term liabilities, specifying the corresponding debt of the borrower at DM 860 000 on 1 January 1977 and at DM 930 000 on 31 December of the same year. Thus in the course of 12 months Contifex had not paid any part whatever of the principal or interest.

If these points are valid, it seems to me to be difficult not to conclude from them that the Curavest loan was granted for reasons which are not acknowledgeable or at least unclear. Extremely hazardous and devoid of any substantial consideration, the transaction does not conform in any sense to the logic of the market or, if one prefers, to the standards of the honest and experienced businessman. To justify it one is forced to presume that relations between the two companies were more murky and involved than the pleadings give cause to believe.

The conditions governing the assignment of the claim at issue should now be considered. The relevant contract was concluded, as I have mentioned several times, on 18 March 1978. On that date Contifex was already in liquidation and such a situation, of which Curavest must have been aware, ought to have led the latter to exercise great caution in the acquisition of a source of income which was still contingent but counting as an asset, and indeed, as I have already said, the only genuine asset of the assignor, if it is true that the liquidity with which the other creditors were satisfied was presumably derived at least in part from the fraudulently-obtained refunds. And so, in such suspicious circumstances Curavest did not restrict itself to entering into the contract of assignment; it acted outside the out-of-court arrangement and, furthermore, months before that arrangement had been concluded. Once such conduct is related to the terms of the loan on account of which the assignment was effected it becomes impossible not to regard it as tainted by bad faith. This, moreover, was the unequivocal view expressed by the representatives of the Council and Commission at the hearing.

10. Once this point is reached, it seems to me that the conclusion is inevitable. When it acquired the claim for compensation Curavest knew that the Community would have to pay the compensation without being able to raise

the other claim by way of set-off. It was therefore an "abusive" assignment because it was carried out to defraud creditors; and in accordance with a general principle common to the Member States, stated *in apicibus* by the Court in the *Ireks-Arkady* judgment, that means that it is ineffective at least *vis-à-vis* the European Economic Community as the debtor under the transferred claim. From this it follows, *inter alia*, in so far as it still matters, that the request made by Contifex to amend the application by its reference to Curavest as the party entitled to the compensation (see paragraph 3 above) is redundant.

The consequences of the ineffectiveness is that the Community has grounds to raise by way of set-off against the compensation claimed by Contifex the larger claim assigned to the Commission by the German customs authorities. The set-off in its turn extinguishes the claim raised by the applicant.

11. On the basis of the foregoing considerations, I propose that the Court, in giving judgment on the application lodged on 10 November 1978 by Contifex Getreideprodukte GmbH & Co. KG (i. L.), called DEKA since 13 January 1979, against the Council of the European Communities and the Commission of the European Communities, should declare that the compensation claimed by the applicant is extinguished by set-off and therefore dismiss the application.

As regards costs, I consider it appropriate to order Contifex to pay them in view of its failure on the sole point at issue at this stage of the proceedings, namely the extinction of the claim by way of set-off. The highly equivocal procedural conduct of the applicant has contributed to my taking this view.