In Case 90/78

GRANARIA B.V., Rotterdam, represented by B. H. ter Kuile and F. O. W. Vogelaar, of the Hague Bar, with an address for service in Luxembourg at the Chambers of Jacques Loesch, 2 Rue Goethe,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by D. Vignes, Director of the Legal Department, assisted by A. Brautigam, a member of that Department, with an address for service in Luxembourg at the office of J. N. Van den Houten, Director of the Legal Department of the European Investment Bank, 2 Place de Metz,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by H. Bronkhorst, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION for damages under Article 175 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT

composed of: J. Mertens de Wilmars, President of the First Chamber, acting President, Lord Mackenzie Stuart (President of Chamber), A. M. Donner, P. Pescatore, M. Sørensen, A. O'Keeffe and G. Bosco, Judges,

Advocate General: F. Capotorti
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 to the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. In its judgment of 19 October 1977 in Joined Cases 117/76 *A. Ruckdeschel* v *Hauptzollamt Hamburg-St. Annen* and 16/77 *Diamalt* v *Hauptzollamt Itzehoe* [1977] ECR 1753 the Court decided that:

1. The provisions of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967, as worded with effect from 1 August 1974 following the amendment made by Article 5 of Regulation (EEC) No 1125/74 of the Council of 29 April 1974, and repeated in subsequent regulations, are incompatible with the principle of equality in so far as they provide for quellmehl and pregelatinized starch to receive different treatment in respect of production refunds for maize used in the manufacture of these two products.
2. It is for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct this incompatibility.

2. The Granaria undertaking, the applicant in this case, is engaged in producing, buying and selling, importing and exporting various agricultural products and, of particular interest in this case, quellmehl. Granaria received production refunds for quellmehl from 1972 until their abolition, on 1 August 1974, by Regulation No 1125/74 of the Council.

The judgment cited above led Granaria to submit the following requests to the Council and Commission by letters dated 30 January 1978:

— In the first place, that the institution concerned pay it, in accordance with the principle of equality referred to in the said judgment, within the two months prescribed by Article 175 of the Treaty, the production refunds dating back to 1 August 1974, to which it was entitled for the quantities of maize and quellmehl concerned, in accordance with Article 11 of Regulation No 120/67, as worded before the amendment made by Regulation No 1125/74;

— In the alternative, that within the two months following the date of the said letters the institution concerned recognizes its liability towards the applicant for any damage which it had suffered as a result of the abolition of the said refunds contrary to the principle of equality, such damage to be ascertained on the basis of particulars to be supplied by the applicant and to be made good in accordance with the law.

Granaria addressed similar requests to the Hoofdproduktschap voor Akkerbouwprodukten [Central Board for Agri-

cultural Products], to the Produktschap voor Granen, Zaden en Peulvruchten [Board for Grain, Seeds and Leguminous Plants] and to the Netherlands Government.

This action was brought on the ground that the Council and the Commission failed to take, within the period prescribed by Article 175 of the Treaty, the decisions requested by Granaria.

3. In fact it was only by Regulation No 1125/78 of 22 May 1978, amending Regulation No 2727/75 on the common organization of the market in cereals, and Regulation No 1127/78 of 22 May 1978, amending Regulation No 2742/75 on production refunds in the cereals and rice sectors (Official Journal L 142 of 30 May 1978, pp. 21 and 24) that the Council reintroduced a scheme of production refunds for the manufacture of quellmehl from common wheat and maize. The main features of those regulations are as follows:

— Provision was made for equality of treatment between the manufacture of quellmehl intended for bread-making and the manufacture of starch;

— At the request of the parties concerned the refunds were to be granted retroactively as from 19 October 1977, the date of the judgment of the Court cited above.

4. The action was brought on 3 April 1978. After 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 — Conclusions of the parties

1. *Granaria* claims that the Court should:

— Declare, pursuant to Article 175 of the Treaty, that the Council and/or the Commission have failed, contrary to the Treaty or to their obligations arising under the Treaty or under some general principle of law, having been first called upon within the prescribed period by Granaria to act, to take a decision or address to Granaria an act (other than a recommendation or an opinion);

— In the alternative, annul the implied decision or decisions of the Council and/or the Commission not to take a decision or not to act in accordance with the request which the applicant had previously addressed to them for that purpose;

— Order the European Economic Community, pursuant to Article 215 of the Treaty, to compensate Granaria for the damage caused by its institutions, which damage Granaria has suffered and will continue to suffer as a result of the non-payment, or failure to order payment, to the applicant of the production refunds for maize and quellmehl covering the period subsequent to 1 August 1974, in respect of the quantities periodically notified to the competent authorities by the applicant, in accordance with Article 11 of Regulation No 120/67 of the Council;

— Declare that such damage is to be ascertained on the basis of particulars to be supplied by Granaria and is to be made good in accordance with the law;

— Order the Council and the Commission, jointly with the European Economic Community, to pay the costs.

2. The *Council* and the *Commission* contend that the Court should:

— Declare the application inadmissible or alternatively declare it groundless;

— Order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

1. The action based on the third paragraph of Article 175 of the Treaty

(a) The Council submits that irrespective of the manner in which it complied with the judgment of the Court of 19 October 1977, it had to amend its Regulation No 2727/75. In the Council's view Granaria's action is designed to obtain a general provision of a legislative nature, identical in scope to a regulation, rather than an act of direct and individual concern to it. As the Court stated in its judgment of 15 January 1974 in Case 134/73, *Holtz and Willemsen* v *Council* [1974] ECR 1, such an action is inadmissible.

(b) The *Commission* endorses the observations of the Council. It adds in particular that the only legal instrument by which the equality of treatment demanded by Granaria may be established in law is the regulation. In fact a regulation is intended to contain a general legislative provision applicable to an indeterminate number of persons.

(c) *Granaria* submits that, with Regulations Nos 1125/78 and 1127/78, the Council has only partially complied with the judgment of the Court of 19 October 1977 and that therefore those regulations are not valid and do not render the application groundless. It considers that, as the amendment to Article 11 of Regulation No 120/67 was not valid, that article continues in force in its original version. Equality of treatment may, according to Granaria, be re-established by paying the refunds on the basis of the rules in force before 1 August 1974. Granaria further submits that the form of a regulation is not appropriate in this case and states that it has not brought this action for the purpose of obtaining a legislative provision. In this regard refers to the solutions which it suggested in its letters of 30 January 1978.

2. The action based on the second paragraph of Article 215 of the Treaty

(a) The *Council* submits that the application does not comply with the requirements of Article 38 (1) of the Rules of Procedure of the Court. According to the Council Granaria does not specify either the nature or the extent of any damage suffered by it. In the Council's opinion it would have been easy to give particulars of the damage, for example in the form of a numerical calculation of the unpaid refunds, since it is a question of damage which has already occurred. This is not, therefore, the situation described in the judgment of the Court of 2 June 1976 in Joined Cases 56 to 60/74 *Kampffmeyer and Others* v *Commission and Council* [1976] ECR 711, where the Court considered admissible an action for liability in respect of future damage. As no figure indicating the amount of the claim is stated, this head of the claim must in the Council's view be regarded as ancillary to the previous claim, which is likewise inadmissible.

As for the causal connexion, the Council criticizes Granaria for merely asserting that the non-payment of the refunds caused it damage. The Council points

out in this regard that it is probable that Granaria passed on in its selling prices the increase in the cost of quellmehl, resulting from the fact that the refunds were not paid, and that therefore no damage was suffered by the applicant.

The Council concludes that it is a question of an action for liability for unspecified damage, which the Court acknowledged to be inadmissible in its judgment of 2 December 1971 in Case 5/71, Zuckerfabrik *Schöppenstedt* v *Council* [1971] ECR 975.

(b) The *Commission* endorses the observations of the Council. It adds in particular that the Court established in its judgment of 15 June 1976 in Case 74/74, *CNTA* v *Commission* [1976] ECR 797, that the amount which may be claimed as damages can never be equal to the amount of the unpaid refunds.

It also points out that, in order to prove the damage, Granaria will have to prove that it is a result of the discrimination, established by the Court, consisting in the fact that manufacturers of animal feed, in competition with the quellmehl in question, received a subsidy; in other words, it must be a question of damage caused by the fact that the manufacturers of quellmehl were in a less favourable competitive position than the manufacturers of starch owing to the fact that the latter received a production subsidy. According to the Commission Granaria has made no attempt to furnish such proof and, moreover, it has not made any such declaration, with the result that its application must be regarded as inadmissible by virtue of Article 38 of the Rules of Procedure.

(c) According to *Granaria*, it is clear from the application that the subject-matter of the dispute is the payment of the refunds subsequent to 1 August 1974 and compensation for the damage sustained as a result of the non-payment. Granaria is equally of the opinion that it has set out the grounds on which it relies more than adequately in its application, if this is considered as a whole.

It is not necessary, in its view, for the application to state the actual amount of the damage; it is customary in cases in which precise calculations cannot yet be carried out to ask that the defendants be ordered to pay compensation for damage "to be ascertained on the basis of particulars to be supplied and to be made good in accordance with the law". Granaria adds that it is not possible at present to quantify the damage because since 1 August 1974 the Council and the Commission have no longer determined the essential element thereof, namely the exact amount of the refunds. Therefore, it is the principle of equality which should determine precisely the damage. According to Granaria, it is apparent, moreover, from the defendants' arguments that they are aware of the subject-matter of the dispute and of the grounds relied on, so that they cannot complain that they are hampered in their defence.

In Granaria's opinion it would be contrary to the independent nature of the action for failure to act and would impair the proper functioning of the entire system of remedies established by the Treaty if the fact that in certain circumstances an action for damages may lead to the same result as an action for failure to act were considered a reason for inadmissibility. In Granaria's submission the action for damages is different from the action for failure to act in that its object is not to secure the adoption of a specific measure but to obtain compensation for the damage caused by an institution in the performance of its duties. Finally Granaria calls attention to the rule to which it has

referred on the admissibility of the action under Article 175 of the Treaty.

B — Substance

1. The action based on the third paragraph of Article 175 of the Treaty

(a) *Granaria* submits that as a result of the judgment of the Court of 19 October 1977 Regulation No 1125/74 of the Council is not valid. Council Regulations No 1125/78 and No 1127/78 are not valid either, in its submission, since the principle of equality between the products in question was not re-established for the period from 1 August 1974 to 19 October 1977 and since it was not re-established for quellmehl and starch intended for use as animal feed. The consequence of the invalidity of the said regulations is, according to Granaria, that Article 11 of Regulation No 120/67 continues in force in the version existing prior to 1 August 1974 and that the refunds must be paid, in respect of the period subsequent to that date, on the basis of those provisions.

Granaria states in its reply that the quantity of maize which it converted into quellmehl from 1 August 1974 to 31 December 1977 inclusive amounted to a total of 313 769.78 kg. If the refunds had remained identical to the refunds paid for maize converted into starch, the sums payable in respect of that quantity would be approximately 1 652 690.64 guilders.

Moreover, says Granaria, the rules in force before 1 August 1974 did not forbid the sale of quellmehl for the purpose of feeding cattle. The judgment of the Court of 19 October 1977 is not, in Granaria's opinion, based on the assumption that inequality of treatment does not exist when it is a question of the relationship between quellmehl and starch used as animal feed. Besides it is well-known that subsidized starch is used for that purpose on a vast scale.

(b) The *Council* observes that the Court did not decide in its judgment of 19 October 1977 that Regulation No 1125/74 was not valid but rather that it was illegal and that therefore it was for the competent institutions to adopt the measures necessary to remove that illegality. But the argument pursued by Granaria would not in the Council's opinion leave the institutions any choice. Consequently the Council rejects Granaria's view that the entitlement to refunds provided for quellmehl by the rules in force before 1 August 1974 continued without interruption.

As for Granaria's argument that Regulations No 1125/78 and No 1127/78 had the effect of removing equality of treatment for quellmehl and pre-gelatinized starch, the Council recalls that it had never proposed, from 1964 to 1974, to establish equality between different types of animal feed. According to the Council, the use of quellmehl as animal feed was merely the consequence of the fact that with the grant of the refund quellmehl was able to become competitive for other uses than those to which it was traditionally put. That consequence of the refund is, however, contrary to the underlying reason for the scheme of refunds, namely the maintenance of quellmehl in its traditional market. The Council recalls, moreover, in this context that the main object of granting a refund for cereal and potato starches and other similar products was to enable those products to meet the competition from chemical substitutes. In the Council's opinion that reason is not valid as regards the market in animal

feed since there are no chemical substitutes on that market. The Council goes on to stress that the Court based its judgment of 19 October 1977 on the fact that quellmehl is traditionally used for bread-making.

(c) The *Commission* endorses the observations of the Council. It adds in particular that the date of 19 October 1977 was chosen in accordance with the margin of discretion accorded by the Court to the Community institutions for the abolition of discrimination. In the opinion of the Commission the judgment does not contain any obligation to re-establish that system retroactively.

Finally, the Commission points out that all the factors mentioned by the Court in its judgment of 19 October 1977 as likely to justify the abolition of the refund for common wheat and for maize used to produce quellmehl for feeding animals are present: in fact, only starch manufactured from less expensive raw materials than wheat and maize, such as tapioca and manioc, could economically be used for feeding animals; moreover, it is clear from a letter from Granaria dated 12 June 1972 — in which it addressed to the competent national authority a request for production refunds for quellmehl — that that product is indeed used as animal feed.

2. The action based on the second paragraph of Article 215 of the Treaty

(a) *Granaria* is of the opinion that the Community is liable for the damage sustained by it as a direct consequence of the unlawful situation created by the institutions as a result of the abolition of the production refunds for quellmehl, which was illegal because it was contrary to the principle of equality. According to Granaria that fact constitutes a sufficiently serious breach of a superior rule of law enacted for the protection of individuals.

(b) The *Council* submits that any damage should be borne by the applicant because it does not exceed the "reasonable limits" within the meaning of the judgment of the Court of 25 May 1978 in Joined Cases 83 and 94/76 and 4, 15 and 40/77, *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209.

It is clear from its observations on Article 175 of the Treaty that the Council is of the opinion that the abolition of production refunds for quellmehl used as animal feed is not contrary to the principle of equality.

Therefore Granaria cannot rely on that principle since, in view of what the Court regarded as an established fact in its judgment of 19 October 1977 on the one hand, and in view of what Granaria has admitted in this case, in particular in its letter of 12 July 1972, on the other hand, it is probable that the quellmehl produced by Granaria is used solely as animal feed. Moreover, this conclusion is corroborated by the fact that Granaria was able, in spite of the abolition of the refunds, to double its production, as is clear from the documents produced by it for the purpose of these proceedings.

According to the Council, furthermore, that fact proves either that Granaria passed on the effects of the abolition of the refunds in its selling prices, which would mean that it suffered no loss, or that the abolition did not cause it any damage because it operates in a different market, namely the market in animal

feed. That fact shows, moreover, that there is no causal link between a loss, other than the non-payment of the refunds, and the abolition of the refund.

(c) *Granaria* states that it has not sold quellmehl for use as animal feed: it sells to buyers, who then decide what to do with the quellmehl.

(d) The *Commission* endorses the observations of the Council.

IV — Oral Procedure

The applicant, represented by B. H. ter Kuile, the Council, represented by D. Vignes and A. Brautigam, and the Commission, represented by H. Bronkhorst, presented oral argument at the hearing on 6 February 1979.

The Advocate General delivered his opinion at the hearing on 7 March 1979.

Decision

1 By an application made on 3 April 1978 against the Council and the Commission, the Netherlands company Granaria B.V., hereinafter referred to as "Granaria", asked the Court, in the first place, to declare pursuant to Article 175 of the EEC Treaty that the two institutions, jointly or severally, had disregarded their obligations by failing to address to Granaria an act which it had requested, and, secondly, to order the Community, pursuant to the second paragraph of Article 215 of the Treaty, to compensate it for damage caused to it by the defendant institutions.

2 These requests arise from the fact that on 1 August 1974, the date of the entry into force of Regulation No 1125/74 of 29 April 1974 amending Regulation No 120/67 on the common organization of the market in cereals (Official Journal 1974, L 128, p. 12), the grant of production refunds for quellmehl, which Granaria had received after commencing production of that commodity in 1972, ceased and was re-introduced only as regards the manufacture of quellmehl for bread-making, by Council Regulation No 1127/78 of 22 May 1978 amending Regulation No 2742/75 on production refunds in the cereals and rice sectors (Official Journal 1978, L 142, p. 24).

In support of its requests Granaria relies on the judgment of the Court of 19 October 1977 in Joined Cases 117/76, *Ruckdeschel* v *Hauptzollamt Hamburg-St. Annen,* and 16/77, *Diamalt* v *Hauptzollamt Itzehoe* [1977] ECR 1753, in

which the Court ruled that the provisions at issue were incompatible with the principle of equality in so far as they provided for quellmehl and pre-gelatinized starch to receive different treatment in respect of production refunds for maize used in the manufacture of those two products.

3 The object of the application, taken as a whole, is essentially to obtain compensation for the damage which Granaria claims to have sustained as a result of the refusal to grant it the refunds which it requested.

Therefore, it is first of all necessary to consider the claim under the second paragraph of Article 215.

The admissibility of the application in so far as it is based on Article 178 and the second paragraph of Article 215

4 The Council and the Commission have put forward an objection of inadmissibility, submitting that the application does not comply with the requirements of Article 38 (1) of the Rules of Procedure in that it does not state either the nature or extent of the alleged damage or the causal link between the acts of the Community and the damage allegedly sustained.

5 It is true that in the application Granaria merely states that it has sustained pecuniary damage as a result of the regulations at issue, reserving the right to give details of the extent thereof at a later stage.

Generally an application in such abridged form, made under Article 178 of the Treaty, would not be sufficient to comply with the requirements of the Rules of Procedure as regards stating the subject-matter of the dispute and the grounds on which the application is based.

6 In the particular circumstances of the case, however, the incomplete nature of the application need not necessarily render it inadmissible.

In fact, when an action for damages is brought before the Court under Article 178 of the Treaty and the legal basis of the Community's liability is disputed, the desirability of making the procedure more economical has sometimes led the Court to give a decision at an early stage of the proceedings on the question whether the conduct of the institutions has been such as to entail the liability of the Community, reserving consideration of

questions relating to causality, as well as those concerning the nature and extent of the damage, for a later stage.

In this case the problem of the legal basis of liability is particularly appropriate for separate treatment in accordance with that practice, so that it is possible, strictly speaking, to consider the application adequate and therefore admissible.

The substance of the application in so far as it is based on the second paragraph of Article 215

7 Granaria submits that the Community is rendered liable by the fact that the abolition of the production refunds for quellmehl created a situation which, in its judgment of 19 October 1977, the Court declared illegal as being contrary to the principle of equality.

8 Whilst it is true, in that judgment, the Court ruled that the provisions at issue were incompatible with the principle of equality in so far as they provided for a difference in treatment between quellmehl and pre-gelatinized starch, none the less it is clear from the grounds of the decision that that finding was based on the information supplied to the Court during the proceedings.

In this regard the Court found that quellmehl had for a long time been exposed to competition from starch on account of the possibility of using the latter product instead of quellmehl for the purpose of certain specific uses in food for human consumption.

9 In view of the allegations made by the Council and the Commission to the effect that quellmehl had been diverted from its specific use in food for human consumption in order to be sold as animal feed, the Court ruled that, even if adequate proof that it was put to such use had been forthcoming, that could have justified the abolition of the refund only in respect of the quantities put to such use and not in respect of the quantities of the product used in food for human consumption.

The Court took the view that the principle of equality is breached to the detriment of quellmehl producers only on the assumption that quellmehl is put to its traditional uses in food for human consumption.

In the course of the proceedings in the present case the parties have not introduced any new factor capable of altering that view.

10 The institutions entrusted with the operation of the scheme of production refunds within the framework of the common organization of the market may legitimately require a person who claims the refunds to provide evidence that the product is used for the purpose envisaged by the scheme.

In this case Granaria has not produced such evidence, either for the period during which the regulations in force made no provision for any production refund for quellmehl or for the period following the reintroduction of the production refunds for quellmehl intended for bread-making.

11 It follows that the Community is not liable towards Granaria and consequently the application must be rejected as unfounded in so far as it is based on the second paragraph of Article 215 of the Treaty.

The admissibility of the application in so far as it is based on Article 175 of the Treaty

12 The claim submitted by Granaria under Article 175 of the Treaty seeks a declaration that the defendant institutions have failed to fulfil their obligations by not acting upon the request which Granaria had addressed to them, asking them to pay the refunds claimed by it and to recognize their liability for the damage which their conduct had caused.

13 The third paragraph of Article 175 provides that any natural or legal person may, under the conditions laid down in the first and second paragraphs of the same article, complain to the Court of Justice that the Council or the Commission has, in infringement of the Treaty, "failed to address to that person any act other than a recommendation or an opinion".

14 The only legal instrument which would have allowed satisfaction of the claim made on the two institutions in this case would have been a regulation auth-

orizing the reintroduction of production refunds for quellmehl and laying down rules for the compensation of any damage caused by their abolition.

Such a provision could be described, by reason either of its form or of its nature, as an act which could be addressed to the applicant within the meaning of the third paragraph of Article 175.

15 Thus the application must be dismissed as inadmissible in so far as it is based on Article 175 of the Treaty.

Costs

16 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs.

As the applicant has failed in its action it must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to pay the costs.**

Mertens de Wilmars Mackenzie Stuart Donner

Pescatore Sørensen O'Keeffe Bosco

Delivered in open court in Luxembourg on 28 March 1979

A. Van Houtte
Registrar

J. Mertens de Wilmars
President of the First Chamber acting President