JUDGMENT OF THE COURT
27 JANUARY 1982 [1]

De Franceschi SpA Monfalcone v Council and Commission of the European Communities

(Gritz — Barring of proceedings in matters arising from non-contractual liability)

Case 51/81

Action for damages — Period of limitation — Date of commencement — Liability arising from a legislative measure — Date on which the injurious effects of the measure are produced

(EEC Treaty, Art. 178 and second paragraph of Art. 215; Protocol on the Statute of the Court of Justice of the EEC, Art. 43)

As is apparent form Article 215 of the EEC Treaty and Article 43 of the Protocol on the Statute of the Court of Justice of the EEC, the involvement of the non-contractual liability of the Community and the assertion of the right to compensation for damage suffered depend on the satisfaction of a number of requirements relating to the existence of an unlawful measure adopted by the Community institutions, actual damage and a causal relationship between them.

The period of limitation which applies to proceedings in matters arising from the non-contractual liability of the Community therefore cannot begin before all the requirements governing the obligation to provide compensation for damage are satisfied and in particular before the damage to be made good has materialized. Accordingly, since the situations concerned are those in which the liability of the Community has its origin in a legislative measure, the period of limitation cannot begin before the injurious effects of that measure have been produced.

In Case 51/81

DE FRANCESCHI SPA MONFALCONE, whose registered office is at Monfalcone, acting through its legal representative for the time being, Coclite De Franceschi, represented and assisted for the purpose of the present proceedings by Giovanni Maria Ubertazzi and Fausto Capelli, of the Milan Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 83 Boulevard Grande-Duchesse-Charlotte,

applicant,

1 — Language of the Case: Italian

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Daniel Vignes, Director of the Legal Department of the Council of the European Communities, assisted by Arthur Brautigam, administrator in the said department, with an address for service in Luxembourg at the office of Douglas Fontein, Director in the Directorate for Legal Questions of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Richard Wainwright, acting as Agent, assisted by Guido Berardis, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

defendant,

OBJECTION of inadmissibility raised by the Council and the Commission of the European Communities pursuant to Article 91 of the Rules of Procedure of the Court of Justice against an action for damages under Articles 215 and 178 of the EEC Treaty,

THE COURT

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

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts, the procedure and the arguments of the parties put forward during the written procedure solely on the issue for admissibility of the action may be summarized as follows:

I — Facts and written procedure

By judgments delivered on 19 October 1977 in Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co.* v *Hauptzollamt Hamburg St. Annen; Diamalt AG* v *Hauptzollamt Itzehoe* [1977] ECR 1753 and Joined Cases 124/76 and 20/77 *SA Moulins et Huileries de Pont-à-Mousson* v *Office National Interprofessionnel des Céréales; Société Providence Agricole de Champagne* v *Office National Interprofessionnel des Céréales* [1977] ECR 1795, the Court of Justice found that the legal position created by Regulations Nos 1125/74 and 665/75 of the Council (Official Journal L 128 of 10 May 1974, p. 12 and Official Journal L 72 of 20 March 1975) involving the repeal of the provisions for the grant of refunds for quellmehl and gritz was incompatible with the principle of equality because the refunds were maintained in the competing sector of starch.

Following those judgments Council Regulations Nos 1125 and 1127/78 (Official Journal L 142 of 30 May 1978, pp. 23 and 24 respectively) supplemented by the implementing Commission Regulation No 1570/78 (Official Journal L 185 of 7 July 1978, p. 22) re-established equality between the products in question but with retroactive effect to 19 October 1977 only and not to the date of abolition of the refunds.

By judgments delivered on 4 October 1979 in Case 238/78 *Ireks-Arkady* v *Council and Commission* [1979] ECR 2955, Joined Cases 241, 242 and 245 to 250/78 *DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke and Others* v *Council and Commission* [1979] ECR 3017, Joined Cases 261 and 262/78 *Interquell Stärke Chemie & Co. KG and Diamalt AG* v *Council and Commission* [1979] ECR 3045 and Joined Cases 64 and 1131/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier Frères SA and Others* v *Council and Commission* [1979] ECR 3091, the Court recognized the Community's liability under the second paragraph of Article 215 of the Treaty as regards the period prior to 19 October 1977.

Referring to the above-mentioned judgments, the applicant has claimed by way of compensation for damage suffered the payment of the refunds which it ought to have received for the period prior to 19 October 1977 for the use of meal processed from maize ("gritz"). On 23 November 1978 it submitted an application to the Finance Administration in Rome for the payment of production refunds for maize groats used in the brewing industry for the period from 4 April 1977 to 18 October 1977. On 22 January 1979 the Finance Administration in Rome rejected the application on the ground that there was no Community refund provided for the period in question.

On 19 December 1979 the applicants submitted an application to the Ministry of Agriculture and the Finance Administration setting out its reasons in law and in fact for considering that it was entitled to compensation in lieu of the production refund in respect of a consignment which it had imported to the value of LIT 54 327 278 together with interest.

On 15 April 1980 the applicant submitted a similar application directly to the Commission of the EEC. By letter of 3 September 1980 sent to the Permanent

Representation of Italy to the Communities the Commission rejected the application in reliance on the limitation period of five years referred to in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC (hereinafter referred to as "the Statute of the Court").

On 25 September 1980 the customs office at Monfalcone forwarded the Commission's reply to the applicant.

The applicant brought this action on 9 March 1981.

By interlocutory applications dated 15 April 1981 made pursuant to Article 91 (1) of the Rules of Procedure of the Court of Justice the Council and the Commission of the European Communities raised an objection of inadmissibility and asked the Court to decide that question without considering the substance of the case.

On 22 May 1981 the applicant lodged an answer to the interlocutory applications of the Council and Commission.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to give a ruling on the objection of inadmissibility without considering the substance of the case and to open the oral procedure without any preparatory inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

Order the European Economic Community and, through it, the Council and the Commission, to compensate the applicant for the damage caused to it as a result of the abolition of the production refunds in respect of maize groats and meal used for the manufacture of beer (which abolition was provided for by Regulation (EEC) No 665/75 of the Council of 4 March 1975) and as a result of the failure to restore the said refund in respect of the period from 4 April 1977 to 18 October 1977, the sum claimed by the applicant by way of damages being LIT 54 327 278 together with interest until payment;

Order the European Economic Community to pay the costs.

The *Council and the Commission of the European Communities* contend that the Court should:

Dismiss the action as inadmissible without considering the substance of the case;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

The commencement of the five-year period of limitation in Article 43 of the Statute of the Court

The *Council and the Commission* in their interlocutory applications of 15 April 1981 put forward the following submissions and arguments:

The *Council* refers to the fact that the Commission stated in a letter rejecting the claims for compensation made by the applicants in Joined Cases 256, 257, 265, 267/80 and 5/81 *Birra Wührer and Others* v *Council and Commission* [1981] ECR 85 which were similar to the present claim, that the limitation period began on the date of publication of the regulations which originally abolished the refunds in question, that is to say 20 March 1975. In that respect the Council stresses that the applicants in the above-mentioned cases, like the applicant in the present case, all submitted their applications to the relevant institution of

the Community after 20 March 1980 so that their applications must be considered as having been submitted out of time since the period of five years after which proceedings are barred under Article 43 of the Statute of the Court expired on 20 March 1980.

The Council observes that the applicant and the applicants in the other similar cases consider that the date from which time began to run for the purposes of the limitation period must be later and, in the present case, must be either the date of actual production of the quantities of goods giving rise to entitlement to refunds during the period in question or the date of publication, namely 30 May 1978, of Regulations Nos 1125 and 1127/78, which did not establish the legal basis for the payment of the refunds for the period between 1 August 1975 and 18 October 1977.

The Council admits that theoretically it is possible to consider other dates as constituting the beginning of the limitation period, for example the date of adoption of the regulations repealing the provisions providing for the grant of the refunds, the date on which the payment of refunds actually ceased or 4 October 1979 when the Court held that the reintroduction of refunds not covering the period in question was unlawful.

The Council considers however that the Commission adopted, in its letter rejecting the applications for compensation submitted to it, the legal position most appropriate to the letter and spirit of Article 43 of the Statute of the Court without restricting too drastically the rights which private persons might legitimately claim.

In the Council's view Article 43 established a close connection between the commencement of the limitation period and the "event giving rise" to non-contractual liability, that is to say, the origin of the damage. In other words the provision means that as from the time when it is certain that the person concerned has suffered or will suffer damage the period of five years begins to run. That view implies that on the economic level there is a certainty of damage so far as the interests of the party in question are concerned without its being necessary, for the purposes of causing time to begin to run, for liability to be established.

In other words it is necessary and sufficient that the person concerned was fully aware or could or ought to have become so, as an informed and prudent trader, of the fact that his interests were or would be affected and it is not necessary for him to be certain that the damage will be made good, that is to say that the Community will have to accept liability for it under Article 215 of the EEC Treaty.

The Council stresses that if the date of publication of the regulations which abolished the refunds is taken as the commencement of the period after which proceedings become barred, this may in the present case meet the requirements in that regard of the national laws of the Member States.

The Council maintains that as appears from the analysis undertaken by Mr Advocate General Reischl in Case 44/76 *Milch-, Fett- und Eier-Kontor GmbH* v *Council and Commission* [1977] ECR 393, the most stringent criteria of national law (in that case, according to Mr Reischl, those of German law) are fulfilled provided that the damage is certain, even if it is future, and that it was possible for the person concerned to learn of the damage and of the person responsible for it, so that it might be

expected of him to bring an action against the latter.

In the Council's view it was clear, as from the date of publication of the regulations abolishing the restrictions, that those concerned would suffer some financial loss by not receiving the refunds in respect of their production after the entry into force of the regulations. The Council maintains that since those measures were unconditional and in view of their automatic implementation on the national level, it would be invalid to make a distinction, necessary where the damage is certain, between the event giving rise to the damage and its subsequent occurrence.

The Council does not think that this interpretation is in the present case too strict or too onerous for those concerned because the Court has stressed that the protection of the rights of private persons requires that they should be informed and prudent. It cites the judgments of the Court in Cases 169/73 *Compagnie Continentale France* v *Council* [1975] ECR 11 and 78/77 *Firma Johann Lührs* v *Hauptzollamt Hamburg-Jonas* [1978] ECR 169 as authorities for that proposition.

The Council observes that, as regards the matters at issue in this case, the majority of the undertakings in the sector concerned brought actions directly before the Court in order to make their claims in good time and many undertakings began to do so as early as 1975.

In those circumstances the Council states that it is not unreasonable to raise the plea that the applicant's action is time-barred for it has not acted with the diligence which might legitimately be expected of it.

Moreover the Council stresses that this is the attitude adopted by the Court in those of its judgments in which it has held to be admissible an action relating to future damage, the cause of which was however certain (Joined Cases 56 to 60/74 *Kurt Kampffmeyer Mühlervereinigung KG and Others* v *Commission and Council* [1976] ECR 711).

This interpretation is moreover not only consistent with the wording of Article 43 of the Statute of the Court but is all the more compelling for reasons of legal certainty because it makes it possible to ascertain, in a particular case, a specific date, and one which is not arbitrary, for the beginning of the limitation period. The other dates which might constitute the beginning of the period upon the expiry of which proceedings are barred all have the disadvantage of being uncertain or of being dependent on the individual conduct of those concerned, that is to say of not being directly related to the event which gives rise to the damage but to subsequent factors, as for example, the actual production of the applicant.

In the view of the Council the only judgment in which the Court has interpreted Article 43 in a manner relevant to this case, namely the judgment in Joined Cases 46 and 47/59 *Meroni* v *High Authority* [1967] ECR 411, referred to by Mr Advocate General Reischl in his Opinion in Case 44/76, mentioned above, does not conflict with that interpretation.

The Council maintains that, on the contrary, the Court held in that case that the time for instituting proceedings under the ECSC Treaty, and *mutatis mutandis* under the EEC Treaty, cannot begin to run in respect of damage so long as the damage is still uncertain, that is to say, so long as it is not possible to know for certain whether it has been or will be incurred.

The Council adds on the other hand that if it is accepted that time should begin to run from the date of publication of Regulations Nos 1125 and 1127/78 which omitted to reinstate the refunds with effect from the date on which they were abolished, actions in respect thereof would not be barred until 22 May 1983, that is five years after the publication of Regulations Nos 1125 and 1127, which would mean that there would be a limitation period of almost eight years.

In the Council's view the same is true of the argument to the effect that in any event time did not run until Regulation No 665/75 abolishing production refunds for maize groats and meal was declared invalid by the Court. That argument must be rejected because it does not take account of the fact that according to the case-law of the Court a preliminary ruling states the issues as they should have been understood by all concerned when the measure in question was adopted.

In other words a preliminary ruling such as that given on 19 October 1977 states how, on 20 March 1975, the validity of Regulation No 665/75 should have been considered; consequently, the apparent legality of Regulation No 665/75 should not have dissuaded a prudent and informed trader from asking for compensation for damage arising from that regulation since 1975.

The Council maintains that that conclusion is all the more compelling since the Court has stressed in a consistent line of decisions that Article 215 of the EEC Treaty provides an independent remedy which is not subject to the requirements that the other remedies or means of legal protection afforded by the Treaty should first have been exhausted.

The Council nevertheless observes that one special circumstance is deserving of consideration. According to its application, the applicant did not begin to product maize groats until April 1977 and the Council admits that it may be wondered whether the applicant is not justified in maintaining that time could not have begun to run against it in March 1975, two years before it began to produce groats. In answer to that argument the Council states that in its judgment of 4 October 1979 in Case 245/78 *(SA Maïseries Benelux NV* [1979] ECR 3017, paragraph 19 of the decision at p. 3040) the Court held in respect of a claim arising in an identical manner to the present case that an undertaking which had not begun to produce maize groats until after the Council's decision of May 1975 to abolish the refunds was not justified in maintaining that the damage which it claimed had been caused by the abolition.

The *Commission* considers that the action brought by the applicant is barred by reason of the five-year limitation period referred to in Article 43 of the Statute of the Court (Title III, Procedure), which is worded as follows:

"Proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community . . .".

In the Commission's view the parties, as regards the calculation of the limitation period, are not at issue on the *dies ad quem*, which can only be 15 April 1980, the date of the letter sent to the Commission by the applicant, which may be regarded as the prior application by

the aggrieved party to the relevant institution of the Community.

The Commission nevertheless maintains that that application was made after the limitation period of five years laid down in Article 43 of the Statute of the Court.

It considers that the *dies a quo* to be adopted for the purpose of calculating the limitation period is 20 March 1975, the date on which Regulations No 665 and 668/75 were published.

The Commission considers that there are two essential elements in the first sentence of Article 43, namely:

(a) the limitation period of five years applies to proceedings brought against the Community in relation to non-contractual liability; and

(b) the *dies a quo* is expressly defined as that of the occurrence of the event giving rise to such proceedings.

Under the system established by Article 43 it is necessary therefore to identify the time when, in relation to the specific "event", the right to institute "proceedings" accrues.

The Commission maintains that by the word "event" the Community legislature means not only a simple event or a simple material act but any kind of conduct or failure to act and any situation, in the widest sense of the term, which is at the origin of wrongful damage. That wide concept cannot fail to cover the actions of a "public authority", or in other words the measures adopted by it. Such measures are as a result capable as such of "giving rise" to proceedings arising from liability.

Moreover, in the Commission's opinion it is a principle generally recognized in the legal systems of the Member States that the period of limitation begins to run from the day on which proceedings may be brought and in that respect it refers to Article 2935 of the Italian Codice Civile, Article 198 of the German Bürgerliches Gesetzbuch and Article 2252 of the French Code Civile. The Commission answers the question when the applicant may bring proceedings arising out of liability by citing the case-law of the Court which provides a correct answer to that question. It cites the judgment delivered in Joined Cases 56 to 60/74 where the Court held as follows (paragraph 6 of the decision):

"Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage forseeable with sufficient certainty even if the damage cannot yet be precisely assessed. To prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain. This finding is confirmed by the rules in force in the legal systems of the Member States, the majority, if not all, of which recognize an action for declaration of liability based on future damage which is sufficiently certain."

The Commission moreover points out that the Court stated in the same case (paragraph 8 of the decision):

"... As soon as the Community rules in question were published and before they were put into effect the applicants were justified in bringing before the Court the question whether and to what extent these rules were such as to put them at a disadvantage in relation to their French competitors and if so whether these rules were for this reason contrary to the principle of equal treatment.

Since the damage which could result from the factual situation and the rules was imminent, the applicants could reserve the right to specify the amount of the damage which the Community would have eventually to make good and restrict themselves for the time being to asking for a finding of the Community's liability."

In the Commission's opinion the analogy with the circumstances of the present case is obvious. It observes that if that case-law is compared with what has been stated above it is necessary to conclude that since the cause of the action for damages accrued immediately after publication of the unlawful measures, namely 20 March 1975, that date constituted the beginning of the limitation period relating to the action.

In the Commission's view the conditions laid down by the Court for a right of action to accrue are satisfied in this case. There can be no doubt that in this case there is imminent damage foreseeable with sufficient certainty notwithstanding the fact that the loss of refunds did not become effective until the following 1 August or 1 September, when Regulations Nos 665 and 668/75, which abolished the refunds in their respective sectors, entered into force. The Commission adds that it was even possible to calculate them mathematically since what was involved was the deduction of specific amounts to be multiplied by the quantities of goods produced.

The argument to the effect that in calculating the limitation period it is necessary to refer to the time when the applicant actually produced the goods in question and actually found that there were no refunds is unacceptable.

The Commission observes that in the first place that argument is incompatible with the wording of Article 43 as interpreted in the light of the case-law of the Court already cited. In the second place the argument applies to this case the criteria generally applied to liability arising from an event which is unlawful in the strict sense. The Commission observes that in the latter case if the event giving rise to the damage and the damage are not simultaneous but the damage becomes apparent after the event giving rise to it, the limitation period runs from the first moment when there is awareness of the damage and that in itself constitutes a legitimate derogation on grounds of equity from the general principle. In such a case, on the one hand, the damage is at the time of the event simply a possibility and unforeseeable and, on the other hand, it remains the direct consequence of the event.

In the present case the Commission maintains that the factor giving rise to the damage is the Community regulation whose publication gave rise to the action for damages. It was then that the unlawful act (in the present case discriminatory treatment) was committed and not when the applicant produced its goods. If this were not the case it would have to be admitted that the factor giving rise to the damage was not the Community regulation but the activity of the person claiming compensation, which would be manifestly absurd.

In the third place, if the five-year limitation period were calculated from a date subsequent to the publication of the Community regulation the limitation period would no longer be five years but five years increased by the period between publication in the Official Journal and the date on which the trader claims that he has in fact suffered damage.

Finally the Commission observes that if this argument, which associates the

beginning of the limitation period with the manifestation of damage resulting from the absence of refunds, there would be as many limitation periods of five years as the applicant produced consignments of gritz and that would lead to a wholly unjustified piecemeal division of the concept of "proceedings" which is at the basis of limitation.

The *applicant* refers to the judgment of the Court of 19 October 1977 in which it was held that Regulation No 665/75 of the Council amending Regulation No 120/67 "is incompatible with the principle of equality and that it is for the competent institutions of the Community to adopt the necessary measures to correct this incompatibility."

It maintains that because Regulations Nos 1125 and 1127/78 partially remedied the consequences of that unlawful situation with retroactive effect limited to the date of the judgment, namely 19 October 1977, the Community institutions failed to fulfil their duty to take the measures necessary to remedy the situation created by Regulation No 665/75 in respect of the period between 1 August 1974 and 19 October 1977 and thus caused the Community to incur liability. This follows from the judgments of the Court of 4 October 1979 in Case 238/78 *Ireks-Arkady* [1979] ECR 2955 and other joined cases.

In the applicant's view the judgment in Case 238/78 answers, amongst other things, the question as to the date on which the five-year period of limitation laid down in Article 43 of the Statute of the Court commences.

The applicant stresses that the Court held in that judgment that "the Community incurs liability for the abolition of the refunds ..." (paragraph 12 of the decision, [1979] ECR 2973) and then immediately confirmed (paragraph 13 of the decision, *loc. cit.)* that "the origin of the damage complained of by the applicant lies in the abolition by the Council of the refunds which would have been paid to the quellmehl producers" (or to gritz producers).

The applicant observes that in so doing the Court followed the Opinion of Mr Advocate General Capotorti which stated in that respect ([1979] ECR 3000) that "the abolition of the refunds for quellmehl and gritz was the direct cause of the inequality as against the producers of starch and of the loss of income from the refunds" and it maintains that the word "direct" has nothing to do with time but expresses the same idea, stated in the Advocate General's Opinion, as that of "direct" damage.

The applicant admits that it might be said, as has been stated many times, that "the relationship between the unlawful act or omission and the damage is such that it may be said that the unlawful act or omission causes damage *per se*". It nevertheless observes that legal writers consistently make a clear distinction between the act or omission and the damage, just as between cause and effect, and it is precisely the causal relationship to which Mr Advocate General Capotorti referred in his Opinion ([1979] ECR 3000).

In the applicant's view it cannot be excluded that the contested regulation itself constitutes the sole determinant cause of the certain damage suffered by Community undertakings in the sector concerned. In that respect it observes

that Regulation No 665/75 discouraged certain undertakings from making plans to produce quellmehl or gritz and that the decisions in that respect taken by the undertakings in question on the basis of the validity of the regulation subsequently revealed themselves as, all told, lacking in foresight. It nevertheless explains that the present case is not concerned with damage of this kind but of damage arising from other harmful consequences of the contested rules and in particular from the fact that the Community rules are responsible for the loss of income from the refunds, contrary to the principle of equality.

In the applicant's view it is only possible to speak of a loss of income from the refunds if the Community undertakings have fully carried out the transaction which would in fact have entitled them to refunds if the contested regulation had not provided otherwise. In that case the contested regulation is a cause of damage as such because it functioned in a context characterized by other facts (or concomitant causes) the first of which is completion of the transaction which would have created a right to the refund.

The applicant concludes that if that premise, which is the only one relevant to this case, is granted, the proceedings to recover compensation for damage could not be instituted at the date of the regulation but at the date on which the right to the refund arises as a result of the use of maize for the production of gritz.

The applicant adds that that conclusion is also suggested by the case-law of the Court. It observes that on the basis of the distinction between the event and the damage the case-law has long indicated that the limitation period begins to run from the moment when damage becomes apparent.

The applicant therefore refers to the judgment in the *Meroni* case and the arguments put forward by Mr Advocate General Reischl in Case 44/76 ([1977] ECR 393). It observes that in that case the Commission had also argued that Article 43 of the Statute of the Court referred only to the time of occurrence of the event which was at the origin of the damage whereas the time when the damage itself became apparent was irrelevant. However, the Advocate General rejected that argument after observing in particular that reference to the event was not supported by the principles contained in the laws of the Member States, and he carefully listed the various alternatives proposed by legal writers. The applicant points out that apart from the solution proposed by the Commission, namely that it is necessary to take account of the event which is at the origin of the damage, the Advocate General referred to other solutions one of which was based on the date on which the damage occurred (and the right to compensation accrued) and the other on the date on which the aggrieved party came to know of the damage and of the person responsible for it. Faced with those three possible alternatives, the Advocate General said that there were no compelling reasons for accepting the narrow interpretation proposed by the Commission and he submitted that there were various arguments for a more liberal interpretation.

In the applicant's view, it appears from a reading of the Opinion that the Advocate General was obviously disposed to adopt the solution according to which the limitation period begins at the time when the damage becomes known but, however that may be, it is clear that

of the three solutions contemplated in that case he came down in favour of the intermediate solution, namely the date on which the damage is actually incurred.

It maintains that in the present case the Commission's argument in relation to the beginning of the limitation period must be rejected if account is taken of the principle underlying Regulation No 1125/78.

It observes in that respect that the regulation is put forward by the Council as "a means of conforming with the Court's conclusions" (third recital in the preamble) and that the Council stresses that the grant of the production refund for products intended for the brewing of beer "should be made retrospective", (fifth recital). The applicant finds that it is on that basis that the regulation provided (last paragraph of Article 1) that "the production refunds ... may be granted with effect from 19 October 1977".

In the applicant's view it is clear that with that provision the Council did not take all the measures necessary to comply with the decisions of the Court and that as a result of that failure the aggrieved parties had to institute proceedings and the well-known decisions of the Court were given.

The applicant states however that what is important in this case is the fact that in taking the necessary measures the Council relied on logical premises incompatible with the objections made by the Commissions to the applicant's claim. In that respect the applicant observes that the passage in Regulation No 1125/78 which states that the refunds may be granted "with effect from 19 October 1977" means that they cannot be granted with effect from an earlier date. Accordingly, before the date referred to the right to a refund or the right to compensation, or both, did not exist either, which in the final count means that such rights cannot have accrued at the date of the contested regulation.

Moreover, in the applicant's view, if it were accepted that the Commission's argument in relation to the beginning of the limitation period was well-founded, the five-year limitation period would still not include the period during which the contested regulation remained in force. The applicant claims that this conclusion is the result of two somewhat different arguments, each, however, leading to the same result.

The first observation is to be inferred from the nature of the event at the origin of the damage.

In this case the "event" was a legislative act, namely Regulation No 665/75. There was therefore a presumption that that act was valid. Until the judgment of 19 October 1977 the regulation could not be regarded as unlawful and could not therefore give rise to an action or, in other words, a right to compensation.

The second observation is based on the effect *ratione temporis* of the judgment of 19 October 1977.

In that respect the applicant, without expressing a view on the general problem of the temporal effects of preliminary rulings, puts forward two possible alternatives. According to the first, the

judgment of 19 October 1977 took effect *ex nunc* (as the Council seems to have thought in adopting Regulation No 1125/78). According to the second it took effect *ex tunc* (in accordance with the Opinion of Mr Advocate General Capotorti which has already been cited, [1979] ECR at p. 2990). The applicant states that in both cases, as long as the contested regulation remained in force, it constituted, at least, an obstacle preventing undertakings from successfully bringing actions for compensation and, conversely, prohibiting the Community institutions from satisfying any claim of that kind.

In the applicant's view those two arguments accord with two well-known maxims of Roman law:

actioni nondum natae non praescribitur, and

contra non valentem agere non currit praescriptio.

According to the applicant both express principles which are part of the legal heritage of the Member States and are pertinently referred to in a study of the pandects of the previous century (Windscheid, Diritto delle Pandette, Italian translation, Milan 1930, Vol. I, pp. 366, 2 and 376, 2). The applicant then states, referring to legal writing (Ferrucci, Della Tutela dei Diritti, in Commentario al Codice Civile, Book IV, Volume IV, Turin 1964, p. 394), that the two principles amount to fundamental reasons of equity and that they cannot therefore be disregarded in interpreting Article 43 of the Statute without risking the adoption of solutions contrary to simple common sense.

The applicant adds that if for a number of reasons, which it is unnecessary to specify, Regulation No 665/75 had been declared unlawful by the Court only after the lapse of five years from the date of the contested regulation, then in the absence of a retroactive measure on the part of the Community institutions the Court would not have been able to compensate the undertakings as, on the contrary, it was able to do by the judgments given in the *Ireks-Arkady* case and the other joined cases.

Finally, referring to the comments by the Council on the judgment delivered by the Court of 4 October 1979 in the joined cases the applicant alleges that the Council misinterprets that judgment.

The applicant observes that the reasons why the Court refused the applicant in the above-mentioned case the right to compensation may in no way be relied upon in the present case.

It says that the undertaking concerned in Case 245/78 *SA Maïseries Benelux NV*, in which judgment was given on 4 October 1979, had sold a product which was originally intended for uses for which refunds were not provided. That undertaking was thus claiming compensation for damage under another head. On the contrary in the present case the applicant has in fact produced the raw material for a use for which provision is made. This gives the applicant the right to refunds and it now claims compensation for the damage resulting from the fact that it has not been able to receive the refunds unlawfully abolished by the Council.

Interruption of the five-year limitation period

The *Council* maintains that the application for payment of refunds sent on 23 November 1978 by the applicant to the national authorities, the application for compensation sent to the same authorities on 19 December 1979 and a similar application sent to the Commission on 15 April 1980 had no effect on the expiration of the period of limitation which the Council says took place on 20 March 1980.

The Council observes that according to the wording of Article 43 of the Statute of the Court approaches to the Italian authorities cannot produce such effect because Article 43 provides that the period of limitation is to be interrupted "if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community".

In the Council's view, in the absence of a legal basis in a Community regulation for the payment of refunds an application made by certain traders to the national authorities responsible in the normal way for the payment of refunds or even the fact that those national authorities report such applications to the Community authorities may not be regarded as an application by the aggrieved party to "the relevant institution of the Community" (Council or Commission) within the meaning of Article 43 of the Statute of the Court.

Accordingly the Council concludes that applications made by the applicant to the Italian authorities could not interrupt the period of limitation.

Should the Court not agree with the Council on that point, the Council relies on another provision of Article 43 of the Statute of the Court requiring an applicant who interrupts the period of limitation laid down by Article 43 to institute proceedings before the Court within the period provided for in the second paragraph of Article 175, taking into account the extension of the time-limit on account of distance which is ten days in the case of Italy.

In the present case that makes a total period of four months and ten days from the last interruption of the period of limitation on 19 December 1979, that is 29 April 1980. The Council points out that the applicant did not bring proceedings before the Court until 9 March 1981.

If the applicant were to maintain that its approach to the Commission on 15 April 1980 could have interrupted the period of limitation the Council observes that it could be objected that the period had already expired 25 days previously.

Finally the Council points out that the telex message sent by the Commission to the applicant on 25 September 1980 in which the Commission claimed, as against the applicant, that the period of limitation laid down in Article 43 had expired, could not interrupt a period of limitation which had already expired when the telex message was sent.

The *applicant* observes that, assuming, contrary to the applicant's own opinion, that the period of limitation runs from the date of the contested regulation and was not suspended, it must be asked whether it was not for one reason or another interrupted before it expired.

In the applicant's view that question is justified by the inadequacies and defects in the drafting of Article 43 which were stressed by Mr Advocate General Gand in Joined Cases 5, 7 and 13 to 24/66 *Kampffmeyer and Others* v *Commission*

([1967] ECR 245 at p. 272) and again in the before-mentioned Opinion of Mr Advocate General Reischl (Case 44/76).

In the applicant's view, assuming that the lacunae in Community law must be "filled" by analogy with the experience acquired in the national legal systems of the Member States, it must be considered above all that Regulation No 1125/78, also or at least, constitutes a recognition of the right by the institution against which the right itself may be invoked. On 22 May 1978, by adopting Regulation No 1125/78, the Council recognized that the previous rules had wrongly abolished the refunds in question.

According to the applicant that recognition is expressed in the second and third recitals of the preamble to the regulation in question which states, in the terms used by the Council, that the grant of the production refunds "constitutes a means of conforming with the Court's conclusions" on the illegality of Regulation No 665/75 and on the duty of the Community institutions to take the necessary action to eliminate the consequences of the unlawful situation. According to the applicant it is hardly necessary to point out that if the Council had wished to do so it could, by using more careful wording, have complied with the decisions of the Court whilst maintaining in principle the view which it had previously propounded.

The applicant concludes that in those circumstances it would be reasonable to consider Regulation No 1125/78 as having effects similar to those which national rules, such as the provisions of Article 2944 of the Italian Codice Civile, accord to the recognition of the right. By recognizing the right the regulation would have the effect of interrupting the period of limitation, assuming that the period had begun, and of initiating a fresh period as from 22 May 1978.

The applicant observes in addition that although it is true that it was only on 24 April 1980 that it sent to the Commission a claim for compensation which the Commission considered to be out of time because it was submitted more than five years after the date of Regulation No 665/75, the fact remains that the applicant also made a claim for compensation by letter sent to the Finance Administration in Rome on 23 November 1978 and by letters dated 19 December 1978 sent respectively to the Minister for Finance and the Minister of Agriculture and, once again, to the Finance Administration.

According to the applicant, although, in this case, those to whom the claim was sent are not the "relevant institution of the Community" to which the second sentence of Article 43 refers, it may on the other hand be properly considered at the very least that the Ministry of Agriculture of the Italian Republic fulfils the functions delegated to it by the Community institutions responsible for managing the agricultural markets, just as in the sphere of the administration of justice the national courts are also Community courts, quite apart from the fact that the applicant's claims were of course forwarded to the Commission in its capacity as the institution which ought to have taken the appropriate steps in the case.

IV — Oral procedure

At the sitting on 8 July 1981 the applicant, represented by F. Capelli of the Milan Bar, the Council, represented by A. Brautigam and A. Sacchettini, acting as Agents, and the Commission, represented by R. Wainwright and G. L. Campogrande, acting as Agents, presented oral argument.

The Advocate General delivered his opinion at the sitting on 13 October 1981.

Decision

1 By application lodged at the Court Registry on 9 March 1981 the applicant brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for damage caused to it by Regulation No 665 of 4 March 1975 abolishing the production refunds in respect of maize groats and meal used for the brewing of beer and as a result of the failure to restore the refunds in respect of the period from 4 April 1977 to 19 October 1977, the latter being the retroactive date of application of Council Regulation (EEC) No 1125/78 of 12 May 1978 which reintroduced the above-mentioned system of production refunds.

2 The Council and the Commission have raised a preliminary objection under Article 91 of the Rules of Procedure founded on the five-year period of limitation under Article 43 of the Protocol on the Statute of the Court (EEC) (hereinafter referred to as "the Statute of the Court") according to which "proceedings against the Community in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto" and "the period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to such proceedings an application is made by the aggrieved party to the relevant institution of the Community." The Court has decided to give judgment on the preliminary objection without considering the substance of the case.

3 The defendants plead that the action is inadmissible because the applicant was out of time in submitting to the Commission its application for payment

of the refunds in respect of the period from 4 April to 19 October 1977. That application was made to the Commission on 15 April 1980.

4 The defendants contend that the commencement of the period of limitation laid down by Article 43 of the Statute of the Court must be taken as being the moment when it becomes possible to institute proceedings in matters arising from liability and that, moreover, according to the case-law of the Court such proceedings may be instituted when the damage may be considered to be imminent and foreseeable with sufficient certainty even though it cannot be precisely quantified except as the result of assessment at a later stage.

5 According to the defendants the commencement of the five-year period of limitation must be 20 March 1975, the date of publication of Regulation No 665 of 4 March 1975, which the Court in its judgments of 19 October 1977 in Joined Cases 124/76 and 20/77 held to be invalid.

6 It follows, in the defendant's view, that the applicant could have brought its action as from 20 March 1975 since the publication of the unlawful regulation which was at the origin of the damage sustained by the applicant may be considered as the event giving rise to the Community's liability and should therefore constitute the commencement of the five-year period of limitation laid down by Article 43 of the Statute of the Court.

7 According to the defendants the application sent to the Commission could not interrupt the five-year period of limitation because it was submitted after the expiry of that period, whilst those sent to the Italian national authorities on 23 November 1978 and 19 December 1979 did not interrupt the period because they were made to authorities which were not "relevant" within the meaning of Article 43 of the Statute of the Court and were not followed by proceedings instituted by the applicant in conformity with the conditions laid down in the second paragraph of Article 175 of the EEC Treaty.

8 The applicant's argument is essentially to the effect that the commencement of the five-year period of limitation in relation to matters arising from the non-contractual liability of the Community can only be the moment when, in

a case such as the present one, the damage has in fact become apparent, that is to say, the date on which the refunds became payable as the result of transactions creating an entitlement to them.

9 As is apparent from Article 215 of the EEC Treaty and Article 43 of the Statute of the Court, the involvement of the non-contractual liability of the Community and the assertion of the right to compensation for damage suffered depend on the satisfaction of a number of requirements relating to the existence of an unlawful measure adopted by the Community institutions, actual damage and a causal relationship between them.

10 The period of limitation which applies to proceedings in matters arising from the non-contractual liability of the Community therefore cannot begin before all the requirements governing the obligation to provide compensation for damage are satisfied and in particular before the damage to be made good has materialized. Accordingly, since the situations concerned are those in which the liability of the Community has its origin in a legislative measure, the period of limitation cannot begin before the injurious effects of that measure have been produced, and consequently, in the circumstances of this case, before the time at which the applicant, after completing the transactions entitling it to the refunds, was bound to incur damage which was certain in character.

11 Accordingly, it may not be claimed, as against the applicant, that the period of limitation began before the date on which the injurious effects of the unlawful measure adopted by the Community were produced.

12 It follows from this, moreover, that the commencement of the period of limitation cannot be the date on which the unlawful measures adopted by the Community entered into force or, *a fortiori*, the date of their publication.

13 The preliminary objection raised by the Council and Commission must therefore be dismissed.

On those grounds,

THE COURT

by way of interlocutory decision, hereby:

1. **Dismisses the objections;**

2. **Reserves the costs.**

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

Delivered in open court in Luxembourg on 27 January 1982.

A. Van Houtte
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Joined Cases 256, 257, 265, 267/80 and 5/81, p. 108)