JUDGMENT OF THE COURT (FIFTH CHAMBER)
18 MAY 1983 [1]

Pauls Agriculture Limited v Council and Commission of the European Communities

(Gritz — Liability)

Case 256/81

Non-contractual liability — Damage — Compensation — Claim for interest — Permissibility
(EEC Treaty, second para. of Art. 215)

A claim for interest submitted in relation to the non-contractual liability of the Community under the second paragraph of Article 215 of the Treaty must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. Such a claim is therefore, as a general rule, permissible.

In Case 256/81

PAULS AGRICULTURE LIMITED, of 47 Key Street, Ipswich, represented by Peter Langdon-Davies, Barrister of the Inner Temple, London, assisted by W. E. M. Godfrey of Messrs Simmons & Simmons, Solicitors, 14 Dominion Street, London EC2M 2RJ, with an address for service in Luxembourg at the Chambers of Messrs Elvinger & Hoss, 15 Côte d'Eich, Boîte postale 425,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by Daniel Vignes, Director in the Legal Department of the Council of the European Communities, assisted by Arthur Brautigam, Administrator in that department, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of the Directorate for Legal Affairs of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

and

1 — Language of the Case: English.

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

defendants,

APPLICATION under Article 173 of the EEC Treaty for a declaration that a decision communicated by letter of 17 July 1981, whereby the Council refused to pay the sum claimed in respect of refunds for the production of maize gritz intended for use in the brewing industry, is void, alternatively under Article 215 of the EEC Treaty against the Council and Commission for damages in a like sum,

THE COURT (Fifth Chamber)

composed of: J. Mertens de Wilmars, President, U. Everling, President of Chamber, Lord Mackenzie Stuart, O. Due and Y. Galmot, Judges,

Advocate General: G. F. Mancini
Registrar: J. A. Pompe, Deputy Registrar

gives the following:

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and procedure

1. The applicant, a company incorporated in the United Kingdom, and a manufacturer of maize gritz used in the brewing industry, received production refunds for its products from November 1974 to 31 July 1975.

By its Regulation (EEC) No 665/75 of 4 March 1975 (Official Journal 1975, L 72, p. 14), the Council abolished, with effect from 1 August 1975, the refunds

previously granted to producers of maize groats and meal and broken rice used for brewing.

By its preliminary ruling of 19 October 1977 in Joined Cases 124/76 and 20/77 *SA Moulins et Huileries de Pont-à-Mousson* v *Office National Interprofessionnel des Céréales* and *Société Coopérative "Providence Agricole de la Champagne"* v *Office National Interprofessionnel des Céréales* ([1977] ECR 1795), the Court held that by abolishing the refunds for maize gritz while retaining the refunds for the competing product, maize starch, the Council had committed a breach of the principle of equality of treatment, to the detriment of the producers of maize gritz.

Following that judgment, the disputed refunds were reintroduced by Council Regulation (EEC) Nos 1125/78 and 1127/78 of 22 May 1978 (Official Journal 1978, L 142, p. 21 and p. 24) with effect from the date of the judgment of the Court, namely 19 October 1977.

The fact that no refund was therefore granted for the period between 1 August 1975 and 19 October 1977 has been contested by the majority of the gritz producers concerned who brought actions before the Court founded on the non-contractual liability of the Community. In its judgments of 4 October 1979 in Joined Cases 241, 242, 245 to 250/78, *DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others* v *Council and Commission of the European Communities* and 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *P. Dumortier Frères SA and Others* v *Commission of the European Communities*, [1979] ECR 3091, the Court held that the Community had incurred non-contractual liability and ordered it to pay to the parties concerned amounts equivalent to the production refunds which they would have been entitled to receive if, during the period from 1 August 1975 to 19 October 1977, the manufacture of maize gritz used in brewing had conferred an entitlement to the same refunds as the manufacture of maize starch.

The applicant considers that, although the application of accession compensatory amounts prevented it from receiving production refunds for the period from September 1975 to August 1977, from that date and until 19 October 1977, it would have received the disputed refunds if the Council, by its above-mentioned Regulation No 665/75, had not illegally abolished the said refunds. The applicant therefore submitted an application by a letter of 3 July 1981 registered at the Secretariat of the Council on 6 July 1981, for the payment of those refunds which amount to the sum of UKL 32 874.65.

By a letter dated 17 July 1981, signed by the Council's Legal Adviser and received by the applicant on 20 July 1981, that application was rejected on the grounds that it was out of time and that the applicant could not claim the relevant payments because it had only commenced production after the abolition of the refunds. Following the rejection of that application the applicant brought an action before the Court which was lodged at the Registry on 21 September 1981.

2. The written procedure followed the normal course. However, the Council and the Commission, by letters of 6 and 1 July 1982, respectively, announced their intention not to lodge a rejoinder.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided by order of 13 October 1982 to refer the case to the Fifth Chamber.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General it was further decided to open the oral procedure without any preparatory inquiry. However, the Court put a question to the applicant.

II — Conclusions of the parties

The *applicant* claims that the Court should:

Declare that the decision of the Council communicated by letter of 17 July 1981 is void and that the Community must pay to the applicant the sum of UKL 32 874.65 together with interest;

In the alternative, order the Council or the Commission, or both, to pay to the applicant the same sum by way of damages, together with interest;

Order the defendants to pay the costs.

The *Council of the European Communities* claims that the Court should:

In the absence of satisfactory evidence, to be furnished by the applicant, of the reality of the damage suffered and of the relation of cause and effect between the illegality of Regulations Nos 665 and 668/75 of the Council and of the relevant loss, to dismiss the application lodged by the applicant as unfounded;

In that case, order the applicant to pay the costs;

In the alternative, if the Court should find the applicant's claim well founded in whole or in part, to deduct where appropriate from the amount of its claim the sums passed on to another stage in the marketing chain and to fix the amount due to the applicant in national currency by applying the "green" rates of the pound sterling in force at the time of the operation which conferred entitlement to receipt of the subsidy in dispute;

To dismiss as inadmissible that part of the claim asking for a declaration that the Council's letter of 17 July 1981 is void inasmuch as that claim relates to an act which is not subject to Article 173.

The *Commission of the European Communities* claims that the Court should:

Dismiss the application as unfounded and order the applicant to pay the costs if the latter does not provide sufficient evidence that it was not able to and did not pass on the loss of the refunds in the prices charged to its customers and that the operations for which it is claiming damages would have qualified for the payment of production refunds and, in particular, that the granules of maize gritz manufactured and delivered to the brewing industry were not larger than 2mm in size.

III — Submissions and arguments of the parties

1. Admissibility

(a) The *Council* considers, in view of the judgments given on 27 January 1982 by the Court in Joined Cases 256, 257, 265 and 267/80, 5 and 51/81, *Birra*

Wührer and Others v *Council and Commission of the European Communities* and *De Franceschi SpA Monfalcone* v *Council and Commission of the European Communities* ([1982] ECR 85 and 117) that the request submitted by the applicant by letter of 3 July 1981 and registered at the Secretariat of the Council on 6 July 1981 interrupted the effect of the five-year limitation period under 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"] and that the subsequent application, introduced within the periods prescribed by Article 43, had the effect of interrupting the limitation period.

On the other hand, the Council considers that the application is inadmissible inasmuch as it seeks a declaration that the decision which according to the applicant is contained in the letter of 17 July 1981 signed by the Council's Legal Adviser by which payment of the sum sought from the Council by the applicant was refused, is void.

The Council takes the view that the said letter does not constitute a legal measure which may be the subject of an application under Article 173 of the Treaty inasmuch as it did no more than provide the applicant with information and was in no way intended to produce legal effects as regards the merits of the request.

According to the Council, Article 173 of the EEC Treaty restricts the Court's jurisdiction to review the legality of measures to those legal measures which are intended to create or alter legal relationships between natural or legal persons who are subject to the rules of the Treaty, inasmuch as those measures comply with the procedural rules laid down in Articles 189 and 190 of the Treaty and having binding force.

The Council submits that the letter of 17 July 1981 addressed to the applicant by its jurisconsult does not clearly come within the framework of Articles 189 and 190 of the Treaty and does not comply with the procedural rules laid down by those articles for the adoption of decisions by the Council.

In that respect, the Council considers that there is an analogy between this case and what was held by the Court in Case 31/80 *(L'Oréal* [1980] ECR 3775) as regards the legal effect of a letter sent by Commission's officers for information purposes which communicated their opinion on the subject of an agreement between private undertakings capable of falling under Article 85 of the Treaty and which was considered to be an element of fact and not a formal decision adopted by the Commission under Article 85 (3) of the Treaty.

(b) The *Commission*, too, takes the view that the application for compensation is admissible in the light of the above-mentioned judgments of the Court of 27 January 1982.

It therefore accepts that the applicant is entitled to seek damages in respect of all the operations carried out after August 1977, in view of the fact that it was from then that the applicant became entitled to receive production refunds within the framework of the transitional measures adopted under the Act of Accession of 1972 concerning the application of accession compensatory amounts.

On the other hand, the Commission, adopting the view of the Council, does not consider that the application for a declaration of nullity can be valid inasmuch as it is directed against the letter of 17 July 1981 signed by the

Council's Legal Adviser which cannot be regarded as a decision within the meaning of Article 173 of the EEC Treaty in respect of which such a declaration could be of benefit to the applicant.

The Commission submits that the letter concerned merely reproduces the opinion held by the Council and the Commission at that time, which was presumed to have already been communicated to the applicant by the United Kingdom authorities, that claims for damages in respect of non-payment of production refunds were time-barred after 20 March 1981.

(c) The *applicant* maintains in a detailed argument, set out in its application, that its claim for damages is not time-barred, as suggested in the Council's letter of 17 July 1981, under the provisions of Article 43 of the Statute of the Court concerning the five-year limitation period for proceedings against the Community in matters arising from non-contractual liability.

In its reply, the applicant confines itself to stating that since the defendants concede that its application for damages under Article 215 of the EEC Treaty was made within the prescribed period, it will make no comment on the defendants' argument to the effect that the letter of 17 July 1981 signed by the Council's jurisconsult does not constitute a decision within the meaning of Article 173 of the EEC Treaty.

2. Substance

(a) In its application the *applicant* submits that its action is founded on the above-mentioned judgment of the Court of 19 October 1977 in Joined Cases 124/76 and 20/77, in which it was held that the provisions of Article 11 of Regulation No 120/67/EEC of the Council, as amended by Article 3 of Regulation (EEC) No 665/75 and the subsequent regulations which have replaced it were invalid inasmuch as they provided for a difference of treatment, as regards production refunds, between maize groats and meal intended for use in the brewing industry and maize starch.

In addition, in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *P. Dumortier Frères SA and Others* v *Council and Commission of the European Communities* ([1979] ECR 3091), the Court held that producers in the position of the applicants were entitled to receive compensation from the Council in an amount equivalent to the refunds on maize gritz used in the brewing industry which 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.

The applicant states that it has manufactured maize gritz for the brewing industry since the turn of the century and that it received production refunds for the period from November 1974 to 31 July 1975. It submits that although, as already stated, for the period from September 1975 to August 1977 the effect of the accession compensatory amounts was such that no production refunds were payable to the applicant in respect of that manufacture, such refunds would, in the ordinary course of events, have been payable to it from August 1977 until 18 October 1977 had it not been for the effect of Regulation No 665/76.

(b) The *Council of the European Communities* refers, as regards the claim founded on the liability of the Community, to the above-mentioned judgments of the Court of 4 October 1979 concerning similar claims. In those cases it was recognized that in principle the Community incurred non-contractual liability by virtue of the illegal nature of Regulations Nos 665 and 668/75.

The Council acknowledges that the same conclusion must in principle apply to the claim for damages formulated by the applicant, namely that the European Economic Community is under an obligation to pay compensation for the damage actually suffered by the applicant as the result of the non-payment of the refunds.

In that respect, the Council notes that the Court has recently reaffirmed in paragraph 9 of the decisions in its above-mentioned judgments of 27 January 1982 that the right to compensation for damage suffered depends 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 Council considers therefore that the applicant still has to establish those last two points. In the first place it must show that it did not pass on or even that it was unable to pass on in its selling prices the difference resulting from the non-payment of refunds. If the applicant had passed on the difference in its selling prices it would not have suffered any real damage because the loss would have been passed on to another stage in the marketing chain and ultimately to the consumer.

The Council submits in addition that if the applicant did not or could not have entirely passed on the difference in its selling prices it must show that for objective reasons it was unable to increase its selling prices and that it did not freely choose not to raise its selling prices in order to increase outlets.

Moreover, the Council considers that in view of the fact that the applicant's claim only covers the period from August 1977 to October 1977 because of the effect of the accession compensatory amounts, the applicant must also show that its selling prices were fixed at an unremunerative level and that the difference between a remunerative level and the unremunerative level was an amount corresponding to the unpaid refund.

The Council adds that in the previous cases concerning liability to which reference has been made (in particular in the above-mentioned judgment of 4 October 1979 [1979] ECR 2955, paragraphs 14 to 17 of the decision), the Council had maintained that where a trader who considered that he had suffered damage as a result of a Community measure passed on his loss in his selling prices and therefore passed it on to a subsequent stage of the marketing chain, it was unfair to compensate that trader twice, the first time at the expense of the ultimate consumer and the second time from public funds, because that would lead to the unjustified enrichment of the trader in question.

As regards the proof that the damage suffered had not been passed on in the selling prices, the Council notes that although the Court accepted the validity of such an argument, in the preceding quellmehl and gritz cases it considered that as neither side was able to furnish sufficient evidence, it was necessary to

give the benefit of the doubt to the applicants.

The Council therefore asks the Court to reconsider that part of its case-law, especially because in the Council's opinion in most cases the institutions are unable to provide the Court with convincing evidence in view of the fact that the only information which they normally have at their disposal consists of the admitted facts which the applicant has chosen to provide in the written procedure. The Council therefore requests the Court to instruct the applicant in the present case to prove that it has actually suffered damage.

Finally, in respect of the "green" rate to be applied for calculation of the applicant's claim in national currency, the Council submits that it follows from previous judgments of the Court and from considerations of the equality of treatment for all Community traders who have suffered damage as a result of the non-payment of the refunds concerned that the applicant's claim expressed in units of account/European currency units should be calculated on the basis of the quantity of the products used, in national currency, by applying the "green" rate applicable at the time of the operation which conferred entitlement to the refund.

In that respect, the Council notes that the same question has already been referred to the Court in Joined Cases 64 and 113/73 and the succeeding cases *(Dumortier and Others* v *Council).*

(c) The *Commission* accepts that the Community is in principle under an obligation to compensate the applicant for the loss of the production refunds, but maintains that the applicant still has to prove that the additional conditions for the payment of damages are fulfilled.

The Commission submits in the first place that, as it has already stated in its defence in Joined Cases 256/80, *Birra Wührer and Others,* no damages are payable to the applicant if the loss of the refunds was passed on in the prices charged to its customers. In that event, according to the Commission, the loss of the refunds was compensated by the increase in price and there was no damage. Accordingly, only if the applicant can establish that, faced with competition from starch producers who had received refunds, it had been obliged to carry the loss itself so as not to lose the market, is it entitled to compensation equivalent to the refunds which should have been paid.

In the second place, the Commission maintains that the applicant must prove that the operations for which it is claiming compensation qualified for the payment of the production refunds and in particular that the granules of maize gritz manufactured and delivered to the brewing industry were not larger than 2 mm in size. The Commission notes that under Regulation No 2727/75 on the common organization of the market in cereals (Article 1 and Annex 4) production refunds are only payable on maize groats and meal falling within the subheading 11.02 A of the Common Customs Tariff and that, in accordance with Additional Note 1 to Chapter 11 of the Common Customs Tariff, that tariff subheading is limited to maize groats and meal which can pass through a sieve with 2 mm mesh.

The Commission understands that in the United Kingdom a quantity of large

groats (grutten) has been produced for brewing purposes and that, for a time, the United Kingdom authorities, wrongly in the Commission's view, paid production refunds in respect of those products. It is therefore clear that the applicant is not entitled to compensation for the loss of refunds on a product which, objectively speaking, did not satisfy the requisite conditions for the payment of the refund, whatever may have been the practice of the national authorities at the time.

In that respect, the Commission produces in the annex to its defence a letter of 7 February 1980 sent by its Director General for Agriculture addressed to the Permanent Secretary at the Ministry of Agriculture of the United Kingdom in which the attention of the national authorities was drawn to the erroneous nature of their practice in granting production refunds on groats larger than 2 mm in size. It also produces the letter in reply dated 6 May 1980 in which the national authority concerned disputes the grounds on which the Commission's interpretation is based and proposes the adoption of an amendment to Regulation No 2727/75 in order to avoid any possible distortion in respect of the payment of refunds according to the dimensions of the product in question. The Commission observes that in December 1980 it introduced such a proposal, but that the Council has not yet taken a decision in the matter.

(d) In its reply the *applicant* states, in response to the question, raised by the Council and the Commission, whether it had passed on the loss of the refunds to its customers and therefore had not itself suffered any damage, that, as was pointed out by Mr Advocate General Capotorti in the above-mentioned Case 238/78, it is extremely unlikely that a manufacturer, in the absence of an existing contract to that effect such as was contemplated by the Court in Case 64/76 *Dumortier Frères* v *Council* ([1979] ECR 3091), would be able to pass on such a loss to his customers. That is especially true in the present case where the applicant was in direct competition with the starch manufacturers who continued to receive the production refund.

As regards the burden of proof, the applicant submits that, again for the reasons given by Mr Advocate General Capotorti in Case 238/78, the burden of proof lies upon the defendant institutions, who must prove that the applicant passed on its loss to its customers. If that is right, as the institutions have produced no evidence to that effect, the applicant considers that it is entitled, without giving any evidence itself, to have that question decided in its favour. The applicant then asks the Court for a clear decision on that point, which would considerably simplify the task of the Court and the parties in any future litigation involving the same kind of problems.

However, the applicant states that the price received by it from breweries for its maize gritz has at all material times been fixed by market forces, not least among which has been competition or potential competition from manufacturers of starch and that there had been no contract with their customers entitling them to the benefit of the production refunds. In order to justify these contentions, the applicant provides figures which in its view make it clear

that any refund received by the applicant was retained by it and that any refund withheld from it caused it an equivalent loss.

As regards the mesh-size of the sieve for the gritz produced by the applicant, which the Commission sets up as a condition for any payment to the applicant of the damages which it claims, the applicant remarks that Regulation No 2727/75, until it was amended by Regulation No 1125/78, did not provide for production refunds for meal for the brewing industry at all and that is the problem with which the present case is concerned. In the applicant's view the Commission may not argue that its right to compensation depends on the terms of a regulation adopted after the events giving rise to its claim and as a result of the Court's adverse decision.

Moreover, it is difficult to understand how that argument is compatible with the terms of Regulation No 1570/78, Article 1 of which provides a detailed definition of groats and meal without any reference to the need to pass a 2 mm sieve.

The applicant submits that whatever the effect of those regulations they are quite irrelevant to the present claim because this is not a claim under Regulation No 2727/75 but a claim for damages against the defendant institutions for discriminating against the applicant by not granting it production refunds in respect of its maize used for gritz for use in the brewing industry at a time when those institutions were granting such refunds to manufacturers who used maize for the production of starch, which directly competed with the applicant's groats in the brewing industry.

The applicant considers that since maize gritz may be used in the brewing industry equally well whether or not it is ground to a fineness of 2 mm, such of the applicant's groats as exceeded that size were just as much in competition with the maize starch as that part which was ground finer. The question, according to the applicant, is therefore not what Common Customs Tariff subheading the product falls under, but whether it is in competition with maize starch.

The applicant takes the view that if it is incompatible with the principle of equality to discriminate between maize used for starch and maize used for gritz for the brewing industry, *a fortiori* it is unlawful to discriminate between maize used for gritz for the brewing industry which is ground to less than 22 mm and maize for gritz used in the brewing industry which is not ground so small.

According to the applicant, in a claim for damages the question is not, as the Commission maintains, whether "the operations for which the applicant is claiming damages would have qualified for payment of the production refund" under the legislation which has been held to be unlawful but whether they should have qualified for such payment. For the reasons set out above, the applicant submits that its operations did qualify for production refunds and that accordingly it is entitled, by way of damages, to a

sum equal to the refund which it should have received.

Finally, as regards its claim for interest, the applicant submits that in order to place it in the same situation as it would have been in had it been paid the appropriate refunds at the appropriate times, the defendant institutions should be ordered to pay, as part of the damages, interest on those payments at the appropriate commercial rates from the dates on which they should have been paid until judgment. The applicant notes that that is the general rule in English law.

IV — Reply to the question put by the Court

In reply to the question put by the Court, the applicant stated that it was unable to uniform the Court of the extent to which the quantity of maize groats on which the claim was based may have exceeded 2 mm in size, in view of the fact that during the period in dispute there was no requirement laid down by the United Kingdom Intervention Board that the material should pass through a 2 mm sieve and accordingly this was not a factor which the applicant had to take into account.

V — Oral procedure

At the sitting on 23 February 1983 the applicant, represented by Peter Langdon-Davies, the Council, represented by A. Brautigam and B. Schloh, and the Commission, represented by R. Wainwright, presented oral argument.

In the course of its oral submissions the applicant abandoned its claim that the letter of 17 July 1981 signed by the Council's jurisconsult should be declared void inasmuch as it should be regarded as a decision within the meaning of Article 173.

The Advocate General delivered his opinion at the sitting on 23 March 1983.

Decision

1 By application lodged at the Court Registry on 21 September 1981, Pauls Agriculture Limited brought an action pursuant to the first paragraph of Article 173 of the EEC Treaty for a declaration that the decision of 17 July 1981, whereby the Council refused to pay it a sum of UKL 32 874.65 claimed in respect of refunds for the production of maize gritz intended for use in the brewing industry, was void. In the alternative, the applicant claims, pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, an identical sum by way of compensation for damage sustained as a result of the refusal to pay the above amount.

2 It should first be noted that in its judgment of 19 October 1977 in Joined Cases 124/76 and 20/77 *(SA Moulins et Huileries de Pont-à-Mousson and Others,* [1977] ECR 1795) the Court held that by abolishing the refunds for maize gritz, while retaining the refunds for a competing product, maize starch, the Council had committed a breach of the principle of equality of treatment, to the detriment of the producers of maize gritz.

3 Following that judgment, the disputed refunds were re-introduced by Council Regulations (EEC) Nos 1125/78 and 1127/78 of 22 May 1978 (Official Journal 1978, L 142, p. 21 and p. 24) with effect from the date of the judgment of the Court, namely 19 October 1977.

4 In its judgments of 4 October 1979 (Joined Cases 241, 242, 245 to 250/78, *DGV—Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others* [1979] ECR 3017, and Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, *P. Dumortier Frères SA and Others* [1979] ECR 3091), the Court held that by abolishing the disputed refunds, the Community had incurred non-contractual liability.

5 The applicant, a manufacturer of maize gritz used in the brewing industry, maintained that on the basis of those decisions of the Court it was entitled to receive damages in a sum equivalent to the amount of refunds which it ought to have received between 1 August and 19 October 1977 and, by letter of 3 July 1981, it requested the Council to pay to it the sum of UKL 32 874.65. By letter of 17 July 1981, the Council rejected that request on the ground that it was out of time inasmuch as it was made after the expiry of the five-year period of limitation laid down in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC. The applicant therefore brought its action primarily against the letter of 17 July 1981 which it sought to have declared void in so far as it must be regarded as a decision within the meaning of Article 173 of the EEC Treaty.

6 However, following the judgment of the Court of 27 January 1982 (Joined Cases 256, 257, 265 and 267/80 and 5/81, *Birra Wührer and Others* [1982] ECR 85), in the course of the proceedings before the Court, the Council

withdrew its objection, founded on the five-year period of limitation, to the admissibility of the applicant's claim. In consequence, in the course of its oral argument, the applicant withdrew its claim for a declaration that the letter of 17 July was void and limited its action to a claim for compensation for the loss which it estimated at the sum equivalent to the amount of refunds which it should have received, converted into national currency at the exchange rate applicable at the time of the operations or alternatively at the rate prevailing on the date of the judgment of the Court, together with interest fixed at the appropriate commercial rates in such a way as to take account of the lapse of time between the dates on which the refunds should have been paid to it and the date of the judgment.

The liability of the Community

7 The Court has already stated in its above-mentioned judgments of 4 October 1979, as well as in other similar cases, that the Community had incurred liability for abolishing the refunds for maize gritz under Regulation No 665/75 of the Council whilst retaining them for maize starch, in breach of the principle of equality of treatment for the various categories of producers concerned. For the same reasons, the Community has also incurred liability in respect of the applicant in this case.

The damage

8 Against the claim for damages calculated on the basis of the refund abolished for maize gritz during the period in question, the Council and the Commission, whilst not disputing that the Community has incurred liability, have raised the objection that the applicant was or should have been able to eliminate the damage by passing on the loss which resulted from the abolition of the refunds in its selling prices. They contend that it is for the applicant to prove the contrary.

9 The applicant, for its part, denies that it was possible to pass on the loss in that way. It maintains that, in the face of the competition of starch producers who were in receipt of the refunds, it was not in a position to pass on to its customers, in the selling prices of its products, the loss sustained as a result of the failure to pay the refunds.

10 Moreover, the applicant has submitted certain statistics in support of its assertions in order to show that it did not pass on, in its selling prices, the loss resulting from the non-payment of the refunds which had been abolished. The defendant institutions have not produced any evidence which casts doubt on those figures and the conclusions which the applicant draws from them. Their objection cannot therefore be upheld.

11 In addition the Commission maintains that, to qualify for the compensation which it claims, the applicant must establish that it satisfied the condition relating to the size of the granules of the gritz which it produced. According to the Commission, under Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (Official Journal 1975, L 281, p. 1), production refunds are payable only in respect of granules of maize groats coming under subheading 11.02 A of the Common Customs Tariff and, in accordance with Additional Note 1 to Chapter 11 of the Common Customs Tariff, that subheading concerns only maize groats and meal of which at least 95% by weight can pass through a sieve with 2 mm mesh.

12 In that respect, it must be stated that, according to correspondence exchanged between the Commission's officers and the British authorities and produced by the Commission, those authorities paid the refunds during the periods concerned and until 1980 without taking into consideration the size of the granules of gritz. Thus, irrespective of the question whether that practice was in conformity with the Community provisions, it must be concluded that the applicant would have received the refunds notwithstanding the size of the granules of the gritz which it produced and that it therefore sustained damage as a result of the abolition of the refunds.

13 It follows that the loss for which the applicant must be compensated must be calculated on the basis that it is equivalent to the refunds which would have been paid to it if, during the period from 1 August to 19 October 1977, the use of maize for the manufacture of gritz used by the brewing industry conferred an entitlement to the same refunds as the use of maize for the manufacture of starch.

14 As regards the conversion by the defendant institutions of the amount of the damages into the applicant's national currency, the Court decided in its judgment of 19 May 1982 (Case 64/76, *Dumortier Frères and Others,* [1982] ECR 1733) that the rate to be applied was that prevailing at the date of the judgment in which it was held that there was an obligation to make good the damage.

15 As regards the amount of the compensation claimed by the applicant, the latter has submitted to the Court a number of documents as proof of the quantities of gritz for which it claims to be entitled to compensation and of the amounts of the refunds not paid in respect of those quantities. The defendant institutions accept the accuracy of those documents only on condition that they be verified by the competent authorities. The Court is not in a position at this stage of the procedure to give a decision on the accuracy of these data. It is therefore necessary to lay down by interlocutory judgment the criteria whereby the Court considers that the applicant must be compensated, leaving the amounts of the compensation to be determined either by agreement between the parties or by the Court in the absence of such agreement.

The claim for interest

16 The applicant has requested, in addition that the Community be ordered to pay interest, as from the dates on which the monthly payment of the refunds fell due, at the appropriate commercial rates fixed in such a way as to take into account the lapse of time between those dates and the date on which it actually receives the compensation for the damage suffered by it.

17 As the claim relates to the non-contractual liability of the Community under the second paragraph of Article 215, it must be considered in the light of the principles common to the legal systems of the Member States to which that provision refers. It follows that a claim for interest is, as a general rule, permissible. On the basis of the criteria adopted by the Court on numerous occasions, the obligation to pay interest arises on the date of this judgment, inasmuch as it establishes the obligation to make good the damage. The rate of interest which it is proper to apply is 6%.

On those grounds,

THE COURT (Fifth Chamber)

As an interlocutory decision, hereby:

1. **Orders the European Economic Community to pay to Pauls Agriculture Limited the amounts equivalent to the production refunds on maize gritz used by the brewing industry which that undertaking would have received if, during the period from 1 August 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;**

2. **Orders that interest at the rate of 6% shall be paid on the above-mentioned amounts as from the date of this judgment, which is also the date to be taken into consideration for the conversion of those amounts into national currency;**

3. **Orders the parties to inform the Court within three months from the delivery of this judgment of the amounts of compensation arrived at by agreement;**

4. **Orders that in the absence of agreement the parties shall transmit to the Court within the same period a statement of their views with supporting figures;**

5. **Reserves the costs.**

Mertens de Wilmars Everling

Mackenzie Stuart Due Galmot

Delivered in open court in Luxembourg on 18 May 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President