the adoption of the contested measure without sufficient justification.

6. In the context of an action for damages, in order to decide upon the existence or extent of the damage alleged by the applicant, it is necessary to take into account, in an appropriate case, the fact that the applicant was able to pass on in his selling prices the disadvantages for which he claims compensation.

7. It follows from the principles common to the legal systems of the Member States, to which the second paragraph of Article 215 of the EEC Treaty refers, that in the context of an action for damages a claim for interest is generally admissible.

In Case 238/78

IRKS-ARKADY GMBH, Kulmbach (Federal Republic of Germany), represented by the Advocates of the Chambers of Fritz Modest and Others, Hamburg, with an address for service in Luxembourg at the Chambers of J. Jansen-Housse, 21, Rue Aldringen,

applicant,

v

1. COUNCIL OF THE EUROPEAN COMMUNITIES, represented by D. Vignes, Director of the Legal Department, acting as Agent, assisted by B. Schloh and A. Brautigam, respectively Legal Adviser and Administrator in the said Department, acting as Joint Agents, with an adress for service in Luxembourg at the office of J. N. Van den Houten, Director of the Legal Service of the European Investment Bank, 2, Place de Metz,

and

2. COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. H. Bourgeois, acting as Agent, assisted by J. Sack, a member of its Legal Department, with an address for service in Luxembourg at the office of its Legal Adviser M. Cervino, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco, A. Touffait and T. Koopmans, Judges,

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

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

1. In its judgment of 19 October 1977 in Joined Cases 117/76 and 16/77, *Ruckdeschel & Co. and Hansa-Lagerhaus Ströh & Co.* v *Hauptzollamt Hamburg-St. Annen*, and *Diamalt AG* v *Hauptzollamt Itzehoe*, [1977] ECR 1753 (hereinafter referred to as the judgment of 19 October 1977), the Court decided that:

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

(2) It is for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct this incompatibility.

2. By Regulations Nos 1125/78 of 22 May 1978, amending Regulation No 2727/75 on the common organization of the market in cereals (Official Journal L 142 of 30 May 1978, p. 21) and No 1127/78 of 22 May 1978, amending Regulation No 2742/75, on production refunds in the cereals and rice sectors (Official Journal L 142 of 30 May 1978, p. 24), the Council re-introduced until the end of the 1978/79 marketing year a scheme of production refunds for the maize and common wheat used for the

manufacture of quellmehl intended for use in the bakery industry. The main features of those regulations are:

— Equality of treatment between the processing of maize and common wheat into quellmehl or into pre-gelatinized starch;

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

Rules for the application of those provisions were laid down by Commission Regulation No 1570/78 of 4 July 1978 laying down detailed rules for the application of Regulation No 2742/75 as regards production refunds on starches and repealing Regulation No 2026/75 (Official Journal L 185 of 7 July 1978, p. 22).

Article 2 of Regulation No 1570/78 is worded as follows:

"The production refund provided for in Articles 1 and 4 of Regulation (EEC) No 2742/75 shall be paid:

(a) To producers of starch, and of quellmehl intended for use in bread-making, obtained from common wheat or maize;"

Article 4 of the same regulation provides as follows:

"For maize processed into groats and meal, broken rice produced in or imported into the Community, and wheat or maize processed into quellmehl, between 19 October 1977 and the date of entry into force of this regulation, and used respectively in brewing or baking, the production refund shall be paid provided the applicant furnishes proof that the maize, wheat or rice has been processed during such period and attaches to the application for the refund proof of sale to a brewery or bakery of the maize groats and meal, broken rice or quellmehl, giving the details regarding quantity and destination required in Article 3 (4)."

3. This application, which was submitted on 30 October 1978, seeks in particular an order that the European Economic Community compensate the applicant for the damage resulting from the failure to re-introduce the production refund for sales of quellmehl made by Albert Ruckdeschel & Co., Kulmbach, the plaintiff in the main action in Case 117/76 cited above, between 1 August 1974 and 19 October 1977. Albert Ruckdeschel, which belongs to the same group as the applicant, assigned to the latter the rights now claimed in the Court.

The applicant states that as a rule the said quellmehl is converted by the addition of other substances into various special cooking agents, and that it is then sold through the wholesale trade to industrial and small bakers, who in turn use the cooking agents obtained from quellmehl to manufacture bread and other bakery products. A part of the quellmehl is also sent to industrial and small bakeries without being mixed.

4. A claim for damages following the abolition of production refunds for quellmehl is also the main issue in Joined Cases 261/78 and 262/78 *Interquell Stärke-Chemie and Diamalt AG* v *Council and Commission.*

5. After hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. However, the Court asked the parties to reply to certain questions.

II — Conclusions of the parties

1. The *applicant* claims, having amended its conclusions in its reply, that the Court should:

— Order the defendant to pay it the sum of DM 1 306 968.01 plus interest at 6% from 1 December 1977;

— Alternatively, order the defendant to authorize and compel the Federal Republic of Germany to pay it, in performance of the Community's obligation to pay damages and on behalf of the latter, an amount equal to the production refund for maize, common wheat and wheat flour in respect of the quantities which Albert Ruckdeschel & Co., Kulmbach, as can be proved, processed into quellmehl for human consumption at its production centres in Kulmbach, Hamburg and Bottrop between 1 August 1974 and 19 October 1977, at the same rate as the production refund which was laid down and paid for the processing of maize or wheat into starch during the same period, plus interest at 6% from 1 December 1977;

— Order the defendant to pay the costs.

2. The *Council* claims that the Court should dismiss the application as inadmissible, or alternatively dismiss it as unfounded and order the applicant to pay the costs.

3. The *Commission* claims that the Court should dismiss the application and order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

1. The applicant's principal claim

(a) The *Commission* observes that the applicant could not secure the adoption of regulations entitling it to the payment of the refunds requested by bringing an action under Articles 173 and 175 of the Treaty, which, in their view, argues against the admissibility of an action for damages with the same object.

The *applicant* replies that that is not its objective: it merely seeks to enforce an individual right to compensation for an infringement of the principle of equality lying in the failure of the institutions of the Community to adopt such a regulation in the first place. The issue of the applicant's entitlement to such compensation is a question affecting the substance and not the admissibility of the application.

In its rejoinder, the *Commission* examines the criteria governing the admissibility and the substance of the application in the same context. The Commission's observations on that question are summarized under heading III, B.

(b) The *Commission* further observes that it is necessary to preclude, if not the assignment of rights to compensation against the institutions of the Community, at least the transference of

the right to bring legal proceedings. The Commission leaves it to the Court to rule on that question.

The Commission emphasizes that if it were a question only of the present case, it would probably see no problem in the applicant's enforcing the right which has been assigned to it. In its view, the assignment of the right to damages enforceable against the Community raises a question of principle. The following considerations give rise to the Commission's reservations: such an assignment is not permitted in the legal systems of any of the Member States; the possibility of an abuse of such assignments cannot be ruled out; Community law does not envisage the assignment and hence does not contain any provision on the subject; moreover, it is not possible to call in aid the national legal systems, as they show too many disparities.

According to the *applicant,* there is no compelling reason to dispute the validity of the assignment of a pecuniary debt, irrespective of the basis thereof, except in the case of a completely personal debt which is by nature non-transferable.

(c) In its rejoinder, the *Council* observes that in its reply the applicant is apparently seeking to obtain payment of the refunds which it considers that it is owed as a result of the judgment of the Court of 19 October 1977. If the applicant's principal claim is indeed an action for the payment of refunds, the Council asks whether that is not rather a matter for the national court, in which case the Court of Justice should of its own motion declare that principal claim inadmissible, the more so as, taking into account the general principles of law common to the Member States referred to in Article 215 of the Treaty, the action provided for must seek compensation for damage, not the payment of a sum allegedly due.

2. The applicant's alternative claim

The *Council* observes that to grant the refunds... requested to the applicant alone would be incompatible with the principle of equality of treatment of the producers in question, since a decision such as that requested by the applicant should apply to all persons concerned. What the applicant seeks to obtain, therefore, is really a measure having general application. According to the Council, an individual is not entitled to ask for such measures to be adopted by the Community, with the result that that part of the claim is inadmissible in accordance with the case-law of the Court on Article 175 of the Treaty: judgment of 15 January 1974 in Case 134/73 *Holtz & Willemsen GmbH* v *Council* [1974] ECR 1, at paragraph 5 of the decision. The Council adds that it does not appear possible to accept that an individual may obtain by means of Article 215 of the Treaty that which he is denied in the context of Article 175.

The *Commission* emphasizes that by this claim the applicant seeks to obtain damages by means of a "restitution in kind". In its view, German law as well as the laws of most of the other Member States, on actions for damages against public authorities, do not allow such a procedure. In any case, the claim is inadmissible, according to the Commission, for still other reasons: if it means that the applicant is thus seeking to obtain the adoption of certain regu-

lations, it is inadmissible under paragraphs (1) and (3) of Article 175 of the Treaty, since it is not a question of acts addressed to the applicant; an action which is inadmissible under Article 175 cannot become admissible by using Article 215.

If the claim seeks the adoption of a decision benefiting the applicant in particular, the action is likewise inadmissible under the third paragraph of Article 175 of the Treaty, since the applicant is seeking a decision addressed not to itself but to the Federal Republic of Germany.

The applicant explains that its alternative claim is intended solely to save the Court the trouble of ascertaining whether Albert Ruckdeschel & Co. actually manufactured quellmehl during the period in question and sold that quellmehl or, as the case may be, the cooking agents derived from the quellmehl, for the purpose of human consumption. The applicant adds that it will not maintain its alternative claim in the oral procedure, since the Council and Commission have not joined issue with it on that point.

3. Finally, the *Council* pleads that to the extent to which the application is based on discrimination resulting from Commission Regulation No 1570/78, it is inadmissible against the Council, in accordance with the case-law of the Court: judgment of 13 November 1973 in Joined Cases 63 to 69/72 *Werhahn Hansamühle & Others* v *Council* [1973] ECR 1229, at paragraph 7 of the decision.

The *applicant* replies that its action is not based on Regulation No 1125/78 or on Regulation No 1570/78, but as the Court declared in the aforesaid judgment of 19 October 1977, on the fact that

"The provisions of Article 11 of Regulation No 120/67/EEC of the Council ... are incompatible with the principle of equality in so far as they provide for quellmehl and pregelatinized starch to receive different treatment ..."

The Council and the Commission are equally liable for the legal acts on which the applicant bases its action.

The *Council* observes in its rejoinder that if the applicant is complaining that the institutions failed to make the re-introduction of the refund retroactive as from 1 August 1974, it should plead, since its action is based on Article 215 of the Treaty, that by providing for retroactive effect only as from 19 October 1977, the regulations in question constituted a serious and manifest breach of a superior rule of law for its protection.

B — Substance

1. The *applicant* claims that by adopting Article 4 of Regulation No 1570/78, the organs of the Community limited their discretionary power regarding the manner of eliminating, and retroactively, the discrimination against quellmehl. In its opinion, the principle of equality requires that the discrimination during the period from 1 August 1974 to 19 October 1977 be eliminated in the same way. Article 4 of Regulation No 1570/78 therefore infringes the principle of equality inasmuch as it does not make provision for payment of the production refund for quellmehl in respect of that period.

The applicant concludes that to that extent the organs of the Community are obliged to make good the damage caused.

The applicant goes on to state that, as is clear not only from the previous history of the discrimination but also from the proceedings in Cases 117/76 and 16/77 *Ruckdeschsel,* the purpose of the provisions adopted shows that the intention was to exclude from the production refund only quellmehl intended for use as animal feed. It is convinced that Article 2 (a) and Article 4 of Regulation No 1570/78 must be interpreted in relation to that intention. It adds that in particular it is necessary to take into account the fact that the production refund for the manufacture of pre-gelatinized starch from wheat or maize continues to be granted even when that starch is not used for human consumption.

The applicant adds that, in order to remain competitive against maize starch and wheat starch, neither it nor Albert Ruschdeschel & Co. increased their selling prices as a result of the abolition of the production refund.

Finally, the applicant states that in order to relieve the Court of preparatory inquiries and to accelerate the procedure, it submitted its alternative claim, which allows the question of principle to be dealt with alone without inquiries, namely the question whether the Community is required to grant the production refund for maize and for wheat intended for the manufacture of quellmehl for human consumption also in respect of the period prior to 19 October 1977.

2. The *Council* emphasizes that the applicant's action presupposes that Regulations Nos 1125 & 1127/78 are not only invalid, but also entail a serious breach of a superior rule of law for the protection of the individual.

It recalls that the measures involved an economic choice, therefore entailing, in accordance with the settled case-law of the Court, a wide degree of discretion on the part of the Community institutions.

The Council goes on to state that in its judgment of 19 October 1977 the Court left open the choice between the re-introduction of the refunds for quellmehl and the abolition of the refunds for pre-gelatinized starch. The Council adds that if this second alternative had been chosen, equality between the two products could have been re-established as from 1 August 1974 without, however, its being necessary to recover the refunds already paid to the producers of pre-gelatinized starch. In fact it considers that there are compelling reasons of legal certainty which go in favour of not recovering the refunds paid when the right to those refunds is abolished retroactively in order to correct an error of the administration. It emphasizes that the judgment of the Court of 9 March 1978 in Case 54/77 *Herpels* v *Commission* [1978] ECR 585, at paragraph 38 of the decision, corroborates that point of view. Therfore, if the refund for pre-gelatinized starch had been abolished with effect from 1 August 1974, the applicant could not, according to the Council, claim any refund whatsoever for its products. If the matter is considered from that point of view, it seems difficult, in the Council's submission, to accept that it was not permissible, in choosing a solution much more favourable for the producers in question, to limit the regulations in point of time, as was done in this case. The Council goes on to note that in its

judgment the Court did not require the institutions to take measures of a retroactive nature; it recalls that the proposals of the Commission did not envisage any retroactivity.

The Council concludes that the aforesaid regulations do not in any way go beyond the margin of discretion available to it in this case and that consequently they are valid, with the result that they cannot be the cause of a sufficiently serious breach of a superior rule of law for the protection of the individual.

Alternatively, working on the assumption that the applicant did not in fact increase its selling prices in order to compensate for the abolition of the refunds, the Council raises the question whether there really were compelling reasons preventing it from doing so.

It recalls in this context that it is clear from the summary of the observations of the plaintiffs in the main action in the judgment of 19 October 1977 that in a situation of free competition, apart from any refund, quellmehl is, as regards the cost of its manufacture, cheaper than pre-gelatinized starch; when pre-gelatinized starch was offered at DM 85 per 100 kg, quellmehl should, on account of the abolition of the refund, have been sold at DM 100 . On the basis of those prices there arises, according to the Council, by reason of the refund for pre-gelatinized starch, a competitive advantage of around 8.6% over the selling price of quellmehl. If account is taken of the increase in the price of raw materials during the period for which the refund was not paid, which increase was around 30%, it seems improbable to the Council that the applicant was unable to alter its selling prices in order to allow for that difference of 8.6%, which even becomes 6.3% as the prices of the two products have increased by 30%. In this context the Council emphasizes that the producers of pre-gelatinized starch were also affected by the increase in the prices of raw materials.

The Council concludes that the abolition of the refunds did not go beyond the limits of the economic risks inherent in the applicant's activities and that it certainly could not have endangered the profitability of its business.

Finally, the Council points out that in the absence of the information necessary to form an opinion about the implications of the cost price of the quellmehl produced by the applicant, the selling prices and the increased competition from pre-gelatinized starch due to the benefit of the refund, it is not possible for it at this stage of the procedure to comment more fully on the question whether any damage was really suffered by the applicant. In any event, the Council has doubts on this point about the admissibility of the application in the light of Article 38 (1) of the Rules of Procedure.

3. The *Commission* points out that the applicant is not claiming compensation for damage suffered, but that it is requesting the payment of production refunds. It recalls that according to the judgment of the Court of 15 June 1976 in Case 74/74 *CNTA* v *Commission* [1976] ECR 797, it is not the unpaid benefits which must be regarded as damage for which compensation may be recovered by means of an action for damages, but only the material losses suffered as a result of the non-payment of the benefits. That is in accordance with the concept of damage in the form in which it exists in most of the national legal systems.

The Commission adds that the applicant has not given the slightest indication of the extent of the damage which it claims to have suffered. Seeing that the quantities of quellmehl sold by the

applicant during the period in question are roughly equivalent to those sold in the earlier periods, the Commission does not consider that the applicant can prove the existence of any damage.

The Commission observes further that the applicant does not satisfy the other conditions governing the liability of the Community for a legislative measure, as laid down in the judgment of the Court of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77 *Bayerische HNL and Others* v *Council and Commission* [1978] ECR 1209.

The Commission admits in this context that the principle of equality constitutes a superior rule of law for the protection of individuals. However, it adds that infringements of that principle may give rise to entitlement to damages only in accordance with the legal principles common to the Member States and do not entail any obligation to make good the effects of those infringements apart from the obligation to pay damages.

According to the Commission, the judgment of the Court of 19 October 1977 contains factors which support its argument: at the time when that judgment was delivered, there was no doubt that by reason of established rights and the protection of legitimate expectation, the refunds granted to the starch producers could not be abolished retroactively; that is why, if the Court shared the applicant's point of view, it could easily have said, with regard to the period elapsed, that the quellmehl manufacturers were entitled to the same refund as that granted for starch; the Court declared that there were several courses of action for making good "any damage sustained by those concerned". Thus it was for the institutions of the Community to make a choice between those possible courses of action.

In the Commission's opinion all those considerations lead to the following conclusions with regard to the present case: it is indisputable, following the judgment of the Court of 19 October 1977, that by abolishing the production refund for quellmehl on 1 August 1974 the institutions infringed the principle of equality as against the applicant; hence, if the other legal conditions were satisfied, the applicant could claim damages from the Community institutions; however, that possibility of entitlement to damages did not imply *prima facie* the granting *ex post facto* of the unpaid refund, because, as the substance of the benefits *stricto sensu*, that refund should not be regarded as constituting damage; it is in order to elude the consequences of that legal situation, unfavourable for it, that the applicant declares that following the judgment of the Court of 19 October 1977, the institutions were obliged in any event, by virtue of the principle of equality, to re-introduce the refund for quellmehl retroactively as from 1 August 1974; that is the reason why it claims compensation; according to the Commission that is wrong because, in accordance with the aforesaid judgment of the Court, the Community institutions were under only a contingent obligation to compensate the applicant according to the principles of Article 215 of the Treaty.

According to the Commission, there was no obligation to re-introduce the production refund for quellmehl retroactively as from 19 October 1977. In the Commission's view, a limitation upon discretionary power cannot be inferred from the fact that — contrary to the Commission's proposals — the Council none the less provided for limited retroactivity, since the Council had reasons for making a distinction between the period preceding and the period following the judgment of the Court.

Moreover, the Commission does not consider that it restricted its discretionary power since it had not provided for retroactive legislation.

The Commission adds that the applicant cannot rely on the principle of equality with regard to the limitation on discretionary power. According to the Commission, that principle means only that in a similar situation one person may not be treated differently from another; but it does not make it unlawful to treat the same person or the same group of persons in a particular way in one case and in a different way in another.

The Commission further points out that in any event the Community was not guilty of a serious and manifest disregard of the limits imposed upon the exercise of its power: the abolition of the refunds was the consequence of considerations of a practical nature and was in no way arbitrary.

Further, after the Court's judgment of 19 October 1977, there cannot in the Commission's view be any question of a serious and manifest abuse of power on its part: there are important considerations of principle which go against a right to the retroactive granting of refunds; besides, the judgment of the Court does not impose any obligation upon the institutions to grant such a right.

Finally, the Commission points out that after the abolition of the refund, the undertakings obviously did not have any great difficulty in maintaining the volume of sales of quellmehl at its former level. Thus the measures taken by the Community did not in any event affect the applicant in such a way that the liability of the Community inevitably follows from the gravity of its action.

4. In reply, the *applicant* states that the facts in Joined Cases 83 and 95/76, 4, 15 and 40/77 *HNL* are fundamentally different from those of the present case: in this case it is a question of an infringement not of the principle of proportionality, but solely of the principle of equality, which infringement involved inequality in the treatment accorded to competing operators belonging to one and the same economic sector; in the *HNL* cases all the competitors belonging to one and the same economic sector were treated in the same way. According to the applicant, the facts of the present case may also be distinguished from those of the *HNL* cases in so far as in this case the Community institutions manifestly and seriously exceeded the limits placed upon their powers: they knew that quellmehl and pre-gelatinized starch are interchangeable and that they compete with each other.

The applicant further submits that a comparison could be made between the facts of this case and those of Case 74/74 *CNTA*, which concerned the abolition of monetary compensatory amounts, only if the institutions had suddenly abolished the production refund both for quellmehl and for pre-gelatinized starch. Since it is a question in this case not of the infringement of the principle of the protection of legitimate expectation, as in the *CNTA* case, but of the principle of equality, the manufacturers of quellmehl were entitled, according to the applicant, to enjoy a production refund as long as their competitors were receiving the refund.

The applicant considers that the conclusions of the Council and the Commission, to the effect that by its

judgment of 19 October 1977 the Court intended to exclude the possibility of making good damage suffered by payment of an amount equivalent to that of the refund, are erroneous. In its view, that judgment establishes, as regards the past also, that the institutions are obliged to compensate the manufacturers of quellmehl, whilst at the same time leaving open several possibilities for that purpose. The applicant adds that since the extent of the damage suffered depends on the conduct of the manufacturers during that period, the Court was not in a position to ascertain the amount of the damage.

The applicant further states in reply that during the period in question it was able to pass on to the buyers the increases in the cost of raw materials, brought about by the increase in the threshold prices for wheat and maize, since the manufacturers of starch who continued to receive the production refund had to bear the same costs in that respect and were obliged to pass them on to the buyers of their products. However, it is quite different when unequal treatment of competing undertakings leads to distortions in the sphere of competition. In such a case, it is not as a rule possible to pass the increase in costs on to the buyers.

If, as a result of an occasional occurrence, the cost price for the dealer increases and he is not able to pass the increase on to the purchasers, because of the risk of seeing his competitors offer to supply more cheaply and thus of losing his customers as a result of asking for a higher price, he must, according to the applicant, in order to maintain his level of business activity, resign himself to suffering losses and continuing to sell to his customers without any price increase. That is the situation in this case: it was foreseeable for Albert Ruckdeschel & Co. that the situation resulting from the abolition of the refunds for quellmehl would not be permanent; the applicant and Albert Ruckdeschel & Co. were guided by those perfectly reasonable commercial considerations. Thus the applicant concludes that it is not possible to presume from the simple fact that those companies continued to manufacture and to sell that they did not suffer any damage.

The applicant further denies that the claim for damages for an amount equivalent to the refunds abolished depends on whether it was able to pass on the increase in its costs caused by that abolition. It draws that conclusion from the general concept of damage: damage which it is intended to make good by means of an action for damages is equal to the difference between the material situation in which the person injured would be if the act causing the damage had not taken place and the situation which arose as a direct consequence of that act.

According to the applicant, the question whether that damage was reduced after the event or could have been, in so far as the person injured passed the damage on to the purchaser, or could have done so, is an entirely separate question which in German law comes under the concept of "Vorteilsanrechnung" (bringing into account benefits received). The applicant goes on to state that according to the German case-law only circumstances bearing an adequate relationship of causality with the act causing the damage must be taken into consideration for that purpose. The applicant concludes that if that case-law is to be applied in this case there is no ground for taking into consideration the passing on to the customers of the increased costs arising from the abolition of the refund: even if the applicant had been able to pass on

the increase, that result would have been obtained solely by virtue of the company's own initiative, and not as a result of the unlawful withholding of the refund. Moreover, the Community would be relieved of its obligations for no good reason if in the last analysis it were to benefit from the fact that the manufacturer of quellmehl, who passed on to his customers the increase in costs connected with the withholding of the production refund, were to be deprived of that advantage. The applicant considers that the German case-law must also be valid in Community law.

5. The *Council*, in its rejoinder, recalls that the plaintiffs in Joined Cases 117/76 and 26/77 *Ruckdeschel* pleaded that after the abolition of the refund the cost price of quellmehl was DM 98.79 per 100 kg, whilst, owing to the refund, pre-gelatinized starch could be supplied at DM 98 per 100 kg. According to the Council, it is therefore probable that the applicant passed on the loss of the refund totally or partially in those selling prices.

The Council then expresses its view on the applicant's submission that the person injured must be restored to the financial position in which he would have been if the damage had not occurred.

Doubting the relevance, even in German law, of that doctrine of civil law in the context of administrative proceedings between an individual and public authorities concerning a subsidy to which that individual claims to be entitled, the Council considers in any case that that doctrine cannot apply in the context of an action for non-contractual liability governed by Community law. The Council adds that it is clear from the judgment of the Court in Case 74/74 *CNTA* that the Community is not obliged to make good damage which, although apprehended, does not in fact occur.

6. The *Commission* points out in its rejoinder that if the applicant's argument to the effect that it is entitled to receive a production refund for quellmehl for the period from 1 August 1974 to 18 October 1977 by virtue of the principle of equality is correct in this case, it follows that it is not entitled to damages, because it is still in a position to bring proceedings directly for the enforcement of its claim. As long as that possibility exists, the applicant cannot in any event claim to have suffered damage.

The Commission takes the view that that argument may be taken into account when the admissibility of the action for damages is considered and that the action must thus be dismissed as inadmissible because the need for protection is lacking and because the real object of the action is not to obtain damages, but to enforce a claim.

If the action is declared admissible, an examination of questions of substance will reveal, according to the Commission, that the action is unfounded: if there does indeed exist an action for the enforcement of a claim, there cannot, by virtue of that very fact, be any damage; if, on the other hand, such a right to enforce a claim is not recognized, there cannot be any right to bring an action for damages having the same object.

Consequently, the Commission is of the opinion that the division of responsibilities between the institutions of the Community and the national auth-

orities means that in this case the claim for refunds must be prosecuted through an action in the national court against the competent authorities. The Court could then give a preliminary ruling concerning solely the question whether the principle of equality requires that the applicant should also be granted a refund for the production of quellmehl retroactively for the period from 1 August 1974 and 18 October 1977. All the other questions should have been dealt with by the national authorities and courts. The applicant had cause to bring proceedings directly before the Court of Justice solely for the purpose of prosecuting a genuine action for damages.

As regards the damage allegedly suffered by the applicant, the Commission points out that the applicant's lower profits, due to the abolition of the refund, could not be treated as a real loss as the refund does not represent a commercial profit; it is not the fruit of an undertaking's own efforts, but purely a subsidy granted by the public authorities in pursuance of a particular objective. That objective is not to enable the undertakings to obtain a certain commercial profit.

With reference to the reasons for the refusal to grant a refund for periods already past, the Commission states that there is no mention in the judgment of 19 October 1977 of an obligation to grant the refund retroactively, although it was already obvious at the time it was not possible to require the manufacturers of pre-gelatinized starch to repay the amounts received in refunds. None the less the fact that the Court did not require the Council or the Commission to grant the refunds retroactively but expressly mentioned in this regard the possibility of making good contingent losses must, in the opinion of the Commission, have been of some importance. The reason for allowing compensation to be paid only for contingent losses is essentially, in its opinion, the fact that granting the refunds *ex post facto* no longer permits attainment of the objective in pursuance of which they were established, namely encouraging the sale of certain products during a certain period.

Finally, the Commission observes that it is not fair to say, as the applicant says, that the Commission bound itself by adopting in Regulation No 1570/78 detailed rules relating to the re-introduction of the production refund for quellmehl: after the adoption of the mandatory provision contained in Article 6 of Council Regulation No 1127/78, the Commission no longer had any discretion in the matter; but that does not prevent it from considering that the reasons put forward by the Council are entirely apt to justify different schemes according as periods prior to or subsequent to the delivery of the judgment of the Court of 19 October 1977 are involved.

IV — Oral procedure

The parties presented oral argument at the hearing on 10 July 1979.

The Advocate General delivered his opinion at the sitting on 12 September 1979.

Decision

1 The applicant in this case requests that the European Economic Community, represented by the Council and the Commission, be ordered, pursuant to the second paragraph of Article 215 of the EEC Treaty, to compensate it for the loss which it claims to have suffered on account of the abolition of the production refunds for quellmehl as a result of Regulation No 1125/74 of the Council of 29 April 1974 amending Regulation No 120/67 on the common organization of the market in cereals (Official Journal 1974, L 128, p. 12).

2 In its judgment of 19 October 1977 delivered pursuant to a reference for a preliminary ruling from the Finanzgericht Hamburg in Joined Cases 117/76 and 16/77 *Ruckdeschel & Co.* v *Hauptzollamt Hamburg-St. Annen* and *Diamalt AG* v *Hauptzollamt Itzehoe* [1977] ECR 1753, the Court ruled that the disputed provisions of the Council regulations were incompatible with the principle of equality in so far as they provided for quellmehl and pre-gelatinized starch to receive different treatment in respect of production refunds. The Court said further that it was for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct that incompatibility.

3 Following that judgment production refunds for quellmehl intended for use in the bakery industry were re-introduced by Council Regulation No 1125/78 of 22 May 1978 amending Regulation No 2727/75 on the common organization of the market in cereals (Official Journal 1978, L 142 of 30 May 1978, p. 1.). The amount of the refunds was fixed by Council Regulation No 1127/78 adopted and published on the same date as Regulation No 1125/78 (Official Journal 1978, L 142, p. 24). Both regulations entered into force on the third day following their publication in the Official Journal of the European Communities. However, pursuant to the last paragraph of Article 1 of Regulation No 1125/78 and Article 6 of Regulation No 1127/78, the refunds were granted at the request of the interested party as from 19 October 1977, that is to say with retroactive effect from the date of the judgment of the Court in the above-mentioned preliminary rulings.

4 Thus the object of the applicant's claims is to obtain compensation for the damage which it claims to have suffered as a result of the absence of refunds during the period between 1 August 1974, on which date Regulation No 1125/74 was first applied, and 19 October 1977. The alleged damage consists in the loss of receipts equal to the amounts of the refunds which would have been paid to the applicant if quellmehl had benefited from the same refunds as starch.

Admissibility

5 The Commission has objected to the admissibility of the claim on the ground that the applicant is acting by subrogation from the firm Albert Ruckdeschel & Co., which was the manufacturer, during the period in dispute, of the quantities of quellmehl in respect of which compensation is claimed for the refunds not paid. That objection cannot be upheld. The applicant has declared that the claim for compensation was assigned to it by the firm Ruckdeschel, which belongs to the same group as the applicant, following a measure of reorganization within the group. The Court considers that there is no reason to prevent a right to compensation from being claimed and enforced in legal proceedings by the assignee in circumstances such as those of the present case which do not give cause to believe that the assignment may have led to an abuse.

6 The Council and the Commission, the defendants, also object that in order to obtain the refunds claimed the applicant should have brought an action for payment of the refunds against the competent national bodies in the national courts. However, that objection cannot be upheld. Although it is true that an action for the payment of amounts due under Community regulations may not be brought under Article 178 and the second paragraph of Article 215 of the EEC Treaty, the claims submitted by the applicant in this case cannot be classed as claims for the payment of amounts due, but rather as claims for compensation for the alleged damage resulting from the unlawfulness established by the judgment of the Court of 19 October 1977. In the circumstances of the case, moreover, it is clear that, pursuant to the said judgment of the Court, a national court could not have upheld such an action in the absence of any provision of Community law authorizing the national bodies to pay the amounts claimed.

7 The same considerations apply to the Commission's objection that the real object of the application, namely the payment of the refunds not granted, may be achieved only by the adoption of a new regulation and that, since the applicant may not pursue such an objective by means of the actions provided for in Articles 173 and 175 of the EEC Treaty, it is equally unable to do so by means of the action for damages under Article 178 and the second paragraph of Article 215. In fact, as the Court has declared on repeated occasions, the latter action was set up as an independent remedy. Thus the claims submitted by the applicant must be considered by way of that action and may be upheld, if they are well founded, without its being necessary for the defendants to adopt new legislative measures.

Substance

8 By its judgment of 19 October 1977, the Court established that the abolition of the refunds for quellmehl as from 1 August 1974, together with the retention of the refunds for pre-gelatinized starch, was incompatible with the principle of equality. It is clear from the judgment that that incompatibility existed only as regards quellmehl used for what were its traditional purposes in food for human consumption, namely bread-making. Moreover, it is that use which gives entitlement to the refunds re-introduced by Regulations Nos 1125 and 1127/78, and there is no dispute on that question between the parties to this case. In so far as it is thus established that the abolition of the refunds was unlawful, the first problem which arises in this case is whether the unlawfulness thus established is of such a nature as to render the Community liable under the second paragraph of Article 215 of the EEC Treaty.

9 The finding that a legal situation resulting from the legislative measures of the Community is unlawful is not sufficient in itself to give rise to such liability. The Court has already expressed that view in its judgment of 25 May 1978 in Joined Cases 83/76 and others *Bayerische HNL Vermehrungsbetriebe and Others* v *Council and Commission* [1978] ECR 1209. In this regard, the Court recalled its settled case-law, according to which the Community does not incur liability on account of a legislative measure which involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. Taking into consideration the principles in the legal systems of the Member States governing the liability of public authorities for damage caused to individuals

by legislative measures, the Court said that in the context of Community provisions in which one of the chief features was the exercise of a wide discretion essential for the implementation of the Common Agricultural Policy, the Community did not incur liability unless the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers.

10 In the circumstances of this case, the Court is led to the conclusion that there was on the part of the Council such a grave and manifest disregard of the limits on the exercise of its discretionary powers in matters of the Common Agricultural Policy. In this regard the Court notes the following findings in particular.

11 In the first place it is necessary to take into consideration that the principle of equality, embodied in particular in the second subparagraph of Article 40 (3) of the EEC Treaty, which prohibits any discrimination in the common organization of the agricultural markets, occupies a particularly important place among the rules of Community law intended to protect the interests of the individual. Secondly, the disregard of that principle in this case affected a limited and clearly defined group of commercial operators. It seems, in fact, that the number of quellmehl producers in the Community is very limited. Further, the damage alleged by the applicants goes beyond the bounds of the economic risks inherent in the activities in the sector concerned. Finally, equality of treatment with the producers of maize starch, which had been observed from the beginning of the common organization of the market in cereals, was ended by the Council in 1974 without sufficient justification.

12 For those reasons the Court arrives at the conclusion that the Community incurs liability for the abolition of the refunds for quellmehl under Regulation No 1125/74 of the Council.

13 This said, it is necessary to go on to examine the damage resulting from the discrimination to which the quellmehl producers were subjected. 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 if equality of treatment with the producers of maize and starch had been observed. Hence, the amount of those refunds must provide a yardstick for the assessment of the damage suffered.

14 The Council and the Commission objected to that method of calculating the damage on the ground that the quellmehl producers eliminated the damage, or could have done so, by passing on the loss resulting from the abolition of the refunds in their selling prices. In principle, in the context of an action for damages, such an objection may not be dismissed as unfounded. In fact, it must be admitted that if the loss from the abolition of the refunds has actually been passed on, or could have been passed on, in the prices the damage may not be measured by reference to the refunds not paid. In that case the price increase would take the place of the refunds, thus compensating the producer.

15 For its part, the applicant disputes the possibility of passing on the loss in that way. It states that, faced with the competition from the starch producers benefiting from refunds, it chose, as a matter of commercial policy, to sell quellmehl at a loss in order to retain its markets, rather than raise the prices at the risk of losing those markets. The price increases referred to by the Council and the Commission are, in the applicant's submission, due to the rise in the threshold price of maize and to the increase in production costs.

16 The statistical data and the arguments put forward by the parties do not permit the conclusion to be drawn that the applicant actually passed on, or could have passed on, the loss resulting from the abolition of the refunds in its selling prices.

17 It follows that the loss for which the applicant must be compensated has to be calculated on the basis of its being equivalent to the refunds which would have been paid to it if, during the period from 1 August 1974 to 19 October 1977 the use of maize for the manufacture of quellmehl intended for use in the bakery industry had conferred a right to the same refunds as the use of maize for the manufacture of starch.

18 The applicant submitted a number of documents to the Court as proof of the quantities of quellmehl for which it claims to be entitled to compensation and of the amounts of the refunds not paid in respect of those quantities. However, the Court is not in a position at this stage of the procedure to give a decision on the accuracy of those data. Therefore, it is necessary to lay down by interlocutory judgment the criteria whereby the Court considers that the applicant must be compensated, leaving the amount 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

19 The applicant further claims that the Community should be ordered to pay interest at the rate of 6% from 1 December 1977, the date on which the Community's liability for the unpaid refunds arose.

20 As it is a question of a claim made in relation to the non-contractual liability of the Community, pursuant to 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 in general admissible. Taking into account the criteria for the assessment of damages laid down by the Court, the obligation to pay interest arises on the date of this judgment, in that 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,

as an interlocutory decision, hereby:

1. **Orders the European Economic Community to pay to Ireks-Arkady GmbH, Kulmbach, the amounts equivalent to the production refunds on quellmehl intended for use in the bakery industry which that undertaking would have been entitled to receive if, during the period from 1 August 1974 to 19 October 1977, the use of maize for the production of quellmehl had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch;**

2. **Orders that interest at 6% shall be paid on the above-mentioned amounts as from the date of this judgment;**

3. **Orders the parties to inform the Court within twelve 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.**

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 4 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 12 SEPTEMBER 1979 [1]

Mr President,
Members of the Court,

1. The opinion which I have to deliver today concerns applications submitted by undertakings from France, Germany, Belgium and the Netherlands, some of which produce gritz, and others quellmehl. As you know, gritz is a type of maize meal used in the brewing of beer, whilst quellmehl is derived from processed maize or common wheat and is used mainly in bread-making. For some time now the two types of undertaking have enjoyed equality of treatment in the context of the Community regulations on production refunds; in particular, Article 11 of Regulation No 120/67 of the Council of 13 June 1967 (on the common organization of the market in cereals) provided for compulsory refunds to be paid to

1 — Translated from the Italian.