In Joined Cases 116/77 and 124/77,

G. R. AMYLUM N.V., Aalst, Belgium, represented by Michel Waelbroeck and Georges Vandersanden, Advocates, 341 Avenue Louise, Brussels, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 Rue Philippe II,

and

TUNNEL REFINERIES LIMITED, London, represented by Francis Jacobs, Barrister, Middle Temple, instructed by Messrs Slaughter and May, Solicitors, 35 Basinghall Street, London EC2V 5DB, with an address for service in Luxembourg at the office of Messrs Elvinger and Huss, 84, Grand Rue,

applicants,

v

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

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented in Case 116/77 by its Legal Adviser, Jacques Delmoly, a member of the Legal Department, and in Case 124/77 by Richard Wainwright, acting as Agent, assisted by Hendrik Bronkhorst, a member of the Legal Department, with an address for service in Luxembourg at the office of Mario Cervino, a member of the Commission's Legal Department, Jean Monnet Building, Kirchberg,

defendants,

APPLICATIONS for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT,

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

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

I — Facts and procedure

1. The product at issue

Glucose having a high fructose content ("isoglucose") is a new natural sweetener made from starch of any origin but most frequently obtained from maize. This product, which appeared on the market in the Community countries in 1976, has sweetening properties comparable to those of sugar. However, in the present state of technical knowledge, isoglucose cannot be crystallized. It follows that its markets at the present time are limited to the food industries using sugar in liquid form: refreshing drinks, jams, biscuits, ice-creams etc. In these respects it competes with liquid sugar.

The applicants in these cases are starch manufacturers who have made heavy investments to allow them to produce isoglucose.

2. Community legislation

In view of the growing industrial production of isoglucose in several Member States of the Community, the Council decided to lay down common measures applicable to that product. Those measures were adopted by Council Regulation (EEC) No 1111/77 of 17 May 1977 (Official Journal 1977, L 134, p. 4).

The recitals in the preamble to that regulation contain amongst other things the following passages:

"... isoglucose is a direct substitute for liquid sugar obtained from sugar-beet or cane" (second recital);

"... being a substitute product in direct competition with liquid sugar, which, like all beet or cane sugar, is subject to stringent production constraints,

isoglucose therefore enjoys an economic advantage and since the Community has a sugar surplus, it is necessary to export corresponding quantities of sugar to third countries; ... there should, therefore, be provision for a suitable production levy on isoglucose to contribute to export costs" (seventh recital).

The system for production levies for isoglucose is laid down by Articles 8 and 9 of the regulation and applies to periods corresponding to the sugar marketing years 1977/78 and 1978/79.

By Article 9 the amount of the production levy is, per 100 kg of dry matter, equal to the amount of the production levy for sugar provided for in Article 27 of Regulation (EEC) No 3330/74 of the Council of 19 December 1974 (Official Journal 1974, L 359, p. 1), the basic sugar regulation, for the same period to which the latter amount applies.

For the period from 1 July 1977 to 30 June 1978, however, the amount of the production levy may not exceed five units of account per 100 kg of dry matter. The latter amount is to apply when the amount of the production levy provided for in Article 27 of Regulation No 3330/74 exceeds five units of account per 100 kg white sugar for the same period.

Article 9 (3) provides that detailed rules for the application of the provisions concerning the production levy are to be adopted in accordance with the Management Committee procedure.

These detailed rules formed the subject of Commission Regulation (EEC) No 1468/77 of 30 June 1977 laying down rules for applying the production levy on isoglucose in respect of the period 1 July 1977 to 30 June 1978 (Official Journal 1977, L 162, p. 7).

Council Regulation (EEC) No 1110/77 of 17 May 1977 (Official Journal 1977, L 134) provides *inter alia* for the exclusion of isoglucose from the field of application of Regulation (EEC) No 3330/74.

3. The applications

(a) In Cases 116/77 and 143/77

G. R. Amylum N.V. on 29 September 1977 and Koninklijke Scholten-Honig N.V. on 21 November 1977 commenced proceedings against the Council and the Commission seeking compensation for the damage which they claim to result for them from the entry into force of Council Regulation No 1111/77 and Commission Regulation No 1468/77.

(b) In Case 124/77

Tunnel Refineries Limited commenced proceedings on 18 October 1977 against the Council and the Commission seeking compensation for the damage which it claims to result for it from Council Regulation No 1111/77.

By an order of 2 December 1977 the Court decided to join these cases for the purposes of the procedure.

By an application lodged at the Court on 16 February 1978, the Syndicat National des Fabricants de Sucre de France (National Union of Sugar Manufacturers of France), the Union Syndicale des Producteurs de Sucre et de Rhum de l'Île de Réunion (Union of Sugar and Rum Producers of the Island of Réunion) and the Syndicat Général des Producteurs de Sucre et de Rhum des Antilles Françaises (General Union of Sugar and Rum Producers of the French West Indies) sought leave to intervene in these cases in support of the defendants' conclusions.

By an order of 12 April 1978 the Court dismissed the application for leave to intervene.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure after the defendants had been requested to answer certain questions (which are set out under heading IV below). At this stage, the oral procedure is confined to the question of liability on the part of the Community, reserving any questions as to the causation of the damage and the nature and scope of the damage.

II — Conclusions of the parties

1. In Case 116/77

The *applicant* claims that the Court should:

— Rule that the Community has incurred liability in respect of the adoption of Council Regulation No 1111/77 and Commission Regulation No 1468/77;

— Award the applicant, as compensation for the damage suffered, a sum provisionally set at BF 777 million;

— Order the defendants to bear the costs;

Alternatively and before giving judgment

— Appoint an expert responsible for assessing the amount of the damage suffered by the applicant as a result of the adoption of the aforementioned regulation;

— Reserve the costs in that connexion.

The Council and the Commission contend that the Court should dismiss the application as inadmissible and unfounded and order the applicant to bear the costs.

2. In Case 124/77

The *applicant* claims that the Court should order it to be compensated for the damage which it has suffered and order the defendants to bear the costs.

The *Council* contends that the application should be dismissed as inadmissible and unfounded and that the applicant should be ordered to bear the costs.

In its defence, the *Commission* contends that the application should be dismissed and that the applicant should be ordered to bear the costs. In its rejoinder, it contends that the application should be dismissed as inadmissible, or at least as unfounded.

III — Submissions and arguments of the parties

A — In Case 116/77

In its *application the applicant* states that it began production and distribution of isoglucose at Aalst, Belgium, in 1972 in a pilot factory having a capacity of 20 000 tonnes of isoglucose *per annum*. In 1975 the applicant constructed a 100 000 tonne isoglucose factory, thus bringing its total production capacity up to 120 000 tonnes of isoglucose. This represents 85 000 tonnes sugar equivalent.

The applicant states that isoglucose is offered to industry at a price 5 to 7% lower than that of sugar, which is justified *inter alia* by the disadvantages involved for a manufacturer in the simultaneous use of two raw materials. In fact, in most cases, sugar is only partially replaced by isoglucose, for various technical and practical reasons.

Until 1976/77, approximately 70% of the isoglucose manufactured by the applicant was derived from maize and approximately 30% from common wheat. The maize is imported from other Community countries, in particular France, to the extent to which it is available. The balance is imported from

non-Member countries (chiefly the United States). The applicant has adapted its manufacturing process and its unloading equipment in order to receive North Loire maize sent by complete train-loads. These investments received aid from the European Agricultural Guidance and Guarantee Fund (EAGGF) (Commission Decision COM (73) 400 def/00053 of 6 June 1973) in the amount of BF 86 million. The applicant obtains the wheat flour from Belgian flour mills, and quantities of gluten are returned to the flour mills, which can use it to reduce the quantities of North American wheat, of high gluten content, which they add to the Belgian or French wheat of bread-making quality used by them.

The applicant challenges the system of production levies on isoglucose which was introduced by Articles 8 and 9 of Council Regulation No 1111/77 and which, in the applicant's submission, unjustly penalizes it as an isoglucose manufacturer in favour of sugar producers. The consequences of that legislation are so catastrophic for the applicant that they will inescapably lead to the closure of its isoglucose production unit.

The applicant acknowledges that the contested measures are measures of economic policy which imply a certain amount of discretion on the part of the institutions which adopted them. Consequently, according to well-established case-law of the Court of Justice, it is incumbent upon it to show that a serious breach of a superior rule of law for the protection of the individual has occurred.

It is also incumbent on the applicant to prove that it has actually suffered damage, to assess the amount thereof and to prove the connexion between that damage and the wrongful act committed by the Community authorities in adopting the contested legislation.

— Serious breach of a superior rule of law for the protection of the individual

In the applicant's submission, the rules on production levies on isoglucose laid down in the disputed regulations violate the following principles of Community law:

— The prohibition on any discrimination between producers within the Community (second subparagraph of Article 40 (3) of the Treaty);

— The obligation to comply with the objectives laid down in Article 39 (1) of the Treaty;

— Observance of fundamental rights, in particular the right of freedom to pursue an industrial or commercial activity;

— Observance of the principle of proportionality.

1. Violation of the principle of non-discrimination

The applicant argues that if the levy system applying to the manufacture of sugar is carefully compared with that laid down by Regulation No 1111/77 for isoglucose, it is found that, far from being confined to compensating for an alleged economic advantage by providing for a contribution by isoglucose to export costs, Regulation No 1111/77 heavily penalizes isoglucose production in comparison with that of sugar, to the point of making the former completely uneconomic. In fact:

(a) The production levy on sugar is due only on such quantities as are included in Quota B, that is such quantities as exceed the basic quota (Quota A) of the undertaking concerned but do not exceed the maximum quota (Quota A + Quota B) of that undertaking (Articles

24 and 25 of Regulation No 3330/74). The maximum quota amounts to 135% of the basic quota (Article 5 of Council Regulation (EEC) No 1112/77 of 17 May 1977, Official Journal 1977, L 134, p. 9). It follows that the levy is due at most only on $^{35}/_{135}$, or slightly less than 26%, of the total production within the maximum quota.

On the other hand, the isoglucose levy is due on all the quantities produced. Consequently, even if it is limited to five units of account per 100 kg, the isoglucose levy is much more onerous for a manufacturer than the sugar levy.

That discrimination appears even greater if account is taken of the fact that it is rare for manufacturers to exhaust their maximum quota. As emerges from the table (in an appendix to the application) taken from the publication "Les Industries Sucrières de la CEE" (The Sugar Industries of the EEC), DAFSA-Analyse, from 1971 to 1976 Quota B varied between 12.5% and 19.8% of the basic quota. Thus the real impact of the sugar levy is not as great as it would appear to be on the basis of the maximum amount of Quota B.

(b) Under Article 4 (2) of Council Regulation No 1113/77 of 17 May 1977 (Official Journal 1977, L 134, p. 11) the minimum price for beet outside the basic quotas was fixed at 70% of the minimum price for beet. If the value of the beet is expressed in terms of the value of the sugar obtained from it, the result is a 60% reduction in the amount of the production levy.

(c) Within the limit of the maximum quota, a sugar manufacturer is guaranteed disposal of his goods at the intervention price. No similar guarantee exists for isoglucose.

The applicant gives sample figures to show that although the maximum amount of the levy borne by a sugar producer is 2.55 units of account per 100 kg of sugar produced, the *actual* amount borne by him on the basis of the quantity of sugar produced in the Community in the marketing year 1976/77 is 0.49 units of account per 100 kg of sugar produced.

The actual amount of the production levy borne by an isoglucose manufacturer is thus at least five times higher than the maximum amount for which a sugar manufacturer is liable. On the basis of the results of the last sugar marketing year, the amount is more than 25 times higher.

Therefore it is clear that the levy on isoglucose does not stop at establishing equilibrium between that product and sugar as regards contribution to the costs of exporting sugar but actually penalizes production of isoglucose. Nor can such penalization be justified by an undue advantage allegedly enjoyed by isoglucose over sugar. Since refunds on the production of starch used in the manufacture of isoglucose were abolished by Council Regulation No 1862/76 of 27 July 1976 (Official Journal 1976, L 206, p. 3), there has no longer been any difference in the conditions of competition regarding raw materials between the production of isoglucose and the production of sugar.

2. The discrimination against isoglucose producers as compared with sugar producers is contrary to the objectives set out in Article 39 of the Treaty

The applicant argues that even if the objective of the contested legislation was, contrary to what appears in the

statement of the reasons on which Regulation No 1111/77 is based, to protect sugar beet growers and sugar manufacturers from competition by isoglucose, discrimination in favour of the latter to the detriment of isoglucose producers is contrary to each of the objectives of the common agricultural policy as stated in Article 39 (1) of the Treaty. In fact:

(a) The effect of such discrimination is not to increase the productivity of agriculture by fostering technical progress. Quite on the contrary, the technological advance achieved by the isoglucose producers risks being lost for ever if those undertakings have to cease their production of isoglucose.

(b) The tax burden imposed does not contribute to improving the standard of living of the agricultural population. In fact, the applicant has always striven to produce isoglucose from Community cereals to the extent to which they were available. Furthermore, if Regulation No 1111/77 indirectly protects sugar beet growers, it is important to point out that such protection is afforded at the expense of Community producers of wheat and maize.

(c) The discrimination to which isoglucose is subject runs counter to the objective of stabilization of markets. In fact, isoglucose manufacturers contribute to the stabilization of markets as they shelter the markets from price fluctuations which might result from circumstances affecting the production of the raw materials used in the manufacture of sugar, such as a bad harvest or a natural disaster.

(d) The discrimination against isoglucose also hinders the pursuit of the objective of ensuring the availability of supplies, as the isoglucose producers ensure greater diversification, and hence greater security, of supplies.

(e) The isoglucose levy increases the production cost of that product, to the detriment of the European consumer.

Therefore the Commission and the Council have taken *no* account of the objectives set out in Article 39.

3. Infringement of the right to the free exercise of an industrial activity

The applicant states that prior to the adoption of Regulation No 1111/77 it had drawn the attention of the Commission to the impossible situation which would confront it if the regulation were adopted. The applicant adds that the Commission's Directorate-General for Internal Market and Industrial Affairs sent two inspectors to the applicant's registered office in order to ascertain the production cost of isoglucose.

The applicant states that the study carried out by the officials concerned in January 1977 led to the conclusion *inter alia* that the application to isoglucose of a levy higher than 12% of the intervention price for white sugar (34.87 units of account per 100 kg) would inevitably force it off the market as from 1 August 1977 and that therefore the application of the production levy provided for in Article 27 of Regulation No 3330/74 (amounting to 30%) would not be economically acceptable.

The production levy provided for by Article 9 of Regulation No 1111/77 is in principle the same as that provided for in Article 27 of Regulation No 3330/74. Even if account is taken of the fact that for the year 1977/78 the levy is limited to five units of account, that still represents 15.2% of the intervention price (which was in fact fixed at 32.83 units of account per 100 kg by Council

Regulation No 1112/77). Even limited in this way, the application of the production levy on isoglucose must inevitably force that product off the market, according to the opinion of the Directorate-General for Internal Market and Industrial Affairs of the Commission itself.

In its judgment in Case 4/73 *Nold* [1974] ECR 491, the Court acknowledged that the guarantee of the right of freedom to pursue commercial and other business activities is one of the fundamental rights of which it will ensure the observance. The infringement of the applicant's fundamental right results from the fact that it has been subjected to a levy the real amount of which per unit produced is at least five times greater than that applying to the manufacture of sugar.

4. Violation of the principle of proportionality

If the objective of the Council and the Commission in adopting Regulation No 1111/77 was to put manufacturers of sugar and manufacturers of isoglucose on the same footing in relation to the costs resulting from surpluses, it is clear, in the applicant's submission, that the measure adopted is excessive in relation to the aim pursued. In fact it would have been sufficient to subject isoglucose production to a levy the real amount of which was equivalent to that of the levy on sugar production.

Even if the objective pursued was to protect sugar production against isoglucose, the threat by isoglucose to the outlets for sugar did not justify the adoption of such a protectionist measure. In fact, isoglucose can be substituted only for liquid sugar. The Commission has stated that the quantities of saccharose marketed in the form of liquid sugar at present represent 700 000 tonnes per year (answer to written question No 803/76 by Mr Martens, Official Journal C 84 of 4 April 1977, p. 12). The total consumption of sugar in the Community amounts to some 10 million tonnes per year. Therefore liquid sugar represents only 7% of that total market.

— Assessment of the damage

The applicant states that the entry into force of the contested legislation will force it to terminate its activities. It states that it has invested BF 257 million in the construction of its isoglucose production unit.

The applicant states that, in addition, a large part of the first-stage plant will cease to be of any use under normal conditions of profitability. This head of damage may be assessed at BF 500 million.

Taking into account the considerable investments made by it, the difficulties involved in reconverting them to other activities and the compensation which will have to be paid to staff in years to come, the total damage suffered by the applicant may be provisionally assessed at BF 777 million. Although that damage has not yet actually occurred, it is sufficiently imminent and foreseeable with sufficient certainty to be able to found a claim for compensation (cf. Joined Cases 56 and 60/74, *K. Kampffmeyer and Others* v *Council and Commission of the European Communities* [1976] ECR 711; Case 44/76 *Milch-, Fett- und Eier-Kontor GmbH* v *Council and Commission of the European Communities* [1977] ECR 393).

— Causal connexion between the wrongful legislation and the damage suffered

The applicant submits that it is patent that if the contested legislation had not been adopted, it could have continued its business normally.

In its *defence* the *Commission* makes *inter alia* the following observations:

Facts

Economic context of the dispute

According to the most recent data (November 1977) at the Commission's disposal, the total production of white sugar in the Community for the sugar marketing year 1977/78 amounts to *11 086 000 tonnes.* The Commission contends that in order to obtain a clear view of the supply of sugar on the Community market it is necessary to deduct from the total production mentioned all amounts of sugar produced in excess of the maximum quota (known as "C" sugar, estimated at 600 000 tonnes for 1977/78), which cannot be marketed within the EEC, and on the other hand to add thereto the 1 305 000 tonnes allocated in the same year as preferential imports from the African, Caribbean and Pacific States pursuant to Protocol No 3 to the Lomé Convention. On the assumption that *internal consumption* will amount to *9 310 000 tonnes,* there is thus a *surplus of more than 2.5 million tonnes* available for export to third countries.

As regards isoglucose, the Commission briefly sets out the properties and uses of the product and states that the estimated capacity for isoglucose production within the Community at the end of 1976 was approximately 150 000 tonnes dry matter, and according to the projects under way 400 000 tonnes by the end of 1977 and at least 700 000 tonnes in 1980.

In conclusion, the Commission emphasizes *inter alia* the following points which it considers particularly important for the rest of the discussion:

— The potential market for isoglucose is not limited to the so-called liquid sugar market, for the simple reason that that market does not exist as such: in fact many consumers prefer to buy sugar in the solid state and dissolve it themselves, in view of the difficulties of storing saccharose syrups. Thus the Commission considers that a more accurate estimate of the potential uses for isoglucose is 30% of the sugar market, that is 3 million tonnes.

— Finally, because isoglucose is in direct competition with saccharose syrups, its market price tends to align itself on the market price for sugar, that is to say in fact on the intervention price for sugar.

The legislative context

The Commission emphasizes the scope and significance of two component parts of the common organization of the market in sugar, namely the quota system and the production levy.

(i) *The quota system* consists on the one hand of a form of support for sugar producers situated in the regions least suited to the cultivation of sugar beet (A Quota) and on the other hand of a means of encouraging regional specialization through the B Quota which enables the more competitive Community producers to increase their production beyond the basic quota under price conditions less favourable than the basic price. If such a system of quotas had not been introduced to limit the guarantee of prices and disposal — with all its consequences on production — it

is generally accepted that sugar prices on the Community market would have been *15% lower* than the prices which have been fixed since the existence of the common organization. The Commission contends that this difference of 15% between the common prices which have been able to prevail owing to the quota system and the free market price which would have prevailed in the absence of the said system is strictly speaking the economic advantage which sugar producers enjoy in return for the limitation on the guarantee of prices and disposal which has been imposed on their production.

(ii) Being a function of the costs resulting for the Community from sugar surpluses on the market, the *production levy* has the role of discouraging production of B sugar (for the less efficient producers) and ultimately of controlling Community sugar production.

The Commission contends that, as regards the system to be applied to *isoglucose* production, the Community had a choice between three possibilities:

— To do nothing and thus to allow "wild" competition to develop freely between a new product springing from advanced technology and an old product subject to the constraints of a particularly complex market organization;

— To lay down a scheme identical in every respect to the one existing for sugar;

— Finally, without prejudice to the future, to adopt provisional measures designed to introduce fair conditions of competition for both products.

The Community chose the third solution. In fact, the essential feature of the "common measures" adopted by the Council in Regulation No 1111/77 is the alignment until 30 June 1979 of all isoglucose production on the levy system existing for B sugar. A transitional ceiling of five units of account per 100 kg has been imposed on the amount of the "isoglucose" levy for the first year of production, whereas for the same period the "sugar" levy was fixed at 9.85 units of account per 100 kg (cf. Article 6 (1) of Regulation No 1113/77). Commission Regulation No 1468/77 of 30 June 1977 laying down rules for applying the production levy on isoglucose until 30 June 1978 for its part provides for the same advance payment (four units of account per 100 kg) as that demanded from sugar manufacturers, payable within the same period (on average five months after the beginning of production in each case).

Law

The admissibility of the application

The Commission contends that one of the necessary and essential requirements for any non-contractual liability *even to exist* on the Community's part under the second paragraph of Article 215 of the EEC Treaty is not fulfilled in the present case: *namely the requirement that the damage alleged must be certain and direct.*

1. Lack of certainty of the damage alleged

The Commission points out that the applicant invokes only *future damage* which has not yet taken place and "provisionally" assesses the total amount of the damage at BF 777 million. Therefore the question which arises is whether that future damage gives rise to a present

right to compensation or whether it cannot be relied upon in the framework of an action for non-contractual liability as it is only potential damage.

On this point the Commission refers to the judgments of the Court in Joined Cases 56 to 60/74 *(Kampffmeyer and Others* v *Commission and Council)* and in Case 44/76 *(Milch-, Fett- und Eier-Kontor GmbH* v *Commission and Council).* In those two cases, the Court held that "Article 215 of the Treaty does not prevent the Court from being asked to declare the Community liable for imminent damage foreseeable with sufficient certainty even if the damage cannot yet be precisely assessed" (paragraph 6 of the Decision in Joined Cases 56 to 60/74; paragraph 8 of the Decision in Case 44/76); specifying, in Joined Cases 56 to 60/74, that "to prevent even greater damage it may prove necessary to bring the matter before the Court as soon as the cause of damage is certain. This finding is confirmed by the rules in force in the legal systems of the Member States, the majority, if not all, of which recognize an action for declaration of liability based on future damage which is sufficiently certain" (second and third subparagraphs of paragraph 6 of the Decision).

Distinguishing between damage in the sense of "dommage" and damage in the sense of "préjudice", the Commission argues that when the Court held that an action for compensation for future damage ("préjudice") is admissible "as soon as the cause of damage ('préjudice') is certain", the Court was referring to cases in which the material fact of the damage ("dommage") already existed when the application was examined, if not when it was brought, and therefore the only question arising was the quantification of the said damage ("dommage").

The Commission analyses the fundamental differences which, in its contention, exist between the situations underlying the two cases cited and the present case, and summarizes its position on the question of the certainty of the damage invoked by the applicant as follows:

The damage ("dommage") invoked has not even begun to be realized; therefore it cannot in itself be the cause of future damage ("préjudice").

At all events, the alleged damage ("préjudice") depends in reality (if the applicant's description of it is accepted) upon a group of factors bound up with a whole economic and social situation which is in constant evolution. Therefore it appears that such damage can only be described in law as hypothetical, that is to say *potential.*

2. Lack of directness of the damage

The Commission examines from two points of view the question of the "*immediate* connexion between the contested regulation and the damage suffered" which the applicant invokes.

The Commission argues that from the point of view of the theory of *adequate causation,* which in its contentive amounts to assessing the *normal* and *ordinary character* of the antecedents of the damage, it is hard to see how the applicant can prove that the "normal consequence" inherent in the imposition

of a modest levy is the closing down of its production units and the laying-off of its staff.

From the point of view of the theory of *"causa proxima"*, in its modern form the absence of any *intervening event* breaking the chain of causation between the fact or event giving rise to liability and the damage invoked, it is even more difficult to conceive that a decision to give up isoglucose production taken by the applicant, whose activity is subject to a general economic context, is not conditioned by any factor other than the contested levy.

On this point, the Commission concludes that, on any view of causality, the causal connexion pleaded by the applicant between its alleged damage and the Community legislation at issue is lacking any directness. Furthermore, the reasons given to support that ground of complaint are insufficient for the purposes of Article 39 (1) (c) of the Rules of Procedure of the Court, and for that reason alone make the application inadmissible.

For all these reasons, the Commission contends that the application in the present case should be declared inadmissible for lack of any certainty or directness in the damage pleaded. Should the Court choose to consider the substance of the question, the Commission persists in its arguments and concludes that the application should at least be dismissed as unfounded, for the same reasons.

The substance of the question

1. Disregard of the objectives laid down in Article 39 (1) of the Treaty

The Commission argues that those objectives cannot be described as "superior rules of law for the protection of the individual". Indeed, Article 39 is a *rule as to jurisdiction*, defining on the one hand the areas covered by the common agricultural policy (material jurisdiction) and on the other hand the authorities — Community or Member States — which have to act within the framework of the common agricultural policy (personal jurisdiction).

Furthermore, as is acknowledged by established case-law (see in particular the judgment of the Court of 13 March 1968 in Case 5/67 Beus [1968] ECR 83), it is for the Community legislature to choose, within the framework of its discretion in matters of economic policy, which of those objectives may take precedence over the others in the case of partial incompatibility between them.

In the present case, the Commission merely observes that the common measures adopted for isoglucose are essentially designed to stabilize the market in sugar which at the present time has a large surplus.

2. Violation of the fundamental right of freedom to pursue an economic activity

At this point in its defence the Commission proposes to examine this question under the heading of the principle of proportionality.

3. Violation of the principle of non-discrimination embodied in the second subparagraph of Article 40 (3) of the Treaty

The Commission contends that the complaint of discrimination, taken as meaning treatment of identical or at least comparable situations in a different way not justified by objective criteria, requires the terms of the comparison themselves to be defined beforehand. In that connexion, the Commission argues in particular that if the comparison is to be made between things which are economically comparable, the general and purely quantitative approach of the applicant should be abandoned in order to examine the real situation of the two sectors, sugar and isoglucose.

By means of the following sample figures, the Commission seeks to show that there is no discrimination between a producer of isoglucose and a producer of sugar in equally efficient conditions of production.

To take the example of a sugar undertaking whose production of C sugar amounted to 87.7% of its production within its basic quota (a case which actually occurred in 1976/77 and which is likely to recur in 1977/78) the average return on sugar is as follows:

— A Production: 100
— B Production: 35
— C Production: 87.7
Total production: 222.7

— Intervention price: 34.60 u.a. per 100 kg
— Production levy (sugar year 1977/78): 9.85 u.a. per 100 kg
— Price of B sugar: 34.60 — 9.85 = 24.75 u.a. per 100 kg
— Price of C sugar: ± 10 u.a. per 100 kg
(average forecast for sugar year 1977/1978)

Return on sugar

100	× 34.60	=	3 460
35	× 24.75	=	866.25
87.7	× 10	=	877
			5 203.25

Average price for the producer

$\frac{5\,203.25}{222.7}$ = 23.36 u.a. per 100 kg

Difference 34.60 — 23.36 = 11.24 u.a. per 100 kg.

Thus the difference of *11.24 u.a. per 100 kg* represents *32.5% of the intervention price* guaranteed for A sugar, whereas the isoglucose levy of *5 u.a. per 100 kg* (sugar year 1977/78) represents only 14.45% of that price.

4. Violation of the principle of proportionality

The Commission recalls the two objectives of the production levy on isoglucose, namely: to make isoglucose producers bear part of the extra costs resulting for the Community from the arrival of the new product on the market; to control the production of isoglucose by reference to the production of sugar and to the availability of market outlets.

As regards the *method used* to achieve those objectives, the Commission contends that the present amount of the said levy of five units of account per 100 kg represents only 14.45% of the actual intervention price guaranteed for A sugar. Therefore such an amount is not "disproportionate" to the price advantage of 15% which isoglucose producers enjoy owing to the existence of the quota system in the sugar sector. In fact it is not disputed that the price of isoglucose tends to align itself on the guaranteed price in the sugar market. Finally, the application of the isoglucose levy has been limited to two years, and moreover its amount has been transitionally limited to a maximum amount of five units of account per 100 kg.

B — In Case 124/77

The *applicant* states in its *application* that it has invested a sum of £8 million in facilities for the production of isoglucose at its existing starch production premises in Greenwich. Isoglucose production was expected to start in November 1977. It was envisaged that the starch used in those facilities would be produced from maize imported from outside the EEC, but the facilities could equally be used for processing starch derived from Community products.

Owing to the introduction of the production levy on isoglucose by Regulation No 1111/77, the applicant is compelled to produce isoglucose at a loss for the coming twelve months and to make a further outlay of some £500 000

in order to provide other outlets for the starch to be used for isoglucose production. The applicant submits that Regulation No 1111/77 caused it damage, and that such damage was caused unlawfully, on the following grounds:

Firstly, the regulation violated the principle of proportionality in that it imposed a wholly unfair burden on the manufacturers of isoglucose in the interests of manufacture of sugar. Indeed, the isoglucose levy is wholly disproportionate and excessive both in relation to the comparative burden on sugar producers and in relation to the object of the measure in question. The object of the levy is stated, in the preamble to the regulation, to be "to contribute to export costs". However, the Community authorities have made no attempt, so far as the applicant is aware, to impose any corresponding burden on sugar producers, except in the form of the B Quota levy system which itself embodies a serious discrimination against producers of isoglucose.

Secondly, the regulation contained no provisions, and no provisions have been adopted in implementation of the regulation, to protect the legitimate expectations of the applicant, who had made investment decisions in reliance upon a Community policy which had been consistently followed over a period of years.

Thirdly, the regulation infringes the Treaty in that its provisions either fail to meet or are contrary to one or all of the objectives of the common agricultural policy as set out in Article 39 of the Treaty. In particular, the regulation has the opposite effect to that of ensuring the availability of supplies (Article 39 (1) (d) of the Treaty). Although there is at present an artificially-generated surplus of sugar in the Community, it is manifest that such a surplus may be a temporary phenomenon and indeed there have recently been periods of acute shortage of sugar.

Fourthly, the regulation infringes the Treaty in that it embodies a gross form of discrimination contrary of Article 40 (3) of the Treaty. While purporting to give similar treatment to isoglucose and sugar by relating the tax to the levy payable on B Quota sugar, the regulation in fact discriminates blatantly against isoglucose producers in making no allowance for the equivalent of an A Quota under which very substantial quantities of sugar can be sold at guaranteed prices. Furthermore, the production levy on sugar is payable on only a small proportion of the total production, especially if account is taken of the fact that the maximum quota is rarely filled.

Finally, the excessive and disproportionate character of the tax on isoglucose is demonstrated by the fact that its effect is to render the production of isoglucose uneconomic in relation to sugar.

Since the tax imposed on the production of isoglucose is manifestly disproportionate and excessive, the inescapable inference appears to be that the defendants sought by means of the levy to offset the real or supposed competitive advantage of isoglucose, and to this end sought to assess the production costs of isoglucose and the potential market for the product. If that inference is correct, then the defendants have manifestly misused their powers in imposing the levy.

If that inference is correct, or if, contrary to the applicant's submission, the defendants were entitled to take account of the production costs for isoglucose and the potential market for the product, then the regulation was vitiated by reason of being based upon wholly erroneous premises in the following respects:

In the first place, the applicant submits on the one hand that at the time when the Commission submitted to the Council the proposal upon which the regulation was based the Commission had no adequate information upon which to base the rate of the levy or alternatively that having such information it failed to take proper account of it, and on the other hand that both the rate proposed by the Commission and the rate fixed by the Council were decided entirely arbitrarily and without regard to the costs of the production of isoglucose. The applicant requests the Court to order the defendants to produce the figures and calculations on which the rate of the levy was initially proposed by the Commission and subsequently fixed by the Council.

Secondly, the regulation was based on a wholly erroneous assessment of the role of isoglucose and of the potential market for the product, for which again the applicant submits that the Council and the Commission are jointly responsible. The applicant requests the Court to order the defendants to produce the information available to them in these respects at the material times.

In support of these submissions the applicant relies on the following:

According to the information available to the applicant, the production capacity for isoglucose in the EEC was estimated in November 1976 to be 70 000 tonnes sugar equivalent for 1976 and 380 000 tonnes for 1977, the actual sales potential being 65% of those figures. The EEC consumption of sugar is about 10 million tonnes *per annum,* of which the consumption of liquid sugar is only about 7%. Accordingly, the threat to sugar represented by isoglucose was so small as to be negligible.

The applicant submits that the Council and the Commission were misled by figures produced on behalf of beet sugar producers which suggested that one million tonnes of isoglucose would be produced in the medium term and which also suggested that isoglucose and sugar were in many respects interchangeable in practice (see the extract from the "Rapport du Conseil d'Administration — Exercice 1976" of the Confédération Professionnelle du Sucre et de ses Dérivés, at Annex 1).

Even in the principal market, namely the soft drinks industry, isoglucose is not a complete substitute for sugar, since changes in sweetness and flavour would be apparent if it were so used. In practice, therefore, users will use up to 50% isoglucose to replace up to 50% of the sucrose normally used.

For *inter alia* the reasons set out above the applicant submits that Regulation No 1111/77 unlawfully caused damage to the applicant and constituted a sufficiently grave infringement of rules for the protection of the individual to render the defendants liable in damages to the applicant.

The damages which the applicant seeks to recover are those caused directly to the applicant as a result of the imposition of the tax on the production of isoglucose by the above-mentioned regulation, including in particular:

(1) the costs of writing off plant and of converting the remainder of the plant to other uses;

(2) the losses on production of isoglucose for the year 1977/78 and loss of profit thereafter.

The applicant states that it will give particulars of the damages in question.

In its *defence the Commission* puts forward in answer to the applicant's submissions (except those relating to damages) the same arguments as those which it put forward in its written observations submitted in Case 145/77 *(Tunnel Refineries Limited* v *Intervention Board for Agricultural Produce).*

It states that it has grave doubts on the admissibility of the application since there appear to be lacking two essential elements which are necessary before there can be any question of liability under the second paragraph of Article 215 of the Treaty: namely the certainty of the damage and the directness of the causal link between this damage and the fault alleged.

C — Defence of the Council in both cases

In its *defence the Council* sets out the considerations which in its view dominate the system introduced by Regulations No 1111/77 and No 1110/77: isoglucose is a direct substitute for sugar; sugar production is subject to severe restraint; the competitive situation and the restraint on production give isoglucose an economic advantage as it is guaranteed sales at the price of sugar; to offset this, it is fair that it should be subject like surplus sugar to the levy laid down by Regulation No 1111/77, payment of which represents its contribution to the higher cost of exporting the surpluses for which it is responsible. The Council sought a balanced solution to this problem, and did not intend to settle the problem once and for all. Indeed, Articles 8 and 9 of Regulation No 1111/77 fix the production levy on isoglucose for two years only, after which the problem is to be reconsidered.

With regard to the *damage* caused to the applicants, the Council enters an objection of inadmissibility, although not as a preliminary objection on a procedural issue under Article 91 of the Rules of Procedure of the Court, on the grounds that the damage is neither present nor certain, nor is it specific.

With regard to the *causal nexus*, that is whether damage can be attributed to the Council's measures, the Council reserves its position on the point, since it can see neither cause nor effect.

In answer to the complaint of the two applicants that Regulation No 1111/77 is not in accordance with the *objectives* of the common agricultural policy as set out in Article 39 (1) of the Treaty, the Council points out that under Regulation No 3330/74 it had given undertakings creating established rights in the sugar sector up to the middle of 1980. Whatever the supposed merits of isoglucose, the Council could not abolish the system it had brought into being. A policy of equilibrium was essential. On the basis of Article 39 the Council was entitled to adopt such a policy.

However that may be, the Council does not consider that the economic choices resulting from its application of Article 39 are in any way open to reproach.

The Council then deals with a series of objections to the fixing of the levy on isoglucose at 9.85 units of account per 100 kg (5 units of account per 100 kg for the 1977/78 marketing year) all linked to the idea that isoglucose has been *overburdened* in comparison with sugar.

As regards the first objection (which is common to both applications) that *the levy thus fixed constitutes discrimination against isoglucose in favour of sugar,* the Council observes that according to some of the arguments put forward by the isoglucose producers, the system set up by Regulation No 1111/77 discriminates against them in that, while they pay the levy at the same rate as sugar producers, they do not have the advantage of a quota system. The Council argues that that comparison is meaningless, since it is impossible to introduce a quota system into the arrangements for isoglucose.

As regards the applicants' comparison between the amount of the isoglucose levy of 9.85 units of account per 100 kg on the one hand and the sugar levy which is alleged to amount only to 0.49 units of account per 100 kg on the other hand, the Council contends that it does not have the significance which the applicants would like to see in it since it does not compare like with like.

In reality the rate of the sugar levy is by no means the same in all sugar refineries. This is due partly to the method of allocating quotas to sugar refineries and partly to the division of each undertaking's quota between the three price systems (A, B and C). Because of various circumstances, the quota system will have quite different effects from one sugar refinery to another. Thus one sugar refinery may produce not only its basic quota but also its B Quota and even some C sugar. Even if the C sugar is sold at a marginal price, it will none the less increase the total revenue of the undertaking. Although the undertaking pays the maximum production levy on its B Quota, it will still have the highest returns. Another refinery, on the other hand, may barely succeed in producing its A Quota. In that case, almost its entire production will be paid for at the A sugar price, that is to say at a higher price per kilogram manufactured than the produce of the first refinery, but the total income of the latter will be higher. Moreover, if it produces only one-third of its B Quota it will pay a lower levy but its total income will still be lower.

When comparing two sugar refineries what matters most is therefore not the rate of the sugar levy paid, whether this is calculated on the basis of total production or by some other method, but rather the total profit made after deduction of the levy on B sugar and the sale of all the sugar, some at the intervention price (A and B Quotas) and some at the world price (C sugar).

In support of its argument, the Council puts forward sample figures showing that the advantage goes to the undertaking which pays the higher levy and not the undertaking paying a lower rate.

Therefore the comparison made by the applicants between the levy rates for sugar and isoglucose is invalid.

The Council mentions that sugar manufacturers have a maximum quota made up of two tranches, namely the Quota A tranche which is guaranteed the full intervention price and the Quota B tranche which is approximately equal to

one-third of Quota A (35%) and is guaranteed only the intervention price reduced by the amount of the levy. In other words, sugar producers are guaranteed the intervention price reduced by a *quarter* of the levy (exactly $\frac{135 - 100}{135} = 26\%$). On the other hand isoglucose producers pay on all their production the *full* levy (although reduced by *half* for 1977/78). It is in this difference of treatment that the discrimination is alleged to lie.

It remains to be determined whether absolute equality of the systems is necessary. The applicants have not begun to answer any of the three questions which arise in this respect:

— Is the competition of use between the two products sufficient to ground absolute equality of systems between them?

— Is it possible now to determine once and for all the connexion between the systems when the production of isoglucose is likely to increase by 500% in the near future, which will put the problem in a new setting?

— Would equality of systems ensure the same remuneration?

It might on the contrary be claimed that since the production of isoglucose is complementary to existing sugar production it is perfectly logical that it should be subject to the constraints of that part of sugar production (B sugar) which is additional to the part judged necessary to cover the normal needs of the Community and which, because of this, benefits from all Community guarantees (A sugar) (cf. the seventh recital in the preamble to Regulation No 1111/77).

Article 39 of the Treaty states that one of the objectives of the common agricultural policy is to "stabilize markets". It therefore seems to be perfectly in conformity with the objectives of the common agricultural policy to consider isoglucose as additional sugar production and to make it bear a suitable financial contribution to cover the export costs of the excess Community sugar.

The charge of discrimination is not then valid.

The Council contends that the statement of the reasons on which Regulation No 1111/77 is based suffices as a reply to the charge of misuse of powers made by the applicant in Case 124/77. It is because isoglucose is subject to the advantages and constraints of the sugar market organization that it must contribute to the costs of this organization. Such a contribution therefore seems a normal *quid pro quo,* and the intrinsically "devious" practice of misuse of powers is thus in no sense proven.

The Council continues its arguments by asserting on the one hand that the selling price of the two products is virtually the same, the selling price of isoglucose approaching to within 2 or 3% the intervention price of sugar, and on the other hand that it has by no means been established that the cost price of isoglucose is at as high a level as that of sugar and thus that the levy which has been fixed cannot be borne by isoglucose. In connexion with the latter point, the Council mentions the principle of law that it is *for the applicant to bring forward proof of his claim,* which is moreover a principle "common to the laws of the Member States" within the meaning of Article 215 of the EEC Treaty.

Be that as it may, the prices for the current marketing years (1976/1977 and 1977/1978) being what they are and taking into account the net cost of raw materials and the considerable profits on the sale of by-products (particularly high for isoglucose) maize is more profitable than sugar beet per tonne of sugar or equivalent thereof. In particular, for 1977/1978 the amount of the isoglucose levy (five units of account per 100 kg) can quite easily be absorbed.

Thus there is nothing discriminatory or disproportionate in imposing the sugar levy on the whole production of isoglucose when sugar only pays it on the B Quota, since the levy represents a balance sought between two products and takes account of their respective cost prices. The objection that the calculation has no basis is also unfounded.

Finally in this connexion, the Council submits that any slight handicap which it might have imposed on isoglucose producers was minimal and perfectly justifiable within the framework of the common agricultural policy under which a burden can be imposed on traders in the general interest.

The Council submits that further claims are the consequence of a faulty interpretation of statistics and for that reason must likewise be dismissed.

This applies to the *special claim of proportionality* made by the applicants in both cases, to the effect that the levy on isoglucose was excessive in relation to the aim pursued. According to the applicants' submissions, since isoglucose had a production capacity of 3.5% that of sugar (namely 350 000 tonnes) in 1977 and could compete — and even then only partially — solely with liquid sugar (700 000 tonnes), there was no reason to impose the levy.

The Council contends that the flaw in this argument is that it is based on a glaring under-estimate of potential isoglucose consumption. In the Community's opinion, which is based on highly reliable studies, isoglucose could shortly reach a sales potential of as much as 33% of total sugar consumption (to be more precise the figure would lie between 19 and 33%, say 25% for the sake of argument). Potential uses, in addition to replacing the 10% (and not 7%) of total sugar production now accounted for by liquid sugar, must include replacing the solid sugar which liquid sugar users turn into a solution as the need arises and the possible addition of isoglucose to certain heated preparations. This would give a total of 25% of the market. The potential market percentage for isoglucose, which at present stands at 3.5% (1977), can thus be multiplied by seven.

To conclude, since isoglucose is still far from realizing its full sales potential and the Community was justified in wishing to establish a balance between sugar and isoglucose, the adoption at this stage of a measure designed to ensure that this balance would be achieved gradually was by no means disproportionate.

As far as the accusation of violating *fundamental rights* is concerned, the Council first points out that for the very reason that they are balanced as between the two industries, the arrangements it has introduced cannot be held to have *prohibited* any activity. Secondly, even if they did hinder one by moderating its development, that would, in the premises, have to be regarded as legitimate in the context of the options of the common agricultural policy and as

having been carried out in a sound manner, without excesses. It has to be acknowledged that, in trade in agricultural products and processed products obtained therefrom, the Treaty has resulted in free trade becoming the exception and regulation the rule. Moreover, the judgment in Case 4/73, *Nold*, recognizes, as well as the protection of the right of freedom to trade, the possibility of restricting such right, provided that the measure concerned is taken in the public interest and for purposes of general interest.

As regards the complaints of violating *legal certainty* and of *lack of any transitional measures*, the Council points out on the one hand that Regulation No 1111/77 is being applied by degrees since the amount of the levy was halved for the first marketing year, hence there is a transitional measure. On the other hand, the Council adduces the absence of any acquired rights to regulation, or rather to non-regulation, and the legitimate caution which should be shown by any business investor.

D — The replies in both Cases

— Case 116/77

Admissibility of the application

As regards the admissibility of the application, the *applicant* argues first that the damage alleged by it is both *certain and direct*. Without there being any need to prove its special character it can be evaluated forthwith.

(a) Certainty of the damage alleged

Referring to an isolated essay on legal theory, the Commission purports to draw a distinction between the concept of damage in the sense of "dommage" and that of damage in the sense of "préjudice". Subtle as that interpretation may be, it is in fact intended less to clarify the case-law of the Court of Justice whereby future damage is accepted as a valid ground for liability than to reduce the scope of a rule in respect of which the Court had not seen fit to draw such a distinction.

If the Court had wished to draw a distinction between damage in the sense of "dommage" and damage in the sense of "préjudice" — French terms which in their ordinary meaning have identical and interchangeable import — it would not have referred to the occurrence of "imminent *damage* ('dommages') foreseeable", as such damage would already have to have actually occurred if the Commission's interpretation were correct. Thus this interpretation must be rejected as being excessively restrictive and as distorting the reasoning of the Court, which used the same formula in two judgments (paragraph No 6 of the Decision in Joined Cases 56 to 60/74, *Kampffmeyer* and paragraph 8 of the Decision in Case 44/76, *Milch-, Fett- und Eier-Kontor)*. Moreover, to justify its position, the Court refers to the rules in force in the legal systems of the Member States, "the majority, if not all, of which recognize an action for a declaration of liability based on future damage ('dommage') which is sufficiently certain" (paragraph 6 of the Decision in Joined Cases 56 to 60/74, *Kampffmeyer)*. Thus the Court has not seen fit, as the Commission contends, to draw a distinction between damage in the sense of "dommage" and damage in the sense of "préjudice".

In the present case, it is clear that the conditions for future damage, in the sense decided by the Court in its case-law, to be accepted as the basis of an action in non-contractual liability are fulfilled. The obligation to pay the production levy on isoglucose at the excessive rate imposed by the legislation at issue will inevitably force the applicant to terminate its investments in that field and before long to put an end to its production activity. In that connexion, the applicant states that it is prepared to provide the Court with any evidence, including supporting figures, which may be deemed necessary.

(b) Directness of damage alleged

The applicant fails to understand how the Commission can express any doubts on this point. The Commission does not give the least indication of the "factors other than the contested levy" alleged to break the chain of causation. Once the applicant has established a *prima facie* causal connexion between Council Regulation No 1111/77 and the damage, it is for the defendants to adduce evidence of the factor alleged to break the chain of causation.

(c) Special character of the damage alleged

Liability for wrongful act or omission does not, as the Council contends, require proof of special damage. That would be the case only where special and abnormally severe damage had been suffered by an individual as the result of an administrative measure not vitiated by a wrongful act or omission. Consequently it is only where liability without fault is at issue that special and abnormally severe damage has to be proved.

Turning to the question of the *causal connexion* the applicant points out that for the administration to be held liable such a connexion must be proved between the measure contested and the damage alleged.

Referring to the theory of the *"causa proxima"*, which is generally used by administrative courts to assess causal connexion in the framework of actions for compensation, the applicant argues that the theory does not have the import which the Commission mistakenly attributes to it. In fact there is a break in the chain of causation only if an alien cause intervenes between the alleged wrongful act or omission and the damage claimed to follow from it, *inter alia* an act of the victim himself. The victim then becomes the only person responsible for the damage he has suffered. Such is not the case in this instance, as the applicant in no wise contributed to the damage it has suffered.

The applicant points out in general that if the arguments advanced by the defendants to the effect that the application is inadmissible were accepted, they would have the effect of considerably reducing the scope for individuals to bring actions in non-contractual liability before the Court of Justice. In this instance, the object of the action is precisely to obtain compensation for the damage occasioned by the application of the disputed regulations to the applicant, namely the closure of its isoglucose factory; the object is not to obtain, in the form of an award of damages, what is in reality only a reimbursement of the levies paid under those regulations.

The merits of the application

1. Disregard of the objectives laid down in Article 39 (1) of the Treaty

The applicant argues *inter alia* that even if, as the defendants contend, Regulation No 1111/77 was intended to stabilize the market in sugar, there is no reason to suppose that that objective necessarily had to be pursued at the expense of the development of a new technical process. Neither the Council nor the Commission has produced any evidence to show that any policy was envisaged other than the policy which was finally adopted to the detriment of the isoglucose producers.

In short, the applicant wonders whether the Community's intention in sacrificing the isoglucose industry is to leave the present sugar producers with a monopoly in a market which they may perhaps themselves convert to isoglucose production. In that connexion, the applicant refers to the negotiations between the Netherlands producer Centrale Suiker Maatschappij and the representative of Koninklijke Scholten-Honig which were reported in the Press. At the present time, there are grounds for thinking that certain large-scale sugar producers are showing interest in taking a hand in isoglucose production.

2. Violation of the right of freedom to pursue a business activity

The applicant points out that even if it was not the Council's intention to put an end to the applicant's activity, the contested regulation will have that effect. Observance of a right, especially a fundamental Community right, must be judged from the point of view of the effect in relation to the objective pursued.

3. Violation of the principle of non-discrimination

The applicant challenges in particular what it sees as an attempt on the part of the Commission to minimize the difference of treatment between isoglucose and sugar by arguing from isolated individual cases. Indeed the Commission put forward an example in which production of C sugar amounted to 87.7% of the production within the basic quota.

Since it is a matter of assessing whether the system introduced by Regulation No 1111/77 penalizes isoglucose producers as against sugar producers, the applicant submits that the basis should be average values. As the applicant stated in its application, from 1971 to 1976 the actual B Quota varied between 12.5 and 19.8% of the A Quota. It follows that on average a sugar producer exhausts his A Quota, then uses an amount of his B Quota equivalent to 16% of the A Quota. Using the Commission's method of calculation, that gives the following figures:

— A Sugar production:	100
— B sugar production:	16
— C sugar production:	0
Total sugar production:	116

— Intervention price: 34.60 u.a. per 100 kg
— Production levy: 9.85 u.a. per 100 kg
— Price of B sugar: 34.60 — 9.85 = 24.75 u.a. per 100 kg.

Return on sugar

100 × 34.60 =	3 460
16 × 24.75 =	396
	3 856

Average price for the producer:

$$\frac{3\,856}{116} = 33.24 \text{ u.a. per 100 kg}$$

Difference: 34.60 u.a. — 33.24 u.a. = 1.36 u.a. per 100 kg

That is to say 2.82% of the intervention price guaranteed for A sugar; whereas

the isoglucose levy of 5 units of account per 100 kg represents 14.45% of that price, that is to say more than five times more.

The applicant adds that even that calculation does not take account in particular of the fact that 60% of the burden represented by the levy on B sugar is actually passed on to sugar-beet producers.

In a supplement to its reply, the applicant states that it has evidence that the example given by the Commission is quite exceptional. The figures quoted by the Commission correspond to those which appear in the 1976 annual report of the *Béghin-Say* company concerning its subsidiary *Unisuc*. On the basis of an analysis of Béghin-Say's reports for 1975 and 1976, the applicant submits that the example put forward by the Commission proves exactly the opposite of what the Commission purports to show.

4. Violation of the principle of proportionality

The applicant refers to the Commission's statement that one of the objectives of the contested legislation is to "control the production of isoglucose" by reference to the production of sugar and to the availability of market outlets. If the real purpose of that objective is to restrain production of isoglucose in order to protect the disposal of sugar on the market, the defendants are guilty, in the applicant's submission, of misuse of powers.

Should the Court hold that it is in accordance with the Treaty deliberately to restrain production of one product in order to favour disposal of a competing product on the market, the applicant relies in the alternative on its complaint with regard to violation of the principle of proportionality.

— Case 124/77

Facts

The applicant contests the statements both of the Commission and of the Council as to the facts in many respects.

1. Isoglucose

(a) The role of isoglucose and the potential market for the product

Isoglucose is not, as the Commission states, simply a substitute for sugar, since it can be substituted *only* for liquid sugar and only up to 50%. Accordingly a reasonable estimate of the *maximum* total market for isoglucose would be 50% of the Community consumption of liquid sugar, that is 350 000 tonnes out of a total sugar consumption of 9 million tonnes.

No shred of evidence is produced by the Commission to support its estimate that the potential market in the long term for isoglucose might amount to as much as 30% of the total Community sugar market.

(b) Production costs of isoglucose

Contrary to various statements by the Commission and the Council to the effect that they lacked information on the subject, the applicant and doubtless also other manufacturers of isoglucose were at all stages prepared to co-operate with the Commission and to provide full information on their production costs. Thus for example, on 5 April 1977 the applicant sent to both the members of the Commission responsible, with copies to the relevant Commission departments, full particulars of the estimated production costs and stated that it was at the Commission's disposal for any check the Commission might wish to make of the figures supplied. The applicant annexes to its reply copies of its letters to the Commission including the following projected cost figures:

8 March 1977

Projected costs of isoglucose

(£ per tonne dry solids basis)

	£ per tonne
Cost of corn (see Note I)	139.77
Add freight to Greenwich	5.18
	144.95
Less contribution from animal feed and other non-starch output	58.15
	86.80
Common processes and handling costs	39.05
Isoglucose special process	49.16
Employee overhead	9.79
Research and general overhead (excluding interest)	4.62
Selling expenses	1.01
Distribution expenses	8.45
Total cost before interest	198.88
Selling price	208.00
Profit before interest	9.12
Less interest @ 12½ % on working capital	2.79
Return on investment of £235 per tonne (see Note II)	6.33 [1]

1 — Since the investment was planned, the withdrawal of production restitution has reduced expected profit by £13.75 per tonne

Notes

(I) At January 1977 threshold price of 142.20 u.a. per tonne excluding ACA which ends December 1977, and production restitution which ends July 1977. Calculation at £1 = 1.7556 u.a. and 1.7256 tonnes corn needed per tonne isoglucose.

(II) Based on capital of £7.4 million for production of 31 377 tonnes production of isoglucose, having excluded £3.7 million of expansion programme integral with this but costed to other output.

12 July 1977

Projected costs of isoglucose

(£ per tonne dry solids basis)

	£ per tonne
Cost of corn (see Note I)	164.35
Add freight to Greenwich	5.18
	169.53
Less contribution from animal feed and other non-starch output	62.27
	107.26
Common processes and handling costs	39.05
Isoglucose special process	49.16
Employee overhead	9.79
Research and general overhead (excluding interest)	4.62
Selling expenses	1.01
Distribution	8.45
Total cost before interest	219.34
Selling price	222.00
Profit before interest	2.66
Less interest @ 12½ % on working capital	2.79
Return on investment of £235 per tonne (see Note II)	— 0.13 [1]

1 — Since the investment was planned, the withdrawal of production restitution has reduced expected profit by £13.75 per tonne.

Notes

(I) At January 1978 threshold price of 149.3 u.a. per tonne with the MCA coefficient of 1.323 and MCA of £20.63. Calculation at £1 = 1.70463 u.a. and 1.7256 tonnes corn needed per tonne isoglucose.

(II) Based on capital of £7.4 million for production of 31 377 tonnes production of isoglucose, having excluded £3.7 million of expansion programme integral with this but costed to other output.

(III) The above figures exclude any effect of the proposed special HFGS (high fructose glucose syrup) levy.

(IV) The conversion and overhead costs are based on 1976/1977 cost levels, and have not been uplifted to take account of inflation. They would be increased by up to 16% to take account of inflation.

2. Sugar

The applicant accuses the Council and the Commission of presenting, in their defences, only a fragmentary picture of the Community sugar market and in particular of not giving details of the crucial questions which relate to the B Quota levy, on which the levy on isoglucose was based.

It argues that the information provided by the Commission together with some published statistics ("Les Industries Sucrières de la CEE" — DAFSA-Analyse) enable the applicant's charge of discrimination to be fully borne out. It appears that for the three-year period prior to the adoption of the regulation, sugar producers suffered *no* constraints whatever from the sugar system, whereas now that, according to the Commission's defence, the production levy on B Quota sugar is likely to be the full amount of 9.85 units of account, isoglucose manufacturers are required to contribute a substantial and wholly disproportionate share of the costs of the system. Moreover, any levy which might have to be paid in the current period is more than offset by the 15% higher Community price for sugar on the Commission's own figures, *even taking the B Quota in isolation,* and in fact the B quota cannot be taken in isolation. Finally, because the A Quota has (as a result of pressure from sugar producers) been fixed at an artificially and absurdly high figure, the B Quota is not generally filled; thus in 1975/1976 the B Quota production at 1 069 000 tonnes was only *one-eighth* of A Quota production at 8 529 000 tonnes.

3. Alleged justification for the levy on the production of isoglucose

Finally the applicant contests the Commission's two arguments relating to the supposed benefit to isoglucose of the guaranteed price for sugar and to the contribution to Community export costs. The applicant observes that in any event the two arguments cannot be used cumulatively.

Law

The applicant comments on certain submissions of law made by the defendants concerning in particular the following points:

1. The principle of proportionality

The applicant argues *inter alia* that if the aim of the levy was really to require isoglucose manufacturers to *pay their share* of the costs of disposing of surplus sugar, it is manifest that the burden imposed on isoglucose should have been *proportionate* to its share of the total market. Thus if the estimated total production of isoglucose was 350 000 tonnes (approximately one-third of a million tonnes) and the estimated total production of sugar was 11 million tonnes, the proportionate burden to be borne by isoglucose should have been $^1/_{33}$ or *3%* of the total burden. Hence the levy imposed is manifestly disproportionate and exorbitant.

2. Objectives of the common agricultural policy

In the applicant's submission it is for the Community sugar system to stabilize the sugar market, and the Community authorities having patently failed to stabilize that market, and having generated large surpluses at high prices, cannot legitimately seek to remedy the situation

by penalizing the production of isoglucose.

3. Damages

The sooner the illegality of the regulation is established and the levy eliminated, the less damage will be done to the applicant. Consequently the applicant has a legal obligation to introduce proceedings at an early stage in order to mitigate the damage and would be acting improperly if it waited for several years' losses to accrue before taking action.

As regards the certainty of the future damage, the applicant submits that it is already shown (see Annex I to the reply) that the result of the imposition of the levy on the production of isoglucose would be to make such production uneconomic. It should thus be apparent that as a result the applicant is obliged to phase out the production of isoglucose and will be obliged unless the regulation is repealed to write off its investment costs. The applicant is unable to see how it can be alleged to have failed to substantiate both the certainty of the damage and its direct causal nexus with the regulation challenged.

E — The Council's rejoinder relating to Joined Cases 116/77, 124/77 and 143/77

In its *rejoinder* the *Council* argues that it is because they were rash in their business actions that the applicants suffered damage. Their applications should therefore be rejected for *lack of causal nexus,* as the damage suffered, that is the economic obsolescence of their investments, was the particular result of the lack of caution with which they entered a sector covered by special rules, hoping to benefit from both the advantages of that sector (high guaranteed price) and those of the raw material used, and without taking into consideration the possibility of additional measures being taken in this sector, as they were blinded by their belief that there would be a sugar shortage and that a new outlet was assured for processed maize.

— Causal nexus

After remarking that the applicant in Case 143/77 unlike the other two applicants had submitted the first piece of evidence that there was a causal link between the alleged damage suffered and Regulation No 1111/77, the Council points out that it seems from the application lodged by the same applicant in the action for liability in Case 153/77 that the cause of the alleged damage suffered is to be found *further back than Regulation No 1111/77.* The application contains *inter alia* the following passage (p 34): *"The production of isoglucose would not have become unprofitable if the production refund had not been abolished".*

Furthermore, it now appears from the figures submitted by the applicant in Case 124/77 in Annex I to its reply in that case (in particular from the document dated 12 July 1977 and headed "Projected Costs of Isoglucose") that *a loss was made by that applicant as well on the manufacture of isoglucose as a result of abolition of the production refund,* that is as a result of Council Regulation No 1862/76 of 27 July 1976.

Be that as it may, it is the Council's opinion that the present claims for damages should be *ruled inadmissible* since the grounds adduced by the applicants do not show that *Regulation No 1111/77* was a *certain cause,* within the meaning of the case-law of the Court in Joined Cases 56 to 60/74, *of the alleged damage.*

With more specific reference to Scholten's application, the Council bases its new argument of inadmissibility on Article 42 (2) of the Rules of Procedure. The arguments put forward by this company after the lodging of the Council's defences in the present cases constitute a fresh issue within the meaning of the said article.

— Serious breach of a superior rule of law

Before replying to a number of remarks made by the applicants concerning the Council's alleged serious breach of such a superior rule of law, the Council submits *inter alia* the following observations on the "potential" production of isoglucose and on the rights acquired by virtue of Community regulations.

1. Potential production of isoglucose and the extent to which that product may be substituted for sugar

The Council observes that it is clear that isoglucose is not fully interchangeable with sugar and the share of the market occupied by household consumption cannot be supplied by isoglucose. On the other hand, the scope for substitution in all industrial uses of sugar is extensive. This leads on to the problem of liquid sugar. There are, however, two types of liquid sugar, one marketed in the liquid state and the other which, after delivery to the processor in the solid state, is added by the latter to an aqueous solution for use (certain manufacturers prepare their liquid sugar themselves using solid sugar).

It is contended that the expression "potential market" for isoglucose means the possible market or, again, the market which could possibly be secured. In this connexion, the Council provides for the purposes of the debate documentation which it has collected; it feels that it is clear from those documents that, technically speaking, there is nothing to prevent isoglucose from replacing sugar in Western Europe by 1980 to the extent of over two million tonnes and certainly at least one million tonnes (W. Grosskopf and E. Schmidt, *"Saccharose or Isoglucose"* pp. 14-17). And the Council emphasizes the turmoil that would result on the market if even only one million tonnes of isoglucose were produced.

2. The question of acquired rights to continuance of regulations

The Council finds no quarrel with the applicant's assertion that there are no acquired rights to the continued existence of regulations. However it points out that, in the context of regulations clearly laying down the conditions which traders are to enjoy during a given period, such traders enjoy, if not "acquired rights" *stricto sensu*, at least protection of their legitimate expectations in the said regulations. This is true of the interest of the sugar undertakings in the system of quotas introduced by Regulation No 3330/74.

3. Infringement of Article 39 of the Treaty

The Council defends the wisdom of its choice of certain objectives in that article in preference to others, against various criticisms made by the applicants.

4. The complaints of discrimination, disproportionality and misuse of powers

The Council challenges the argument common to the replies that the levy on A + B sugar amounts to 2.82% of its

price (in fact the intervention price) whereas the levy on isoglucose amounts to 14.45% of the corresponding price, and that these figures, being in a ratio of *1 to 5.2*, are evidence of the *discrimination* against isoglucose. In that connexion, the Council repeats in particular that before attempting to prove that the rate of the levy on their product is discriminatory, the isoglucose manufacturers should have considered whether their product is not receiving more than favourable treatment in that, thanks to the sugar arrangements, it is sold at a price determined not by market forces but by the sugar system. Since they have not made this comparison and since the two situations are *objectively* different, they cannot claim that sugar and isoglucose are two similar products which are being treated differently. In following the applicants' line of argument it is easy to overlook the fact that Regulation No 1110/77 establishes the relationship between the two levies and justifies the amount of the levy on isoglucose as laid down in Regulation No 1111/77.

The applicants will no doubt maintain that the relationship established by Regulation No 1110/77 represents a *misuse of powers* in that an uneconomic product, sugar, is being "propped up" by an economic product, isoglucose, at the expense of the latter. The Council has already rejected this argument in its various forms.

The Council considers that there is no justification for the complaint that the levy on isoglucose as compared with the levy on sugar is *disproportionate*, since the effect of Regulations Nos 1110/77 and 1111/77 is precisely to bring the growth of isoglucose production into proportion.

5. The Council considers that it has said enough on the system of Regulation No 1111/77 to dispense it from making further justification of having *violated freedom of trade and industry, or even basic liberties.*

6. Violation of legal certainty by the absence of transitional measures

The Council argues *inter alia* that Article 18 of Regulation No 1111/77 has a different purpose from that which the applicants wish to attribute to it. In fact it is a standard provision included in every change in agricultural regulations for "current contracts".

Here the situation is quite different. Regulation No 1111/77 starts out from a system legitimately established for sugar and links any expansion of isoglucose production to the difficulties which such development will provoke in the sugar system, from which, moreover, isoglucose benefits.

F — The Commission's rejoinder relating to the three cases

— Facts

In its *rejoinder*, the *Commission* deals *inter alia* with the following points:

1. Extent to which isoglucose may be substituted for sugar

The Commission maintains its position that isoglucose can be substituted for sugar in the majority of industrial uses of sugar (including crystal sugar) and that the potential market in the long term might amount to as much as 30% of total Community sugar consumption. In support of that contention, the Commission annexes to its rejoinder an

excerpt from the study by Mr Ehle: "Die Konkurrenzsituation zwischen Zucker aus Rüben und Zucker aus Mais in der Bundesrepublik Deutschland" ("The Situation regarding Competition between Beet Sugar and Sugar derived from Maize in the Federal Republic of Germany") (p. 83).

2. Production costs

The Commission confirms that at the time it submitted its proposal it did not have and still does not have figures on the actual and comparative production costs of isoglucose and liquid sugar. The figures produced by the applicant in Case 124/77 are merely estimates (of which some are particularly open to discussion) since it appears that its plant has not yet come on stream.

3. Raw materials

The Commission observes that the applicant in Case 143/77 criticizes the Commission for minimizing the importance of isoglucose for Community maize growers, but does not query the present figures produced by the Commission regarding Community supplies of maize. Moreover, shortages in production of maize and surpluses in production of sugar beet within the Community should be weighed against each other.

— Law

The Commission persists in all the arguments *as to the admissibility of the applications* put forward in its defences, while developing them in order to answer the various points made in the replies.

On the *merits of the applications,* the Commission develops its arguments in reply to the applicant's submissions, in particular on the following points:

1. Violation of the principle of non-discrimination

Concerning Case 116/77, the Commission recalls that the production of isoglucose is only one of a number of activities of the starch industry, which has many outlets for its numerous products; on the other side there is the sugar industry which is much more specialized in both its production and its outlets. An objective comparison therefore must be made at the level of the economic activities and not, in the abstract, at the level of "products".

In order to refute the applicant's assertion that sugar undertakings producing B and C sugar only constitute a minute minority in comparison with the body of sugar producers, the Commission produces annexed to its rejoinder a statistical table on the number of undertakings producing B and C sugar up to the marketing year 1977/78. It may be seen from the table that, leaving aside the first year, 1968/69, of application of the common organization, the number of undertakings producing B sugar varies between 76% and 90% of the total number of sugar undertakings, while between 5% and 44% of the undertakings produced C sugar. These figures show that, contrary to the applicant's argument, the comparison made by the Commission with a sugar undertaking producing the three kinds of sugar has a firm economic basis. The objections put forward by the applicant (in the supplement to its reply) to the calculation carried out by the Commission only go to show that the applicant does not wish to be compared with a sugar-producing competitor placed in a similar situation, that is to say recently arrived on the market and

supporting the maximum burden of the production levy.

2. *Violation of the principle of proportionality*

The Commission points out that the applicant in Case 124/77 maintains that if the aim of the levy is to require isoglucose to pay its share of the costs of disposing of surplus sugar the burden imposed on isoglucose should be proportionate to its share of the total market. The applicant calculates this proportion as 3%. Applying the applicant's own method and taking the applicant's figures for the production of isoglucose, the Commission calculates that the present share borne by isoglucose is only 2.6% of the total burden of exporting the surplus of sugar on the Community market envisaged for 1977/78. In fact, in the Commission's view, the proper approach is to compare the levy on one tonne of isoglucose with the cost of disposing of the tonne of sugar which it displaces from the Community market. At slightly more than one-fifth of the cost to Community funds, it can hardly be said that the levy is disproportionate from this point of view.

IV — Questions put by the Court

First question (to the Council and the Commission):

(a) The Council and the Commission are asked to produce the figures and calculations on which the rate of the production levy for isoglucose was initially proposed by the Commission and subsequently fixed by the Council.

(b) The Council and the Commission are asked to produce the information available to them at the material times as regards the capacity for isoglucose to be used as a substitute for sugar and the future production possibilities of isoglucose.

The Council's answer

In reply to this question the Council provides extracts from the three documents concerning isoglucose in the Commission's proposals of February 1977 (Commission proposals of 11 February 1977 on the fixing of prices for certain agricultural products and on other related measures, Vol. I; "Situation of the Agricultural Markets, 1976 Report, Part I", submitted to the Council by the Commission; proposal for a Council regulation (EEC) laying down common provisions for isoglucose).

In addition the Council submits to the Court a document dated 11 January 1977 produced by the Association Générale des Producteurs de Maïs (General Association of Maize Producers): "Observations sur les Sirops de Glucose Riches en Fructose" (Observations on High Fructose Glucose Syrups). The Council contends that this document confirms that:

— At the end of 1977 the isoglucose production capacity amounted to 400 000 tonnes;

— Plans were being studied with a view to attaining a capacity of approximately 1 000 000 tonnes by 1980; and

— The extent to which isoglucose might possibly be substituted for sugar (potential use) amounted to 2 000 000 tonnes.

The Commission's answer

(a) The Commission states that its examination of the rate of the production levy for isoglucose provided in Regulation No 1111/77 was not based

on specific calculations. The Commission approached the question in the following manner: isoglucose being a product which could be substituted for liquid sugar, it was appropriate to include it in the management of the sugar market. Given the existing forecasts of the situation of the sugar market in the Community and of the costs in the form of refunds following from exports, the Commission proposed that the production of isoglucose should be subjected to the same levy system as that existing for the production of sugar, which had the object of causing producers to share to a certain extent in the financial losses of the Community resulting from the putting of sugar on to the market. The parallelism referred to in the Commission's proposal between the rate of the levy for isoglucose and that for sugar can be explained, then, by this decision to treat in an identical fashion two competing products which were interchangeable in certain of their applications.

During the discussions in the Council the question arose whether this complete parallelism which might result, in particular, in a maximum rate of levy of 30% of the intervention price of sugar should not be tempered during a certain transitional period. It was in this context that the Council finally accepted a maximum amount of five units of account for the levy on isoglucose, this amount representing the economic advantage gained by this product from a market price for sugar higher than it would be without the limitation on production deriving from the quota system.

The Commission intended that the one year transitional period should be extended in accordance with the Commission's proposals to the Council for 1978/79, providing during this period the same figure of five units of account for the isoglucose levy.

(b) In appendices to its answer the Commission submits the relevant information in its possession at the time of the preparation of Regulation No 1111/77 as regards the capacity for isoglucose to be used as a substitute for sugar and the future production possibilities of isoglucose.

Second question (to the Council and the Commission):

Did the Council and the Commission at any time, whilst the provisions now in dispute were being drafted, examine and take into consideration the bio-chemical and hygienic properties of isoglucose as compared with traditional sugars manufactured from beet and cane?

The Council's answer

The Council states that a comparative examination, such as this question refers to, was not made by the Council at the time of the discussions leading to the adoption of Regulation No 1111/77. The Council's Agent also wonders whether what was at stake here might have been not so much a problem of market organization as a question of harmonization of legislation and possibly a matter of public health.

The Commission's answer

The Commission states that it did not take into consideration the bio-chemical and hygienic properties of isoglucose as compared with traditional sugars manufactured from beet and cane whilst the provisions now in dispute were being drafted. The Commission acted on the assumption, based on the information in its possession at the time, that isoglucose had, from the economic and commercial point of view, characteristics comparable

to those of traditional liquid sugar. By way of illustration, the Commission submits in an annex data provided by the producers of isoglucose themselves which confirm this assumption.

Third question (to the Council):

Can the Council supply the Court with other examples taken from the agriculture sector of an obligation (pecuniary or otherwise) imposed on the producers or manufacturers of a product coming under one sector of the common agricultural policy to assist producers or manufacturers of a product coming under another sector?

The Council's answer

The Council's Agent rejects the idea that Regulation No 1111/77 was designed to "assist" sugar producers by imposing a constraint on isoglucose producers. Moreover, he does not consider that the use of the expression "another sector" is an appropriate way of distinguishing isoglucose from sugar. Both products are, in his view, as a pragmatic consequence of the substitution possibilities and of Regulation No 1110/77 (Article 4), part of one vast sector, that of sweetening agents.

The Council's Agent makes the point that the agricultural systems of the Member States may be integrated by levying taxes on traders in certain products in one or all Member States for the benefit of traders in other products.

In this connexion the third question put by the Court concerns an extremely complex problem relating to the arrangements to be applied to "similar and competitive products", "interchangeable products", or, to use the words of the Court in Joined Cases 117/76 and 16/77 (eighth paragraph of the Decision) to products which "are in a comparable situation, in particular in the sense that (the one) can be substituted for (the other) in the specific use to which the latter product is traditionally put" and which must therefore be afforded equal treatment under the general principle of equality.

The Council's Agent states that it is possible to provide the Court with examples where the interdependence of a certain product with products covered by a sector of the agricultural policy has made it necessary for the Community authorities to adopt measures to maintain or re-establish a balance between products falling within this agricultural sector and similar products. Thus, the Community authorities imposed constraints on non-agricultural products, that is to say products not listed in Annex II but which in common parlance are considered to be of agricultural origin, constraints which were necessary for the smooth functioning of the common organization in question:

(i) Example: Regulation No 1696/71 of 26 July 1971 (Official Journal, English Special Edition 1971 (II), p. 634) on the common organization of the market in hops (see in particular the third recital in the preamble thereto). In fact, the smooth functioning of this market would have been jeopardized if "broadly speaking interchangeable" products with hops, namely the essence and vegetable extract of hops had not been subject to the common organization in question. In order to establish a balance between

hops and these two products, the Community authorities extended the common organization in question to these products and thus subjected their producers to the obligations flowing from this organization.

(ii) Another example: Regulation No 2783/75 of 29 October 1975 on the common system of trade for ovalbumin and lactalbumin (Official Journal L 282 of 1 November 1975) the first five recitals in the preamble to which show the absolute necessity of such links between products by reason of their competitive use, that is to say their interchangeability.

Conversely it is also possible to mention another method tending towards the same goal, by which an advantage is granted to the agricultural product so that a balance may be re-established with a similar product. In order to guarantee a balance between agricultural products (starch from cereals, potato starch etc.) and interchangeable products from the industrial sector, the Council (Regulation No 1132/74) introduced a production refund for the former. The Court considered this to be a legitimate mechanism (end of paragraph 7 and paragraphs 9 and 12 of the Decision in Case 2/77 *Hoffmann's Stärkefabriken* v *Hauptzollamt Bielefeld).*

As a third point mention might be made of the example of the case where supply difficulties in an agricultural sector led the Community authorities to tax not only the export of the agricultural product, but also certain goods resulting from the processing of the product, provided that the agricultural product in short supply made up a certain percentage of those goods. Example: Council Regulation (EEC) No 3185/74 of 17 December 1974 introducing an export charge on certain goods covered by Regulation No 1059/69 (Official Journal L 340, p. 74) (sugar content — that is to say the product in short supply — a minimum of 35 %).

In conclusion, the Council's Agent reiterates that the "agricultural intervention system" is a coherent whole made up of guarantees offered to producers, but subject to constraints imposed on those selfsame producers. It would run entirely counter to the system and to the general Community interest to wish to benefit from the guarantees whilst refusing to accept the constraints. This, however, is the position adopted by the isoglucose producers who wish to benefit from the guarantees offered to the sugar producers, without having to suffer any of the constraints imposed upon them.

Request for additional information addressed to the Commission

1. In the observations submitted by the Commission in Case 103/77 there is a reference to page 27 (French version) to a report which is being prepared on the competitive capacity of isoglucose as compared with sugar. If this investigation has already been concluded the Court would be obliged if the report could be made available to it.

2. In the reply in Case 116/77 there is a reference on page 7 (French version) to an investigation by the Commission's Directorate-General III into the costs of production of isoglucose. The Court would be glad to be informed of the results of this investigation.

3. In Case 124/77 there is a reference in the Commission's defence on page 27 (French version) to a report to be drawn up by experts on the production costs on isoglucose and sugar. If this report is yet in existence the Court would be glad to receive a copy.

4. The Commission is asked to provide detailed information with regard to the quantities of B and C sugar produced by the individual sugar producers during recent sugar marketing years (for example from 1974).

The Commission's answers

Points 1 and 3

The comparative investigation into the production costs of isoglucose on the one hand and of sugar, liquid and invert sugar on the other, referred to on page 27 (French version) of the Commission's observations in Case 103/77 is the same as that referred to at page 27 (French version) of the Commission's defence in Case 124/77.

This investigation has been entrusted by the Commission to a specialist private firm, Klynveld, Turquands, DTG & Co. (KTD). The two industries in question have accepted this firm.

Originally the Commission intended, so that it should be representative of the Community as a whole, that this investigation should be carried out in three Member States (Germany, Belgium and the United Kingdom) where there was production of isoglucose, sugar and liquid sugar. However, the "isoglucose side" in Germany and the "sugar side" in the United Kingdom were not able to agree. The investigation, then, was limited to Belgium — at the Amylum company for isoglucose and at the Tirlemont refinery for sugar.

By agreement with the Commission and the two industries KTD planned to carry out the first part of tits investigation at Amylum, the report on which was completed on 23 March 1978 and is in the form attached at Annex I, and to pursue the second part of its investigation at Tirlemont, which commenced on 10 April and should be completed during the month of May. It is further planned that the third part in which KTD gives its conclusions should be ready in mid-June. Thus at the present stage the Commission is only in possession of partial information from this investigation. It will communicate the rest of the information to the Court as soon as it is available. The Commission thinks it important to mention to the Court that it has undertaken with regard to the sugar industry to treat in a confidential manner the information acquired during the course of the investigation (see Annex II).

Point 2

The investigation into the production costs of isoglucose referred to in the reply in Case 116/77 is an analysis of accounts carried out by the Directorate-General for Industrial Affairs at Amylum (see Annex III). The Commission has not taken a position on the results of this investigation. As it emerges from the answers to the first and third requests, the Commission thought it appropriate to have a comparative investigation carried out.

Point 4

The Commission provides as Annex IV the information requested by the Court. The Commission mentions that this information has been acquired under the provisions of Regulation (EEC) No 1087/69 (Official Journal L 140 of 12 June 1969, p. 15). Article 7 of that regulation provides:

"Information communicated pursuant to the regulation is solely for the internal use of the Commission. Only those persons who, within the Commission, are responsible for the sugar market may have access to information relating to an individual factory or undertaking. Such information may not be disclosed to third parties."

Supplementary question put to the Commission

On page 26 of its defence in Case 116/77 the Commission gave an example to show that the charge imposed on an undertaking manufacturing isoglucose is equivalent to the one imposed, by way of the production levy, on a modern sugar undertaking manufacturing A, B and C sugar.

The Commission is requested to repeat this calculation for the last two sugar-marketing years taking as a basis the average production of all the modern sugar untertakings which have exhausted their B Quota and produced appreciable quantities of C sugar and taking into account the fact that the price allowed for beet-growers in respect of B and C sugar is less than that paid to them in respect of A sugar.

The Commission's answer

At page 26 of the Commission's defence in Case 116/77 the Commission put forward a calculation, carried out on the basis of the prices and levy for the 1977/78 marketing season but on the hypothesis of a production for the firm in question of the same order as that obtained during the 1976/77 sugar-marketing season since its actual production for 1977/78 was not yet known at the moment of the calculation (November 1977). In the light of the Court's question, the Commission now thinks it useful to submit for this firm the actual figures for the two most recent marketing seasons — see Annex I. These figures show that the position of the particular firm has not improved in spite of its increased quota.

Regarding the other firms for which the Court has asked the Commission to do the calculation again, the Commission thinks it necessary to emphasize that an analysis of their average production for the two most recent marketing seasons does not give a correct impression of their situation. In fact the production of C sugar in most Member States has been comparatively small, often non-existent, because of the drought which prevailed during the 1976/77 marketing season and which seriously affected yields. The average Community yield was 15 to 20% lower than that for a normal harvest.

Finally the Commission indicates to the Court that it does not know the price paid by sugar-manufacturers to producers for beet intended for C sugar since this does not derive from Community rules but is a matter for agreement between the parties. As to the price actually paid for beet intended for B sugar the Commission knows that it is often higher than the minimum price

fixed by the Community and that in certain cases the same price has been paid for all this beet as for beet intended for A sugar. For these reasons the Commission is only able to give the Court the information requested for each individual firm (15 in all) in the form of the calculation applied at page 26 of its defence in Case 116/77. These firms are distributed amongst four Member States.

V — Further procedure and related events

A — Oral procedure

At the hearing on 24 May 1978 G. R. Amylum N. V., represented by Michel Waelbroeck, of the Brussels Bar, Tunnel Refineries Ltd., represented by Francis Jacobs, Barrister, Middle Temple, London, the Council of the European Communities, represented by its Agent, Daniel Vignes, assisted by A. Brautigam and D. G. Lawrence, members of its Legal Department, and the Commission of the European Communities, represented by its Agents J. H. J. Bourgeois and R. Wainwright, assisted by H. Bronkhorst and J. Delmoly, members of its Legal Department, presented oral argument.

The Advocate General delivered his opinion at the hearing on 20 June 1978.

B — Requests submitted after the closure of the oral procedure

By letter of 8 August 1978 Tunnel Refineries Ltd., the applicant in the main action in Case 145/77 *(Tunnel Refineries Ltd.* v *Intervention Board for Agricultural Produce)* and the applicant in Case 124/77, requested the Court, in the context of Joined Cases 116, 124 and 143/77, to consider certain information to which the attention of the Court had been drawn by a letter of 7 August 1978 from G. R. Amylum N. V. relating to the price, for the sugar marketing year 1977/78, of sugar beet corresponding to C sugar.

In its judgment of 25 October 1978 in Joined Cases 103 and 145/77 *(Royal Scholten-Honig (Holdings) Ltd.* v *Intervention Board for Agricultural Produce, Tunnel Refineries Ltd.* v *Intervention Board for Agricultural Produce,* [1978] ECR 2037) the Court stated that if it were to agree to the above-mentioned request it would be necessary for it to do the same in the context of Joined Cases 116, 124 and 143/77 as well as in Cases 103 and 145/77. Having regard to the reasons given in the decision of the above-mentioned judgment the Court did not think it necessary to agree to the above-mentioned request.

On the same grounds the Court also refused to accede to a request from the Commission, contained in a letter dated 25 September 1978, under Articles 60 and 61 of the Rules of Procedure, that it should be authorized to produce to the Court the second and third parts of the comparative study of the production costs of isoglucose on the one hand and sugar, liquid sugar and invert sugar on the other, conducted by the private firm Klynveld-Turquands DTG & Co., and that the Court, if it thought it necessary, should order the re-opening of the oral procedure.

C — The Court's judgment of 25 October 1978 in Joined Cases 103 and 145/77

In its judgment of 25 October 1978 the Court, giving a preliminary ruling on questions submitted to it by the High Court of Justice, Queen's Bench Division, Commercial Court, ruled that Council Regulation No 1111/77 of 17 May 1977 was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of 5 units of account per 100 kg of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court had in fact held that the provisions of the above-mentioned regulation establishing the production levy system for isoglucose offended against the general principle of equality of which the prohibition on discrimination set out in Article 40 (3) of the Treaty was a specific expression. It had however added that its answer would leave the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

D — Resumption of the written procedure in Joined Cases 116, 124 and 143/77 and disjoinder of Case 143/77

By letter of 21 November 1978, the Court invited the applicants in the three above-mentioned cases to supplement the written procedure with a statement of observations specifying their losses and the causal connexion between those losses and the actions of the Community and giving, in the light also of the recent case-law of the Court, and in particular of the judgment of 25 May 1978 in Joined Cases 83 and 94/76 and 4, 15 and 40/77 *(Bayerische HNL Vermehrungsbetriebe GmbH & Co KG and Others* v *Council and Commission* [1978] ECR 1209) such observations as they thought appropriate on the question whether any losses were such as to be chargeable to the Community in pursuance of Article 215 of the Treaty.

Following that invitation supplementary observations were submitted by the applicants. In reply the Council and the Commission submitted supplementary written observations.

Koninklijke Scholten-Honig N. V., the applicant in Case 143/77, asked that certain data contained in the evaluation of its losses annexed to its supplementary observations should be treated as confidential and as a result that case was, by order of the Court of 7 March 1979, disjoined from Cases 116 and 124/77.

E — Re-opening of the oral procedure

The Court, after asking Tunnel Refineries Ltd. to supply supplementary information as regards the evaluation of its losses (see under VIII below) and on hearing the report of the Judge-Rapporteur and the views of the Advocate General, decided to re-open the oral procedure, limited to the question whether the Community had in principle any non-contractual liability, having regard also to the behaviour of the applicants, as regards one or more heads of the claims for damages put forward by the applicants, any question concerning the proof and detailed calculation of the quantum of any damage which might be established being if necessary deferred until a later stage in the procedure.

VI — Conclusions of the parties in Case 116/77

The applicant formally claims that the Court should:

— Rule that the Community is liable in view of the entry into force of Articles 8 and 9 of Council Regulation No 1111/77 and of Commission Regulation No 1468/77;

— Award the applicant, as compensation for the damage suffered by it at the date of lodging the claim the sum of BF 106 612 456 plus interest at 7 % until the date of actual payment;

— Reserve the applicant's right to claim full reparation for any damage which it may suffer in the event of its being obliged to close its isoglucose factory if the defendant institutions omit to draw the consequences of the judgment of the Court of 25 October 1978 as regards the applicability of the provisions set out above to the sugar years subsequent to the 1977/78 sugar year;

— Order the defendants to pay the costs.

The *Council* and the *Commission* contend that the application for damages should be dismissed as unfounded and that the applicants should be ordered to pay the costs.

VII — Summary of the observations of the parties

A — In Case 116/77

The *applicant* makes the following principal observations:

1. The damage

Whilst restricting itself to giving details of the amount of the damage suffered by it until the date of its statement arising out of the entry into force of Council Regulation No 1111/77, the applicant nevertheless states that as long as the defendant institutions have not announced their decision with regard to the consequences to be drawn from the judgment of 25 October 1978 regarding the systems to be applied to isoglucose, it must reserve its right to claim compensation for the whole of the damage resulting from any obligation incumbent upon it to close down its isoglucose production unit. The loss was evaluated in the application at BF 777 million

For the present, it has been possible to state the damage suffered arising from the entry into force of Regulation No 1111/7 as follows on the basis of the data contained in the note annexed to its statement:

(a) Direct loss of profit as a result of the replacement of sales of isoglucose by alternative sales	BF	72 72[illegible]
(b) Interest on (a)	BF	2 9[illegible]
(c) Loss of profit arising from the reduction in milling	BF	28 48[illegible]
(d) Interest on (c)	BF	2 18[illegible]
(e) Securities paid to the Société Générale de Banque	BF	18[illegible]
(f) Expenses incurred by the applicant in defending its interests against the Belgian authorities	BF	10[illegible]
Total:	BF	106 612 4[illegible]

2. The illegality of the act giving rise to the damage

The act complained of is Regulation No 1111/77. It is an act of a legislative nature involving choices of economic policy which, according to the settled case-law of the Court, does not make the Community liable, having regard to the provisions of the second paragraph of Article 215 of the Treaty, unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred (cf. for example Case 5/71, *Zuckerfabrik Schöppenstedt*, [1971] ECR 975; Joined Cases 54 to 60/76, *Compagnie Industrielle du Comté de Lohéac* v *Council and Commission* [1977] ECR 645). It is therefore important to consider whether that condition is satisfied in this case.

(1) The breach of a superior rule of law for the protection of the individual

The applicant maintains that it is entitled to rely upon the breach of such a rule of law, namely the fundamental principle of non-discrimination set out in Article 40 (3) of the Treaty, for failure to observe which the Court in its judgment of 25 October 1978 annulled Regulation No 1111/77.

(2) The "sufficiently serious" nature of the breach of the superior rule of law

(a) The applicant states that it shares the opinion expressed by Mr Advocate General Capotorti according to which "the concept of serious breach is absorbed by that of the breach of a principle of Community law or simply becomes a superfluous adjunct since it has already been specified that liability presupposes the breach of a superior rule of law which confers personal rights on individuals" (opinion in the *Bayerische HNL Vermehrungsbetriebe* case). The applicant has proved that the Community institutions have failed to observe a principle fundamental to the proper functioning of the Community so that it is necessary to conclude that it is therefore entitled to obtain compensation from the Community.

(b) However, in its opinion it may also be thought that the nature of a "sufficiently serious breach" attaches not to the nature and importance of the superior rule of law which has been breached but to the seriousness of the fault in the sense of the *obvious* and *manifest* nature thereof.

However, even in that event it is still necessary to state that the Council has *manifestly* failed to make a proper appreciation of the situation of the isoglucose producers by imposing on their production a levy the amount of which was manifestly in excess of what was necessary to recover from the isoglucose market the production and marketing constraints proper to the sugar market. In fact in its judgment of 25 October 1978 the Court, after describing the factors which have been wrongly assessed by the Council, stated that the charge imposed on the isoglucose manufacturers was "manifestly unequal" (paragraph 82). The Council therefore committed a serious fault involving the Community in liability.

(c) In the *HNL* judgment, in order to arrive at an appreciation of the manifest and serious nature of the manner in which the institution concerned had exceeded its powers, the Court considers the harmful effects suffered by the applicant. Thus it stated that "individuals

may be required ... to accept within reasonable limits certain harmful effects on their economic interests as a result of a legislative measure without being able to obtain compensation from public funds even if that measure has been declared null and void" (paragraph 6).

Whilst not considering such a restrictive interpretation as justified, the applicant declares itself ready to show that it has in fact suffered, as a result of the disputed provisions of Council Regulation No 1111/77, "harmful effects on its economic interests which exceed reasonable limits".

3. Abnormal damage

The applicant points out in particular that, contrary to the situation of the applicants in the *HNL* case, Council Regulation No 1111/77 dealt with easily identifiable undertakings, limited in number, which could be recognized without difficulty on the part of the Community. Thus the limited number of the undertakings concerned had the effect of maintaining sufficiently serious damage concentrated amongst them. Moreover, to establish the point it is sufficient to refer to the amount of the damage claimed by the applicant. The grave nature of the damage is thus beyond doubt, not only as regards the amount but also because it affects a restricted group of undertakings which may easily be distinguished individually. Furthermore, contrary to the disputed measure in the *HNL* case, the effects of which affected the applicants only indirectly, in the present case the imposition of a discriminatory charge on isoglucose production had a direct and consequently a much more noticeable incidence on the profitability of the isoglucose produced by the applicant in view of the fact the charge could not be recovered in the selling prices by reason of competition from sugar.

4. The causal connexion

According to the applicant it is clear that the cause of the damage is the direct consequence of the imposition of the isoglucose production levy laid down in Articles 8 and 9 of Regulation No 1111/77. To establish this point it is sufficient to note that as from November 1978, that is to say a short time after the effect of the abolition of the charge was felt, the applicant's business profits began to increase.

It should also be noted that the applicant took all possible steps to reduce the damage as far as possible. Thus it did everything possible to maintain its level of production, compensating for the reduction in sales of isoglucose by alternative sales even though frequently less profitable. The amount claimed by the applicant, namely BF 106 612 456, represents scarcely more than half the production levy which it would have borne during the period in question (July 1977 to October 1978) — namely BF 202 467 440 — if it had not taken steps to reduce the amount of the damage.

5. The damage suffered by the applicant (Annex I to its observations)

On this subject the applicant attaches to its observations a note with the tables annexed.

By way of introduction it states in particular that during the period from July 1977 to October 1978 inclusive the levy on isoglucose made it necessary to reduce sales of that product. In fact, owing to the production levy the direct profit margin on isoglucose had become lower than that on its marginal sales of starch and glucose. The applicant accordingly attempted to limit its loss as

far as possible by selling products other than isoglucose.

However, it was not possible to find outlets for the alternative products in the early months. In these circumstances the reduction in isoglucose production brought about a reduction in milling (normal milling being 1 050 tonnes of maize per 24 hours for 8 000 hours a year; these figures are the extrapolation of the milling carried out for the previous year). This meant that the applicant lost the profit on the isoglucose equivalent of the milling not carried out.

Not only could the applicant no longer accept new customers for isoglucose, but it had become imperative, so as to reduce its losses, to cut back the number of existing customers in proportion as outlets for alternative sales were found. It was necessary to make a selection, enforced by reasons of profitability, amongst those customers: deliveries for which the transport costs were the highest were eliminated. A zone of 350 km around the Aalst factory was established. All the customers outside that zone were abandoned. In addition, canvassing was completely stopped.

As soon as the judgment was delivered, canvassing was resumed and sales immediately increased steeply. In the applicant's view the present situation makes it appear likely that scarcely four months after the judgment maximum capacity will be reached.

Even after the applicant had succeeded in finding alternative outlets it continued to suffer a loss in view of the fact that the sales of alternative products, whilst being more profitable than sales of isoglucose subject to the levy would have been, did not make it possible to realize the same margin as would have been realized by sales of isoglucose during the same period without the levy. The result was a loss equivalent to the difference between the margin which would have been obtained on the isoglucose not sold and the margin on the sale of the alternative products.

As regards details of the calculation of the losses due to the replacement of sales of isoglucose by sales of alternative products and the reduction in milling during the first three months, the applicant puts forward in particular the following considerations.

(1) Loss of direct profit margin by reason of the replacement of sales of isoglucose by sales of alternative products

The applicant states that the loss suffered by reason of the sale of alternative products was calculated as follows. For each month of the period in question (July 1977 to October 1978) the difference between the sales prices ex factory and the direct cost of the alternative products was determined; this margin was compared with that of isoglucose. The comparative margin of unsold isoglucose is based on the average monthly margin for isoglucose sold during the same period.

The direct cost is the sum of all the expenses which are directly proportional to the number of units manufactured. It is the total of the amounts paid for the raw material (maize), the ingredients, packing and energy. The following are not included in the direct cost: wages, costs of upkeep and repairs, selling costs,

amounts written off and any general expenses.

The direct cost of isoglucose is the direct cost calculated by Klynveld, Turquands, DTG & Co. at the request of the Commission according to the report of 23 March 1978 (Report on a Cost Price Calculation of Isoglucose, issued to the European Economic Community, Division III/A/3). This document is part of the file submitted to the Court. The direct cost and the selling prices of alternative products and the selling prices for isoglucose were calculated on the basis of the applicant's accounting documents.

The applicant supplies explanatory notes on the tables of figures annexed in relation to the following matters:

— Table 1: Monthly direct cost of isoglucose calculated on the basis of the Klynveld Turquands DTG report.

— Table 2: Selling prices of isoglucose and margin.

— Table 3: Selling price and direct margin of alternative products.

— Table 4: Difference in margin between alternative products and isoglucose.

— Table 5: List of alternative sales.

— Table 6: Sales potential abandoned.

On the basis of the data contained in those tables, the applicant claims that during the period from July 1977 to October 1978 inclusive 25 473 tonnes of alternative products (starch and glucose) were sold in place of the isoglucose which the applicant would have sold but for the production levy (Table 5).

The applicant had to abandon during that period 24 500 tonnes of isoglucose (Table 6).

The difference between the margin on isoglucose not sold and the margin obtained on the alternative products sold is BF 72 723 229. Interest on this amount from 30 October 1978 has been calculated at BF 2 936 798.

The total loss due to alternative sales which were less productive is BF 75 660 827 (Table 4).

(2) Loss of margin owing to the reduction in grinding

The loss arising from reduction in grinding following the lesser production of isoglucose is calculated by comparison with the grinding effected during the period in question and normal grinding (1 050 tonnes of maize per 24 hours for 8 000 hours a year of programmed grinding).

The applicant's average grinding for the 12-month period preceding the levy was 1 063 tonnes per 24 hours. From November 1977, it was possible to recommence grinding at the level of 1 050 tonnes per 24 hours or more by the sale of alternative products.

The loss suffered is calculated by the product of the tonnage not ground, multiplied by the maize/isoglucose conversion factor, multiplied by the margin not realized set out in Table 2.

The grinding loss took place in the months of August to October 1977.

The applicant gives a detailed calculation of the following total losses due to reduction in grinding:

Isoglucose margin lost:	BF 28 482 539
Interest (7 % until 31 October 1978):	FB 2 187 182
Total loss:	FB 30 669 721

— Commission's observations

In the introduction to its observations on this matter the *Commission* notes in particular that it submitted to the Council on 12 March 1979 a proposal for a regulation amending Regulation No 1111/77 (Annex II). It continues its observations under the following headings:

1. Act giving rise to the damage

As regards the *act giving rise* to the alleged damage, the Commission maintains that the invalidity of Regulation No 1111/77 and more particularly the infringement of certain rules which compelled the Court to state that the regulation was invalid, is not sufficient for the Community to incur liability under Article 215 of the Treaty.

In addition it is necessary, according to the Court's settled case-law (most recently the judgment in *HNL* of 25 May 1978) that there should be "a legislative measure which involves choices of economic policy" — a description acknowledged by the applicants — and there must have been "a sufficiently serious breach of a superior rule of law for the protection of the individual". Furthermore, in so far as the concept of "a sufficiently serious breach" may not take account of the conduct of the Community, that breach must be blameworthy. In other words three or, if necessary, four requirements must be met: a breach of a superior rule of law, the rule in question must have been designed for the protection of individuals and finally the breach must have been sufficiently serious and, where necessary, must amount to a fault.

The Commission acknowledges that the rule of law which led the Court to rule that Regulation No 1111/77 was invalid — namely "the general principle of equality of which the prohibition on discrimination set out in Article 40 (3) of the Treaty is a specific expression" (judgment of 25 October 1978, paragraph 83) — is a superior rule of law which is intended to protect individuals.

The Commission denies, however, that a "sufficiently serious breach" has occurred. In this respect it refers to the *HNL* judgment in which the Court expressed the view that in order to determine the conditions which must be met by such a breach it is necessary to take into consideration the principles in the Member States governing liability for damage caused by legislative measures and that it may be stated that the public authorities can only *exceptionally* and *in special circumstances* incur liability for legislative measures which are the result of choices of economic policy (para-

graph 5). Contrary to what is understood by the applicant the unlawfulness of the measure complained of does not necessarily and automatically constitute blameworthy conduct.

According to the Commission the requirements on which this situation is based in the law of the Member States also apply at Community level. The Court has taken express account of this by requiring that the breach be serious, which, in the *HNL* case resulted in the criterion of the ***manifest*** and ***grave*** disregard by the Community of the limits on the exercise of its powers (paragraph 6). Since the criterion establishes a balance between the public interest pursued by the legislative measure complained of and the economic interests of individuals, the manifest and grave nature of the disregard must of necessity be determined taking into consideration also the effects harmful to those interests, as may be clearly seen in the *HNL* judgment.

If the breach of the principle of equality established in the present case by the Court is to be the cause of the alleged damage, it must satisfy two requirements: one concerning the nature of the cause and the other the nature of the damage arising from it.

(a) The behaviour of the Community legislature

As regards the applicant's argument based on the paragraphs of the judgment of 25 October 1978 in which the Court gives as a reason for its ruling the fact that the levy is "manifestly" discriminatory, the Commission puts forward in particular the following observations.

First it claims that in that judgment the Court did not express its views on the existence of a serious breach of a superior rule of law but confined itself to establishing the objective invalidity of the regulation. Moreover, as may be seen from the "milk powder" cases (for example the judgment of 5 July 1977 in Case 114/76 *Bela Mühle* v *Grows Farm* [1977] ECR at p. 1221, paragraph 7), the manifestly disproportionate nature of the measure in question does not necessarily constitute a "sufficiently serious breach".

Moreover, as the Court stated in the "milk powder" judgment *(HNL)* of 25 May 1978: "in a legislative field such as the one in question, in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the Community does not therefore incur liability unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers" (paragraph 6).

The fact that the Community has the power to impose a levy in this case and that by putting into effect such a levy it has remained within its powers can no longer be contested after the judgment of 25 October 1978. Hence, any manifest and grave disregard of the limits to the Community's powers can only reside in the fixing of the levy. In the Commission's view, to assess the manifest nature of such a disregard it is important to take into account the whole of the conditions surrounding the fixing of the levy. The arguments which preceded the Court's judgment of 25 October 1978 showed the complexity of the situations and difficulties relating to a comparison between two industries with very different structures and the necessity to evaluate in economic terms

the effects of the rules. The error cannot therefore be described as manifest.

(b) Nature of the damage

Without prejudice to the arguments which it puts forward later with regard to the damage and the causal connexion, the Commission remarks that in order to assess the seriousness of the damage suffered by the applicants *Amylum* and *Tunnel*, and in particular the incidence of the levy on the profitability of the isoglucose produced by the applicants, one must not lose sight of the fact that that profitability itself depends on the common organization of the market in sugar.

2. *The damage and the causal connexion*

The Commission disputes the direct and abnormal nature of the details of the damage put forward by the applicant *Amylum*.

As regards the *direct* nature of the damage claimed, the Commission points out that the applicant defines as more than two-thirds of its damage the "loss of direct margin arising from the replacement of sales of isoglucose by alternative sales" and justifies this re-orientation of its commercial policy by the fact that "the direct isoglucose margin had become less than the margin on the marginal sales of starch and glucose". According to the Commission it does not appear that the imposition of the production levy was the direct and sole cause of that situation. In fact, as may be seen from the inquiry carried out by the Klynveld Turquands at the applicant's premises, the *cost price* of isoglucose, *before any levy*, amounts to BF 1 672 per 100 kg. (page 8 of the above-mentioned report), whilst the average *selling price* of isoglucose from July 1977 was BF 1 520 per 100 kg. (as may be seen from Table 2 of Annex I to the applicant's observations). It appears clearly therefore that the sale of isoglucose was not profitable even before the imposition of a production levy and that the levy therefore cannot be considered as the "sufficient cause" of that aspect of the damage.

Secondly the other principal factor in the damage claimed, namely the "loss of margin owing to the reduction in milling" cannot, for the same reasons, be considered as the direct result of the imposition of the levy.

As regards the *"abnormal"* nature of the damage alleged, the Commission points out, first, that the incidence of the levy on production costs of isoglucose can only have been relative from the point of view of the profitability of the undertaking. In any event, according to the Commission, it is for an expert inquiry to quantify that incidence in detail. In the present state of the action it seems however that since the imposition of a levy could only, at the most, have aggravated a situation which was already unprofitable, that finding should lead to excluding the abnormality of the damage failing proof to the contrary to be adduced by the applicant. Furthermore, since isoglucose production constitutes only part of the applicant's operations, a consideration of the grave and abnormal nature of any damage resulting from the levy should be conducted having regard to the whole of the applicant's operations.

Secondly it appears that the economic risks inherent in the production of isoglucose are much higher than the applicant claims. In fact, at the time at which the applicant undertook the construction of its production unit for 100 000 tonnes of isoglucose (1 April 1975), the prices for sugar on the world

market were characterized during the whole of the marketing year from 1 July 1974 to 30 June 1975 by high levels (average annual spot price for white sugar on the Paris market for 1974/75: 66.60 units of account per quintal); thus the decision to invest in this sector took place at a time when marketing prospects, on the assumption of a free market, seemed very remunerative. However, the situation on the sugar market changed in such a way that world prices settled at a considerably lower level (for example the annual average spot price in Paris for white sugar for 1977/78 was 13.55 units of account per quintal). The size of these fluctuations shows that obviously the economic risks actually incurred by the applicant *far* exceed the relative incidence of the levy on its economic operations.

B — In Case 124/77

— Applicant's observations

1. The losses

The *applicant* states, by way of preliminary observation, that the strategy adopted for sound commercial reasons to mitigate the losses which would have been caused by the isoglucose levy was primarily to divert the extra starch production to other uses.

The damages which it claims have been the subject of an independent audit, the certificates in respect of which is set out in Annex I to its observations. Its claim is made on the basis that no further unlawful measures will be taken in respect of isoglucose. Subject to that qualification, the applicant would accept this claim, which has been updated to November and December 1978, plus continuing interest, as representing its full entitlement in damages.

The applicant refers to the major investments undertaken by it with a view to permitting it to produce isoglucose and states that the introduction of the levy in July 1977 drastically affected its plans. As Annex II to its observations it sets out a chronological summary of the main events relating to its investments and to the levy, together with supporting documents.

The applicant sets out under the following headings the losses directly attributable to the isoglucose levy.

(a) Lost factory production

The introduction in July 1977 of the levy at the rate of £29.33 per tonne (to rise to £58.66 per tonne in July 1978) made the production of isoglucose uneconomic inasmuch as the return on production would be marginal. On a total costs basis it would have made a loss. Production of isoglucose was due to start in November 1977 and to reach a maximum at the level of about 1 000 tonnes a week in the summer of 1978, the summer months being the main season for sale of isoglucose, which was to be supplied principally to soft drinks manufacturers. By reason of the levy it was necessary to reduce production from the planned level of about 1 000 tonnes a week to about 250 to 300 tonnes a week. The applicant's customers were informed accordingly and made other arrangements for the supply of sweeteners for 1978. As the result of the decision to limit production of isoglucose, Tunnel was unable to use its full starch capacity

and the plant had to be shut down from time to time. The resulting loss of factory production has been estimated at £320 186. Details of loss of production and the relevant calculations are set out in Annex III.

(b) Lower alternative return

The applicant states that it was obliged to find alternative outlets for considerable quantities of starch which would have been used for the production of isoglucose. The applicant's concern was to optimize its return on the additional starch plant; however, the only immediate use which could be found for the additional starch was to produce dry starch. This involved re-entering a difficult and very competitive market, but although the return was likely to be low, it would have been higher than the return on isoglucose when account was taken of the levy on the product.

By drying starch rather than producing isoglucose, on the assumption of a nil levy but without of course taking account of the production refund which had been abolished from July 1977, the applicant lost profits which have been evaluated at £235 262. Details of the calculations are set out in Annex III.

(c) Starch stockholding costs

As a result of being compelled to re-enter the dry starch market, the applicant inevitably encountered initial difficulties in selling dry starch at its higher production levels, with the result that warehouse storage and handling costs were incurred. Tunnel is confident that it can sell its stocks in time, but has incurred continuing storage and handling costs. These costs have been evaluated at £57 376 (cf. Annex III).

(d) Higher unit cost owing to reduced isoglucose production

Since isoglucose is a product dependent upon advanced technology, in particular enzyme technology, its cost is naturally dependent upon full utilization of the plant.

As a result of the timing of the announcement of the isoglucose levy, it was necessary to reduce the production of isoglucose without its being possible to modify the plant satisfactorily to deal with the lower throughput. The plant was designed to handle 700 dry substance tonnes (1 000 commercial tonnes) a week, but because production had to be reduced to about 210 dry substance tonnes, production was inefficient and higher unit costs were incurred.

Two main sources of loss were identified: one was the waste of steam, which had to be put in at the level needed for full production; the other was the low productivity of the expensive enzyme process, because the enzyme conversion columns, in which the starch undergoes the process of conversion to fructose, could be only partly filled. These losses were evaluated at £39 548 (cf. Annex III).

(e) Subsequent alternative investments

The applicant remarks that it had been decided in September 1976 to install a dextrose spinner to make better use of its existing equipment; the starch raw material for dextrose was expected to come from a reduction in traditional

glucose production. In June 1977, however, after the announcement of the levy, it was proposed that the level of glucose production should be maintained and that part of the starch originally intended for isoglucose should be used as raw material for dextrose. In November 1977, it was decided to re-organize the factory's evaporation facilities; although other factors were also present, one of the main reasons for this was that at the expected reduced levels of isoglucose throughput it would otherwise be impossible to maintain the quality of isoglucose production at the standards agreed with customers. In October 1978 two further capital projects were approved, for further dextrose production and increased refinery conversion. Further details of these projects, together with supporting documents, are set out in Annex II.

The projects mentioned in paragraph 26 of the observations would have been unnecessary had there been no levy on isoglucose. The losses under that heading have been evaluated at £367 778 (cf. Annex III).

(f) Additional bank interest

The applicant states that it had to fund its losses under headings (a) to (e) from its normal sources of finance, principally bank loans and overdrafts. Based upon its actual borrowing record during 1978, a reasonable estimate for such interest actually paid in respect of the above losses is 12% per annum. The interest charges have been calculated down to 30 November 1978 and have been included in the total figures given above for each of the headings (a) to (e).

(g) Loss of goodwill

The applicant's decision to restrict production was obviously unpopular with customers. It consequently suffered a major loss of goodwill which it is unable to quantify at this stage.

(h) Improved purchasing terms

The applicant also considers that it has lost the opportunity to negotiate quantity discounts and rebates on some materials and services associated with isoglucose. Again, at this stage, it is unable to quantify this loss.

— Summary

The applicant estimates that its losses up to 30 November 1978 totalling £1 020 150 are made up as follows:

(a) Lost factory production:	£	320 186
(b) Lower alternative return:	£	235 262
(c) Starch stockholding costs:	£	57 376
(d) Higher unit costs:	£	39 548
(e) Subsequent alternative investments:	£	367 778
Total:	£	1 020 150

plus continuing interest from 1 December 1978.

2. *The causal connexion between those losses and the actions of the Community*

The applicant submits that the losses suffered by it were a direct consequence of the unlawful actions of the Community. Furthermore, the applicant, which could not have been expected to foresee any unlawful Community action, and on whose part there were no contributory acts, acted throughout with

proper commercial prudence and, when the levy was imposed, took every reasonable step to mitigate its losses.

Since the judgment of 25 October 1978, the applicant has been able to revert to its original plans.

3. Liability of the Community

The applicant refers in particular to the requirement laid down in paragraph 6 of the *HNL* judgment according to which the Community does not incur liability "unless the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers". By referring to that requirement the Court makes it clear that it is relevant to consider both the character of the infringement and its consequences.

(a) Character of the infringement

On the basis of the judgment of 25 October 1978 alone, the applicant submits that the infringement is sufficiently manifest to establish the Community's liability. The Court there ruled that the isoglucose levy was manifestly discriminatory on various grounds (cf. the reasoning set out in paragraphs 64 to 66 and 78 to 80). The Court concluded that the charge was "manifestly unequal" (paragraph 82). Since what is required to establish the liability of the Community is a manifest disregard of the limits on the exercise of its powers, it follows, in the applicant's submission, that that requirement also is satisfied in the present case.

In the alternative, if the Court should not consider that the manifest character of the infringement is already established by its findings on discrimination, the applicant respectfully invites the Court to consider the further violation of other rules of law for the protection of the individual as alleged in its application.

(b) Effects of the infringement

As regards the effects of the infringement, the applicant refers essentially to the same factors as those advanced by the applicant *Amylum* to distinguish these cases from the *"skimmed-milk powder cases" (HNL).*

4. Conclusion

In conclusion the applicant submits that its claim for damages falls squarely within the conditions laid down by the Court's case-law and fully satisfies all the requirements for establishing the liability of the Community.

— Observations of the Commission

By way of introduction, the *Commission* states that it is not able either to challenge or to accept the reality of the causal connexion or the accuracy of the figures advanced by the applicant. For this it takes the view that it would need to mount an investigation to examine the basis of the applicant's assumptions and calculations. The Commission therefore requests the Court to limit its judgment at this stage to the issue of liability. If the Council and the Commission were to be held liable, the amount of the damages should then be left over to be agreed between the parties or, in the absence of such agreement, to be decided on by the Court as a separate question after the holding, if necessary, of a preparatory inquiry.

The Commission then proceeds to an examination of the matter under the following headings:

1. Liability

The observations submitted by the Commission with regard to the

Community's liability are in essentials similar to those set out under the heading of "Act giving rise to the damage", in relation to Case 116/77.

2. Causal connexion

According to the Commission, all the "losses" claimed by the applicant show one thing in common: they are the direct effect of the strategy adopted by the applicant "to mitigate the losses that would have been caused by the isoglucose levy" rather than the effect of the levy itself. That strategy and the reasoning behind it are most clearly explained in the "Introduction" to Annex III to the applicant's statement of observations. In fact, it appears that even with the levy at its reduced rate as from 1 July 1977, isoglucose still made a contribution to the applicant's fixed costs. It was therefore the prospect of the doubling of the levy with effect from 1 July 1978, as originally provided in Regulation No 1111/77, which induced the applicant to limt its production of isoglucose, to expand its production of dry starch and to develop further sales of its traditional syrup lines.

The Commission submits, on the basis of the applicant's own account, that the strategy adopted aggravated the losses and should rather be regarded as a "contributary cause" of those losses or even as a "factor breaking the chain of causation" (cf. the opinion of Mr Advocate General Trabucchi in Case 169/73 *Compagnie Continentale* v *Council* [1975] ECR 117 at p. 151).

That submission is supported by the following considerations. First, the "losses claimed" are all in fact "loss of profit" with the possible exception of the "cost of alternative investments" which is in any event to be excluded for reasons set out below. According to the Commission's calculations, if, instead of adopting an alternative strategy, the applicant had continued its production of isoglucose as apparently planned, it would in fact have paid out by way of levy, over the period in question (November 1977 to October 1978) less than half the amount (£1 020 150) which it is now in fact claiming as the losses resulting from its own strategy.

Secondly, shortly after the applicant started production of isoglucose, the Commission made the proposal to the Council of Ministers to freeze the isoglucose levy at the level of 50% adopted theretofore (9 December 1977). In the climate of the time, the applicant had every reason to suppose that the Council would adopt that proposal, as it in fact did at its meeting on 8 to 12 May 1978. The decisions taken essentially on the basis of anticipation of the full levy were therefore soon proved to have been over-hasty and in any event lost their essential justification as from May 1978.

The Commission further claims that the root cause of the applicant's difficulties in obtaining a reasonable return from its investment in isoglucose was the surplus of sugar prevailing on the Community and world markets at the time when its plant came on stream (end of 1977), whilst the applicant's basic investment decision was made in October 1974, when world prices were extremely high and were bringing about a steep increase in Community prices. In this context it is significant that already by October 1975 the applicant was having doubts about the wisdom of its investment in

isoglucose and had decided to reduce the planned capacity by half (from 200 tonnes to 100 tonnes per day, dry matter).

Finally the Commission submits that another "significant contributory factor" intervened between the applicant's investment decision and its "losses", namely the withdrawal of the production refund on starch for the production of isoglucose (Council Regulation No 1862/76). In this respect the Commission draws attention to the applicant's statement (reply, Annex I, "projected costs of isoglucose") that the "withdrawal of production restitution has reduced expected profits by £13.75 per tonne" the actual profit being no more than £9.12. This drastic reduction (by 60%) of the "expected profit" must have conditioned the strategy which the applicant adopted at the time of the imposition of the levy.

3. Losses

In its observations on the losses the Commission emphasizes the necessity for additional information in order to appreciate properly various aspects of the evaluation of the losses claimed by the applicant in Annex III to its observations (in particular under the headings "Reduction in factory throughput", "Producing dry starch rather than isoglucose" and "Stockholding costs of starch").

The Court has asked the applicant to supply such information (see under IV below).

As regards the losses under the heading "Capital and interest on alternative investments", the Commission states that on any legal or accounting principle this item is inadmissible as a loss for which compensation may be claimed. Furthermore, the Commission takes the view that the losses (unquantified and unquantifiable) under the headings "Loss of goodwill" and "Loss of opportunity to negotiate improved purchasing terms" do not have the element of certainty required by general principles and by the case-law of the Court.

Finally the Commission states that as a result of the judgment in Cases 103 and 145/77, collection of the isoglucose levy has been suspended from 1 July 1978 and that if the proposal for the amendment of Regulation No 1111/77 submitted by the Commission to the Council is adopted by the latter, one of the effects will be the repeal of the levy *ab initio*. The applicant is obliged to take account of this factor by deducting the amount of the unpaid levy from its claim for damages.

In *conclusion* the Commission requests the Court to declare that it is not liable for the losses claimed by the applicant.

C — Observations of the Council relating to both cases

1. Introduction

The *Council* devotes the introduction to its observations to a brief summary of the facts concerning isoglucose, a description of the actions of the parties between the introduction of the levy and the judgment of the Court of 25 October 1978, followed by a consideration of the legal consequences of that judgment and finally a description of the measures proposed by the Commission in order to comply with that judgment.

First the Council remarks that there are two possible methods of production for isoglucose, either by expanding the maize-grinding capacity of a conventional starch plant already built and adding on the specific plant required for the production of isoglucose, or else by creating a production unit specifically

and solely equipped for isoglucose production.

The applicants *Amylum* and *Tunnel* apparently chose the first option, which is less ambitious and better able to cope with unforeseen market fluctuations. In order to escape to a great extent the effects of the levy they chose to make products other than isoglucose during the period between the introduction of the levy and the date of the judgment of the Court, namely dextrose, glucose and starch.

By doing so, *Amylum* left its isoglucose production unit unused, whereas *Tunnel* made further investments in order to produce on a permanent basis products as profitable as isoglucose but not subject to a levy (cf. Annex III, p. 5 of the *Tunnel* statement).

The damage which the applicant *Amylum* claims to have suffered merely by virtue of the entry into force of Regulation No 1111/77 mainly consists of the difference between the direct margin for isoglucose with no levy and the direct margin for alternative products, the direct margin being the difference between selling prices and variable unit costs per product. In the case of the applicant *Tunnel* in addition to a similar head of damages there is the value of the investments for the substitute products which, according to the applicant, would not have been necessary had there been no levy.

As regards the judgment of 25 October 1978, the Council takes the view, on the basis of a consideration of the reasons on which the said judgment was based, that the Court did not call in question the actual principle of a production levy to be paid by isoglucose producers, but rather found that in the case in point the amount of five units of account charged was too high considering the charge actually borne by sugar producers.

On the basis of the Court's judgment and for the sake of argument the Council proceeds to make a rough calculation of a non-discriminatory levy to be borne by isoglucose producers which would compare economically with that borne by sugar producers.

In this respect the Council begins its comparison with isoglucose producers by taking as a model a sugar producer who has used up both his A and B quota, the Court having, in paragraph 74 et seq. of the above judgment, accepted the comparison between the charge levied upon modern sugar works which also produce C sugar and that levied upon isoglucose producers. For the purposes of its comparison the Council accepts that the Court criticized the fact that, when the officers of the Commission calculated the average charge for these sugar undertakings running from 3.81 to 13.52 units of account per quintal, no allowance was made for the fact that 60% of the charge was passed on to beet growers. In these circumstances the charge actually borne by this model producer during the 1977/78 sugar year may be broken down as follows:

Since 1 000 kg of beet normally produce 130 kg of sugar (cf. paragraph 4 of Regulation No 1112/77 (Official Journal L 134, p. 9), the part of the levy charged to beet growers for 100 kg of sugar is $\frac{100}{130}$ of the difference between the minimum price paid to beet growers per tonne of beet which has produced A sugar and the minimum price also paid to beet growers per tonne of beet which has produced B sugar, in other words,

these prices being 25.43 and 17.80 units of account per tonne respectively (cf. Regulation No 1113/77 (Official Journal L 134, p. 11, Art. 4)), that is to say $\frac{100}{130}$ (25.43 — 17.80) = 5.87 units of account per quintal for sugar. Hence the share of the levy per quintal actually borne by the sugar producer would be the amount paid (9.85 units of account per quintal) less the amount passed on (5.87 units of account per quintal) or 3.98 u.a. per quintal for B sugar, that is, by dividing this charge according to the proportion of B sugar in the maximum quota, an actual levy of 3.98 × 26% = 1.0348 units of account per 100 kg.

If the Court's reasoning is followed, it is that latter charge which might be levied per 100 kg of isoglucose for the 1977/78 sugar year without discriminating against isoglucose producers by comparison with sugar producers in similar circumstances.

However, the Council emphasizes that once again it should be remembered, in order to appreciate the economic risks inherent in present-day sugar production with a structural surplus of sugar, that it is not the aim of quotas to create structural surpluses. In this connexion Article 27 (2) of Regulation No 3330/74 of the Council lays down that the production levy shall be calculated at a flat rate in proportion to the total losses incurred by the Community in disposing of the surplus of guaranteed sugar on the world market. On the basis of that principle the maximum levy for the 1977/78 sugar year was 19.5 units of account per 100 kg (cf. the 7th and 8th Recitals in the Preamble to Commission Regulation No 2889/78 of 8 December 1978 — Official Journal L 344). However, that amount was not used by Regulation No 2889/78 for the maximum levy for that year since Article 27 (3) of Regulation No 3330/74 limits the levy at a flat rate of 30 % of the intervention price (in this case 9.85 units of account per quintal), at a time when the sugar market looked very different from the present picture of structural over-production, so as not to discourage regional specialization too greatly.

In the present state of affairs it would have been conceivable, according to the Council, to abolish the 30% ceiling since the charge to which it gave rise is apparently not such as to discourage the production of sugar in excess of the basic quota in regions less suited to sugar-making. On that assumption the levy to be paid by sugar works would have increased as follows:

Levy:	19.50 u.a.
Amount passed on to beet growers:	5.87 u.a.
	13.63 u.a. × 26 % = 3.5438 u.a. per 100 kg

If the validity of such a "full" charge is to be admitted without the application of the ceiling in the case of the sugar-producers, the validity of a similar charge must also be admitted in the case of the isoglucose producers since their entire output contributed to the surplus of guaranteed sugar, which is not the case for sugar itself.

Finally the Council remarks that under the proposal for a regulation amending Regulation No 1111/77, which the Commission sent to the Council on 7 March 1979, that portion of isoglucose production which exceeds the basic quota of the producer undertaking would be charged a production levy

equal to that portion of the "sugar" levy yet to be paid for the 1979/80 sugar year by sugar producers only. Thus for the 1979/80 sugar year, *mutatis mutandis,* this proposal introduces a charge equivalent to that first described above.

2. Manifest and grave disregard of the limits on the exercise of powers.

Referring to the *HNL* judgment, the Council proceeds to examine (i) whether the features of the measure declared void by the Court in its judgment of 25 October 1978 were such that the measure did or did not exceed the bounds of the risks inherent in the economic activities of those concerned (*HNL* judgment, paragraph 5, second sentence; paragraph 7, first and fifth sentences); and (ii) whether in adopting the levy at the amount it did the Council manifestly and gravely disregarded the limits on the exercise of its powers (paragraph 6).

As to Point (i)

The Council thinks that the proper interpretation of the *HNL* judgment implies that each specific feature of the measure in dispute should be assessed on its own merits and in its own economic context. The characteristic features of the economic context of the measure in dispute in this case are in particular as follows: the rashness with which the parties concerned committed their considerable investments to development and exploitation of a new sweetener the value of which remained unproven; their mistaken belief in the existence of a market capable of absorbing sweeteners; their unjustified expectation that they would be able to continue to enjoy a production refund for maize processed by them into isoglucose; the fact that without a refund they were apparently unable to sell their product except at a considerable loss; the fact that, in view of its cost price and of the fact that no higher selling price could be expected in the relatively near future, their product could not bear any levy whatsover; and the fact that the Community might have imposed a levy of about four units of account for the said marketing year without infringing the principle of equality of treatment had it not set the sugar levy a ceiling of 9.85 units of account.

Thus, in the light of these considerations, an assessment should be made of the effect of introducing the five units of account levy on the profitability of the parties' isoglucose production. In this connexion it should be recalled that the applicant *Tunnel* permanently gave up isoglucose production, either totally or for the most part, since it was not profitable, and that the applicant *Amylum* was the only one — for want of any alternative as it appears — not to convert its plant.

As to Point (ii)

The Council wonders whether the Court makes use, in attributing or rejecting liability of the Community, of a criterion linked to the seriousness not merely of the damages suffered by the plaintiff but also of the breach of the rule of law in question. Such a criterion appears to be implicit in the terms of the 6th paragraph of the *HNL* judgment.

This conclusion is understandable having regard to the difficulties with which the Council and the Commission are faced

in the implementation of the common agricultural policy and the complexity both of the interests to be taken into account and the objectives to be attained, bearing in mind the vagaries of the economic situation.

Recalling the complexity of the problem which arose in 1976 with the appearance of isoglucose in considerable quantities on the Community market, the Council feels that the greatest doubts might be entertained concerning the seriousness of the breach which it is supposed to have committed when it adopted the regulations concerned.

Economic impact of the levy of 5 units of account

Proceeding, like the Commission, to a comparison of the cost price of isoglucose produced by the applicant *Amylum* (as it emerges from the Klynveld Turquands report) with the average selling price charged by *Amylum* (Table 2, Amylum's observations), the Council finds on the basis of these figures that *even before any levy was imposed* there was a clear loss. According to the Council these figures may be taken as representative for all the parties concerned since *Amylum* in particular had the longest experience of isoglucose. Furthermore the average selling price indicated by *Amylum* confirms that the selling price for isoglucose on a glutted market is in fact determined by the intervention price for sugar so that, as long as the market is glutted, no appreciable increase in the selling price can be expected in the short or medium term.

The conclusion is therefore that investments in isoglucose were economically unjustifiable and that production of isoglucose cannot be expected to show a return in the foreseeable future. Accordingly introduction of the levy of 5 units of account *could not have been a causal factor in the decision to give up isoglucose production since it was unprofitable even before that decision; it may at the very most have influenced the time of giving it up.*

It may well be asked why, if Isoglucose was *a priori* not profitable, the Council nevertheless imposed a levy on it. On this subject the Council points out that it was not, owing to reticence on the part of isoglucose manufacturers, in a position to ascertain all the elements in the manufacturers' cost price, whereas for the Community every quintal of isoglucose placed on the market went towards increasing the sugar surplus, and, finally, that the manufacturers of isoglucose were well aware of this surplus just as they were aware of the Community rules governing sugar, in force until 1980.

Finally the Council examines the arguments put forward in particular by the applicant in Case 143/77 that, on the one hand, as long as there was a positive margin between variable unit costs per product and the selling price, production had to continue and, on the other hand, if the effect of the levy of 5 units of account had been to use up that margin it followed that the invested capital would lose all its value.

In the Council's view there are two misconceptions in that argument. First, it is founded on calculations taking into account for determining the margin only variable costs and their relation to selling price, whereas the calculation should be based on all the costs to be borne by the producer, which should be compared with selling price; indeed, the hypothesis developed presupposes that the undertaking is paying the fixed production costs by drawing on another source, which is contrary to sound business management. Secondly, the above-

mentioned argument postulates that any levy whatever charged on isoglucose, in whatever manner, should be prohibited, whereas the Court has not condemned the principle of such levies.

On the basis of an examination of these two points the Council concludes that with a levy which complied with the equality of treatment of sugar producers, the applicant *Amylum* would in any case be obliged to halt production and thus to incur the whole of its "losses". Similarly, the applicant *Tunnel* would in any event be obliged to make investments in order to produce dextrose. In these circumstances it is difficult to see *why the applicants should now be compensated for damage incurred by temporary or permanent re-allocation of their production capacity when such re-allocation or closure would in any case be necessary without any blame whatever being attributable to the institutions.*

3. Causal connexion

As a subsidiary application the Council requests the Court, if it finds that the non-contractual liability of the Community is incurred in principle, to take the arguments expounded above as establishing that there is no causal connexion between the Community's action and the losses alleged by the applicants.

4. Alleged damage

Whilst holding to the arguments set out in the defence and the rejoinder, the Council reserves the right to advance at a later stage — should the Court find that the Community is liable under Article 215 and that there is in fact an unbroken causal connexion between the Community's actions and the alleged damage — any relevant argument regarding the constituent elements of the damage to the parties concerned.

In *conclusion* the Council asks the Court to reject the applications for damages and interest as unfounded and order the applicants to bear the costs.

VIII — Request from the Court for information from the applicant Tunnel Refineries Ltd. and the latter's reply

By letter of 8 June 1979 the Court asked the applicant *Tunnel* to supply it with information in answer to the following questions:

First question: its sales and production forecasts for isoglucose expressed by both price and quantity.

Answer

The only relevant forecast providing detailed figures, before the announcement of the levy, was prepared in May and June 1976 as part of Tunnel's annual budget plan for the year beginning in September 1976. It sets out in Annex A to its answer extracts from the budget plan from which it emerges that the isoglucose plant was to be used at 100% of its effective capacity from the beginning of production. The extracts also show the relative margins of isoglucose and of dry starch and the expected fall in production of dry starch as isoglucose production increased.

However, it was not possible to start production of isoglucose until the end of 1977, that is to say, after the announcement of the levy. The subsequent forecasts (cf. Annex II to the applicant's statement of observations with regard to damages) were based on the existence of the levy.

Second question: an explanation of the cause for the increase in the "isoglucose contribution" during the period December 1977 to September 1978 from £40.24 to £93.99 (statement of observations, Annex III, Tables B1 and B2 (i)).

Answer

The applicant states that the "isoglucose contribution" is the profit margin on the sale of isoglucose, reflecting the difference between variable production costs and selling price and ignoring the levy.

The increase in that margin from July 1978 was in line with the selling price of sugar. The increase in the margin before that date was due not to an increase in price but to a reduction in costs.

Third question: as regards the heading "producing dry starch rather than isoglucose", an explanation of its decision to process most of the wet starch "in its under-utilized dry starch plant and also to stop the importation and re-sale of dry starch" (statement of observations, Annex III, P. 2). Has the more intensive use of this plant reduced the unit costs of production? If so, has that been taken into consideration in calculating the "margin lost" in Table B2 (i)? Is there a connexion between the decision not to import or re-sell dry starch in future and the decision to increase production of that product?

Answer

According to the applicant the reason for the decision to process most of the wet starch by producing dry starch was that that was the only immediate use that could be found for the additional quantities of starch, which, but for the levy, would have been used for the production of isoglucose.

The application ceased to import and re-sell dry starch because its own production of that product meant more starch on a market where there was already a plentiful supply.

The process used for the production of dry starch is quite different from the isoglucose process inasmuch as fixed costs are not a significant item. Accordingly there was no reduction in costs attributable to greater production of dry starch.

Fourth question: as regards the heading "Stockholding costs of starch" (statement of observations, Annex III, p. 3) the actual figures for these costs.

Answer

The applicant states that in the past it has not considered it necessary to maintain permanent records of the floor space and storage occupied by any specific product. It has not therefore preserved internal records and copies of invoices in sufficient detail to allow it to determine the actual storage costs of starch alone. However, on the basis of his personal knowledge and experience, the applicant's chief storekeeper estimates that during the period from November 1977 to November 1978

storage space was used approximately as follows: starch 65%, machinery 15%, process materials 10% and dextrose 5%. On the basis of that estimate the share of storage and handling costs borne by starch for the above-mentioned period is £ 58 230 (out of £ 89 584), slightly higher than the figures already given by the applicant.

IX — Oral procedure

At the hearing on 18 September 1979 the applicant *Amylum*, represented by M. Waelbroeck of the Brussels Bar, the applicant *Tunnel*, represented by F. Jacobs, Barrister, Middle Temple, London, the Council, represented by Daniel Vignes, Director in the Legal Department, acting as Agent, assisted by A. Brautigam, an administrator in the said Department, and the Commission, represented in Case 116/77 by its Legal Adviser, Jacques Bourgeois, acting as Agent, assisted by Jacques Delmoly, a member of the Legal Department, and in Case 124/77 by its Legal Adviser Richard Wainwright, acting as Agent, assisted by H. Bronkhorst, a member of its Legal Department, presented oral argument.

The Advocate General delivered his opinion at the hearing on 23 October 1979.

Decision

1 The applicants in these cases are claiming that the European Economic Community, represented by the Council and the Commission, should be ordered to pay them compensation under the second paragraph of Article 215 of the EEC Treaty for the damage which they claim to have suffered as a result of the imposition of a production levy on isoglucose in pursuance of Council Regulation No 1111/77 of 17 May 1977 laying down common provisions for isoglucose (Official Journal L 134, p. 4).

2 It may be recalled that the following reasons were given in the seventh recital in the preamble to that regulation for the setting up of a production levy system for isoglucose:

"... being a substitute product in direct competition with liquid sugar, which, like all beet or cane sugar, is subject to stringent production constraints, isoglucose therefore enjoys an economic advantage, and since the Community has a sugar surplus, it is necessary to export corresponding quantities of sugar to third countries; ... there should, therefore, be provision for a suitable production levy on isoglucose to contribute to export costs".

3 According to the ninth recital, the aforesaid levy system is complementary to that established for sugar by Council Regulation No 3330/74 of 19 December 1974 on the common organization of the market in sugar (Official Journal 1974, L 359, p. 1) and the envisaged levy on the production of isoglucose is analogous to that provided for in Article 27 of Regulation No 3330/74, namely to the levy on a percentage of the production of sugar manufactured in excess of the basic quota.

4 The production levy system for isoglucose was established by Articles 8 and 9 of Regulation No 1111/77 and applied to the 1977/78 and 1978/79 sugar years. Article 9 (1) of the regulation provided that Member States were to charge a production levy on manufacturers of isoglucose and the first subparagraph of Article 9 (2) provided that the amount of the levy per 100 kg of dry matter should be equal to the amount of the production levy provided for in Article 27 of Regulation No 3330/74 for the same period to which the latter amount applied. However, under the second subparagraph of Article 9 (2), for the period from 1 July 1977 to 30 June 1978 the amount of the levy referred to in paragraph (1) might not exceed the amount of five units of account per 100 kg of dry matter.

5 In its judgment of 25 October 1978 given in answer to a reference for a preliminary ruling from the High Court of Justice, Queen's Bench Division, Commercial Court, in Joined Cases 103 and 145/77, *Royal Scholten-Honig (Holdings) Limited* v *Intervention Board for Agricultural Produce; Tunnel Refineries Limited* v *Intervention Board for Agricultural Produce* ([1978] ECR 2037), the Court ruled that Regulation No 1111/77 was invalid to the extent to which Articles 8 and 9 thereof imposed a production levy on isoglucose of five units of account per 100 kg of dry matter for the period corresponding to the sugar marketing year 1977/78. The Court had found that the provisions of that regulation establishing the production levy system for isoglucose offended against the general principle of equality of which the prohibition on discrimination set out in Article 40 (3) of the Treaty was a specific expression. However, it had added that its answer would leave the Council free to take any necessary measures compatible with Community law for ensuring the proper functioning of the market in sweeteners.

6 Following that judgment the Commission, by letter dated 8 January 1979, informed the Member States that, pending measures to be adopted by the

Council to ensure the proper functioning of the market in sweeteners, it was appropriate to suspend all collections of the isoglucose production levy and that, similarly, the establishment, accounting and allocation to own resources of the amounts concerned should be provisionally suspended by Member States.

7 On 25 June 1979 the Council adopted Regulation No 1293/79 (Official Journal 1979, L 162, p. 10) amending Regulation No 1111/77 in the light of the judgment of the Court of 25 October 1978. Since the most appropriate means for avoiding inequality of treatment between producers of sugar and producers of isoglucose was to subject isoglucose production to rules analogous to those applying to sugar production until 30 June 1980, Regulation No 1293/79 in particular established, on a transitional basis until that date, a temporary system of production quotas for isoglucose. It was also provided that for the quantity of isoglucose produced which exceeded the basic quote without exceeding the maximum quota Member States were to charge a production levy on the isoglucose producer concerned, the amount of which was to be equal to the share of the sugar production levy as fixed for the 1979/80 sugar year by virtue of Article 28 of Regulation No 3330/74, borne by the sugar manufacturers. As regards the production levy established by Regulation No 1111/77 and declared invalid by the above-mentioned judgment, it was abolished by Article 2 (1) of Regulation No 1293/79 with effect from 1 July 1977.

8 In the course of the oral procedure in these cases the applicant *Tunnel Refineries Limited* (hereinafter referred to as "Tunnel"), stated that it had not paid the isoglucose production levy established by Regulation No 1111/77. In fact, as soon as the levy was established *Tunnel* took immediate steps to contest the legality of the levy before the High Court and informed the national intervention agency, which refrained from collecting the levy until the outcome of the proceedings instituted by *Tunnel*. The applicant *G. R. Amylum N. V.* (hereinafter referred to as "Amylum") stated, for its part, that it refused to pay the levy to the Belgian intervention agency and was sued for payment by the agency. Having regard to the proceedings pending before the Court in Joined Cases 103 and 145/77, an arrangement was arrived at between *Amylum* and the intervention agency under which *Amylum*, to guarantee payment of the levy, provided a bank guarantee. The intervention agency for its part desisted from its active pursuit of the action

for payment which had been undertaken before the national court and withdrew its action after delivery of the Court judgment of 25 October 1978 in the aforementioned joined cases.

9 Thus the applicants are not claiming from the national authorities reimbursement of the production levies overpaid but are seeking to obtain compensation from the Community for losses resulting in particular from the reduction in sales of isoglucose and from operating deficits and other losses which they claim to have suffered as a result of the introduction of the levy of five units of account per 100 kg of dry matter laid down by Regulation No 1111/77 and declared invalid by the Court in its judgment of 25 October 1978.

10 According to *Amylum* the damage caused to it by the entry into force of Regulation No 1111/77 consists, for the most part, on the one hand in the reduction in its profit margin resulting from the replacement of sales of isoglucose by alternative sales of starch and glucose and, on the other hand, in the loss of its profit margin resulting from the reduction in grinding during the early months following the establishment of the levy, a step made necessary by the absence during that period of outlets for the alternative products. *Amylum* is also claiming the cost of the bank guarantee referred to above and the expenditure in which it claims to have been involved in the defence of its interests before the Belgian authorities.

11 According to *Tunnel* the damage for which it is claiming compensation and which is attributable to the isoglucose production levy established by Regulation No 1111/77 consists in the loss of production of its factory, the loss of profits resulting from the production of dry starch instead of isoglucose, additional costs for storage and handling of starch as well as losses incurred by reason, on the one hand, of higher unit costs in its undertaking due to reduced isoglucose production and, on the other hand, of supplementary investments effected to increase production of substitute products.

12 Since the Court has already established in its judgment of 25 October 1978 that the imposition of an isoglucose production levy of five units of account per 100 kg of dry matter was incompatible with the principle of equality, the first question which arises in these cases is whether that illegality is such as to involve the Community in liability under the second paragraph of Article 215 of the Treaty.

13 A finding that a legal situation resulting from legislative measures by the Community is illegal is insufficient by itself to involve it in liability. The Court has already stated this in its judgment of 25 May 1978 in Joined Cases 83/76 and Others, *Bayerische HNL & Others* v *Council and Commission* ([1978] ECR 1209). In this connexion the Court referred to its consistent case-law in accordance with 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. Having regard to 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 has stated that in the context of Community legislation in which one of the chief features is the exercise of a wide discretion essential for the implementation of the common agricultural policy, the liability of the Community can arise only exceptionally in cases in which the institution concerned has manifestly and gravely disregarded the limits on the exercise of its powers.

14 This is confirmed in particular by the fact that, even though an action for damages under Articles 178 and 215 of the Treaty constitutes an independent action, it must nevertheless be assessed having regard to the whole of the system of legal protection of individuals set up by the Treaty. If an individual takes the view that he is injured by a Community legislative measure which he regards as illegal he has the opportunity, when the implementation of the measure is entrusted to national authorities, to contest the validity of the measure, at the time of its implementation, before a national court in an action against the national authority. Such a court may, or even must, in pursuance of Article 177, refer to the Court of Justice a question on the validity of the Community measure in question. The existence of such an action is by itself of such a nature as to ensure the efficient protection of the individuals concerned.

15 These considerations are of importance where, as in these cases, the Court, within the framework of a reference for a preliminary ruling, has declared a production levy to be illegal and where the competent institution, following that finding, has abolished the levy concerned with retroactive effect.

16 It is appropriate to inquire in the light of these considerations whether, in the circumstances of these cases, there has been, on the part of the Council and

the Commission, a grave and manifest disregard of the limits which they are required to observe in exercising their discretion within the framework of the common agricultural policy.

17 In this respect it must be recalled that the Court did not declare invalid any isoglucose production levy but only the method of calculation adopted and the fact that the levy applied to the whole of the isoglucose production. Having regard to the fact that the production of isoglucose was playing a part in increasing sugar surpluses it was permissible for the Council to impose restrictive measures on such production.

18 Although, in its judgment of 25 October 1978, giving a preliminary ruling within the framework of a consideration of the validity of Regulation No 1111/77, the Court found that the charges borne in pursuance of that regulation by isoglucose producers by way of production levy were manifestly unequal as compared with those imposed on sugar producers, it does not follow that, for the purposes of an assessment of the illegality of the measure in connexion with Article 215 of the Treaty, the Council has manifestly and gravely disregarded the limits on the exercise of its discretion.

19 In fact, even though the fixing of the isoglucose production levy at five units of account per 100 kg of dry matter was vitiated by errors, it must nevertheless be pointed out that, having regard to the fact that an appropriate levy was fully justified, these were not errors of such gravity that it may be said that the conduct of the defendant institutions in this respect was verging on the arbitrary and was thus of such a kind as to involve the Community in non-contractual liability.

20 It must also be recalled that Regulation No 1111/77 was adopted in particular to deal with an emergency situation characterized by growing surpluses of sugar and in circumstances which, in accordance with the principles set out in Article 39 of the Treaty permitted a certain preference in favour of sugar beet, Community production of which was in surplus, whilst Community production of maize was to a considerable extent deficient.

21 It follows from these considerations that the Council and the Commission did not disregard the limits which they were required to observe in the

exercise of their discretion in the context of the common agricultural policy in such a serious manner as to incur the non-contractual liability of the Community.

22 The applications must be dismissed as unfounded.

Costs

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

24 As the applicants have been unsuccessful they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the applications;**

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

Kutscher O'Keeffe Touffait

Mertens de Wilmars Mackenzie Stuart Bosco Koopmans

Delivered in open court in Luxembourg on 5 December 1979.

A. Van Houtte
Registrar

H. Kutscher
President