JUDGMENT OF THE COURT
2 MARCH 1977 [1]

Milch-, Fett- und Eier-Kontor GmbH v Council and Commission, of the European Communities

Case 44/76

1. *Procedure — European Economic Community — Non-contractual liability — Request for declaration — Imminent and foreseeable damage — Damage not yet assessable — Application to the Court — Admissibility*
   (EEC Treaty, Article 215)

2. *Agriculture — Products subject to a single price-system — Export refunds — Variability — Payment — Conditions*

1. 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.
2. Neither the publication by the Council of Regulation No 876/68 nor the behaviour of the Commission as regards the grant of variable export refunds is sufficient to make the Community liable and to require it to make good the damage suffered by the applicant since the competent institution is only required to grant variable refunds if the goods are in free circulation in the territory of destination.

In Case 44/76

MILCH-, FETT- UND EIER-KONTOR GMBH, 72-74 Amandastraße, 2000 Hamburg 50, represented by its Managers, Joachim Brandenburg and Friedrich Schulz, and assisted by Peter Wendt and Hans-E. Heyn, of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Félicien Jansen, Huissier, 21 rue Aldringen,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Bernard Schloh, acting as Agent, with an address for service in Luxembourg at the office of J. Nicolaas Van den Houten, Director of the Legal Department of the European Investment Bank, 2 place de Metz,

1 — Language of the Case: German.

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Kalbe, acting as Agent, with an address for service in Luxembourg at the office of Mario Cervino, Legal Adviser to the Commission, Bâtiment Jean Monnet, Kirchberg,

defendants,

Application for damages under Article 215 of the EEC Treaty,

THE COURT

composed of: H. Kutscher, President, P. Pescatore, President of Chamber, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe and G. Bosco, Judges,

Advocate-General: G. Reischl

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts

The facts and arguments put forward by the parties in the course of the written procedure may be summarized as follows:

I — Facts and written procedure

Since surpluses developed on a large scale on the market in butter in 1968 the Community authorities adopted measures to promote their disposal. To this end the Commission adopted Regulation No 1308/68 of 28 August 1968 (JO 1968, L 214, p. 10) which permitted any party concerned, subject to certain conditions, to purchase from the national intervention agency butter for which a supplementary reduction of 5.5 u. a. per 100 kg was granted if that party undertook to export the butter.

The applicant, a marketing organization for German dairies, entered into a pooling agreement ('the butter pool') in August and September 1970 for the export of butter held by the Einfuhr- und Vorratsstelle, the German intervention Agency.

Under this agreement the members of the pool, two German undertakings and two Belgian undertakings, remained legally and economically independent. The sole aim of the association was to combine the financial and marketing strength of the four undertakings and by apportioning the profits and losses to share the risk. The members of the pool undertook to export in all approximately 41 000 tonnes of butter.

On 2 September 1970 the applicant obtained, for itself or for the pool, export certificates to Morocco, Algeria or Tunisia fixing in advance the refunds for certain quantities of butter, which the applicant maintains amounted to 10 000 tonnes and the Commission to 21 500 tonnes.

On the basis of those certificates the applicant sold on 12 January 1971 to N. Corman & Fils S.A. (hereinafter referred to as 'Corman'), a Belgian member of the pool, 3 000 tonnes of butter, of which it had only taken delivery fo 2 000 tonnes, on the following conditions: 'Destination: North Africa (Morocco)' and 'Delivery to take effect only an Tangiers quay'.

On the same day the contract was modified from 'fob' to 'civ' loaded on quay'.

The refund was claimed on submission of the declaration within the meaning of Article 1 (1) of Regulation No 1041/67 of the Commission of 21 December 1967 (OJ, English Special Edition 1967, p. 323).

When the Principal Customs Office, Hamburg-Jonas (hereinafter referred to as 'the customs office') which was competent to pay the refund, demanded proof of marketing in Morocco the applicant was unable to supply it. As the customs office considered that the consignment of butter in dispute had really been dispatched from Morocco to Eastern European countries and that of the 2 000 tonnes only 1 102 had been unloaded, whilst 898 tonnes had been transported in the same vessel to Gdynia in Poland where they had been supplied to a Czechoslovakian purchaser, it considered that the rate fixed in advance for North Africa, namely 137 u. a. (DM 501.42 per 100 kg, could not be granted and calculated the refund on the basis of the lower rate, DM 347.70, in force for all third countries on the day of exportation.

A refund of DM 1 335 900 was accordingly refused and a refund of DM 823 417.75 was then paid and finally reclaimed by the customs office.

The applicant then brought a number of actions directly before the Finanzgericht Hamburg and these led the Court of Justice, upon a reference for a preliminary ruling, to deliver a judgment on 2 June 1976 in Case 125/75 *(Milch-, Fett- und Eier-Kontor GmbH* [1976] ECR 771) in which it ruled that 'where the refund is varied, ... the goods must have been given customs clearance and put into free circulation at the destination'.

However, 'as a precaution and in order to keep within the period' prescribed in Article 43 of the Protocol on the Statute of the Court of Justice of the EEC the applicant, after addressing an initial request on 16 January 1976 to the Commission and failing to receive a reply, lodged the present application on 12 May 1976.

The claim for damages is based on the applicant's view that the Commission wrongfully misled the applicant in its communications during the period 1967 to 1970 and indeed in 1971 regarding the material conditions for claiming the export refund. The Commission has infringed the superior legal principle of legal certainty and wrongfully violated the principle of the protection of legitimate expectation.

The application is also directed against the Council on the ground that it has

failed to establish clearly the legal situation regarding export refunds and that, contrary to Article 152 of the EEC Treaty, it has omitted to request the Commission to submit to it appropriate rules.

The application was recorded at the Court Registry on 17 May 1976.

On hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without a preliminary inquiry.

II — Conclusions of the parties

The *applicant* claims that the Court should:

1. (a) order the defendants to pay the applicant the sum of DM 1 355 900 together with interest from 1 May 1971 at the rate mentioned in Annex 2 for the respective periods therein mentioned;

   (b) order the defendants to discharge the applicant from the claims for repayment of a sum of DM 823 417.75 made by the Hauptzollamt (Principal Customs Office) Hamburg-Jonas together with interest at 2% over the appropriate discount rate of the German Federal Bank from 5 February 1971, and to pay those sums to the said Hauptzollamt Hamburg-Jonas on behalf of the applicant;

   (c) (aa) order the defendants to pay the applicant the sum of DM 72 922.96 together with 4% interest from the date of commencement of these proceedings;

   (bb) order the defendants to discharge the applicant from claims against it by the Free Hanseatic City of Hamburg, the cashier of the court, in the sum of DM 28 145.60 in respect of court fees and by paying this sum on behalf of the applicant to the said cashier upon demand being made by the Finanzgericht Hamburg;

   (cc) order the defendants to discharge the applicant from claims by the Hauptzollamt Hamburg-Jonas for legal fees amounting to DM 551.50 by paying this sum on behalf of the applicant to the Hauptzollamt Hamburg-Jonas upon its demanding the payment thereof.

2. (a) declare declare that the defendants are obliged to compensate the applicant for all damage which the applicant has suffered or will suffer because from August 1970 to March 1971 it relied on the fact that payment of the full refunds, which were fixed for exports to Morocco, in accordance with Section II (a) of the Annex to Regulation No 1420/70 of the Commission, depends solely upon fulfilment of the condition that the butter has in fact arrived in Morocco and that this be proved by a control copy (as proof of the exportation) together with a copy of a transport document (a duplicate of the bill of lading) or by a certificate of unloading (both as proof of 'arrival' in Morocco);

   (b) alternatively,
   order the defendants to compensate the applicant for all the damage which it has suffered through relying upon the fact that payment of the full refunds, which were fixed for exports to Morocco, in accordance with Section II (a) of the Annex to Regulation No 1420/70 of the Commission depends solely upon fulfilment of the conditions that the butter has in fact arrived in Morocco and that this be proved by a control copy (as proof of the 'exportation') together with a copy of a transport

document (a duplicate of the bill of lading) or by a certificate of unloading (both as proof of 'arrival' in Morocco);

(c) order the defendants to bear the costs.

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

1. Dismiss the application;
2. Order the applicant to bear the costs.

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

1. Dismiss the application;
2. Order the applicant to bear the costs.

III — Submissions and arguments of the parties

(a) Facts

The *applicant* recalls that at the time in question it was the Bundeszentrale der deutschen Milchwirtschaft (the Federal Central Office of the Germany Dairy Industry) and that its capital was held entirely by two bodies governed by public law.

It collaborated closely with the authorities in the Federal Republic competent with regard to food, which requested it in the summer of 1970 to make greater efforts to reduce the German 'butter mountain'. Since the applicant was incapable of doing so alone it associated itself with other, private, butter dealers. This was how the pool come into being.

The decision to export 10 000 tonnes of butter to North Africa was not taken because the refund granted for that area was apparently the greatest but in view of an appraisal of the opportunities for sale, as confirmed by the reply of the Commission of 18 March 1970 to Written Question 311/69 of Mr H. Vredeling (JO 1970, C 38, p. 1).

Furthermore Regulation No 1593/70 of the Commission of 5 August 1970 (JO 1970, L 181, p. 18) fixed the refund at 140 u.a. for Bulgaria and Cuba and if the pool had only been concerned to obtain the highest possible rate of advance fixing it would in the circumstances have chosen those two destinations.

Since the market conditions had changed in the meantime only part of the butter sent to Morocco remained there. The annual requirements of Morocco, approximately 11 000 tonnes, were thus met by other means.

The *Commission* disputes the applicant's statement that its duties were largely the same as those of the office for storage. The applicant has never been other than a purely private organization endeavouring to make profits.

The exports in dispute in no way constitute isolated exceptions. The applicant itself has recognized that of the 18 000 tonnes delivered in February 1971 in Morocco only 88 remained there.

The Commission notes other deflections of trade effected by the applicant, in particular, sales to the Czechoslovakian foreign trade undertaking, Koospol, through other countries of destination such as Morocco, and the East Berlin undertaking, Nahrung Export-Import through Lebanon. The undertaking Koospol did not accept the offer but when false documentary evidence was submitted to the customs office the latter, 'as a routine matter', paid the applicant more than DM 28 000 000 as export refunds for butter which never arrived in Lebanon and was immediately sent direct to Rostock.

The *Council* maintains that the customs office asked the applicant to furnish it with proof that the goods exported not only actually reached their destination but further that they were put into free circulation.

The *applicant* denies this and replies that during the proceedings before the Finanzgericht, and indeed shortly before the said Case 125/75, the customs office always maintained that entry into free circulation was irrelevant.

Annex 2 to the Commission's defence, a letter concerning the commercial relations between the Koospol undertaking, appears to constitute a personal idea of the applicant's commercial director rather than a real offer by the applicant. At any rate Koospol, a very important undertaking, has often sold butter in North Africa. It has a well-established clientele there and could have acted as middleman since the butter was none the less consumed in North Africa. Furthermore the applicant took no steps to arrange for the transport to Rostock of the goods sold by it with Beirut as the destination once the Lebanese purchaser acquired power of disposal over them.

The *Commission* replies that it no longer knows whether it is liable for compensation because the applicant was unable to convince the customs office that its butter did indeed arrive in Morocco because, as the Commission has learned, the customs office does not recognize the documentary proof of arrival which the applicant has produced, or because of the argument that mere arrival in the country of destination is insufficient in all cases to confer entitlement to variable refunds. The two parts of this alternative are mutually exclusive.

(b) Admissibility

The *Commission* remarks first of all that the application cannot be directed against 'the European Communities'. In so far as the application is directed against the European Economic Community the request for a declaration is inadmissible for want of particulars (Article 38 (1) of the Rules of Procedure) if the claims under 2 (a) and (b) relate to other exports than the 2 000 tonnes in dispute.

The claims for compensation arising from all acts whatever of the Commission 'from the years 1967 to 1970' are time-barred from the end of 1975 at the latest. Since the applicant put forward its claims for the first time in a telex message of 16 January 1976 only the acts of the Commission after 16 January 1971 can provide grounds for claims for compensation.

The *Council* notes that the application is chiefly directed against the Commission and that the Council itself is mentioned only in three short passages. It relies upon the objection that the application is time-barred: the telex message of 16 January 1976 whereby the applicant asserted its rights and endeavoured to persuade the Commission not to object that the application was time-barred was not addressed to the Council. Article 43 of the Protocol on the Statute of the Court of Justice of the EEC and the independence of the institutions prevent a claim against one institution from interrupting the period of limitation concerning another. Furthermore for the period from 1967 to 1970, or indeed to 1971, there was no 'communication' from the Council apart from Regulation No 876/68 of the Council of 28 June 1968 which could be interpreted as constituting cooperation.

Both the 'event giving rise' to the proceedings which took place on 1 May 1976 (the day from which the applicant claims interest) and the entire 'normal course' of the case date back more than five years. The Council accordingly contends that the application is time-barred.

With regard to the objection that the application is time-barred it is possible to disregard the question whether in Community law it must be joined to the question of admissibility or the substance of an application. If the objection is

upheld the application must in any case be dismissed.

The *applicant* agrees that it mentioned the Council as a mere precaution. The telex message of 16 January 1976 was not addressed to the Council. However, this is of no importance since the Council and the Commission constitute two agencies of the same legal person, the European Economic Community (or, following the merger, 'the European Communities') and for the purposes of instituting proceedings it is sufficient to take action against one of the agencies.

It would only be a pointless formality to require the same telex message to be sent twice when it was to be expected that the Commission would inform the Council.

It has always been the applicant's intention to institute proceedings against the EEC alone. Furthermore, since there is no separate budget for the Council or the Commission (Article 20 of the Merger Treaty of 28 April 1965), there is no foundation for the objection that the telex message of 16 January 1976 was not also addressed to the Council.

In addition the said telex message was only sent as a measure of especial caution. The applicant could have suffered damage at the earliest when the customs office refused the application for the refund for the 2 000 tonnes in dispute, that is on 15 June 1972. The notes claiming the reimbursements were only dated 17 July and 10 October 1972; the various communications from the Commission merely constitute the uncompleted acts preliminary to the event giving rise to the damage.

Before those dates the applicant was unaware of its injury. There can thus be no question whatever of a time-bar. The date from which interest may be claimed depends on different criteria: it is a question of when the applicant could have used the amount of the refund.

In so far as the applicant was capable of quantifying its claims it has done so. Since the procedure before the Finanzgericht is not yet concluded it is impossible to know whether it will involve witnesses' expenses, and additional costs (for example, lawyers) cannot be assessed at this point.

The claims under headings 2 (a) and (b) relate exclusively to the 2 000 tonnes in dispute.

The *Council* replies that the second sentence of Article 43 of the Protocol on the Statute of the Court of Justice of the EEC concerns 'the relevant institution of the Community'. There are a number of institutions independent of one another, possessing various powers which have been specifically conferred upon them. The revenues and expenses of the Council and of the Commission have always been included in the common 'EEC' budget like those of the Parliament and of the Court.

It is incorrect to refer to a 'legal person' bearing the name of 'European Communities'. The applicant does not quote any provision whereby the Commission was for example bound to inform the Council of the receipt of the relevant telex message. Furthermore although it is true that when there is 'cooperation between several institutions' it is sufficient for a litigant to assert his rights against one of them in this case there has been no cooperation. So far as the Council is concerned there was thus no interruption of the period of limitation on 16 January 1976.

The applicant lodged its application with reference to the expiry of the period of time prescribed for instituting proceedings against the Commission on the ground of failure to act having regard to its failure to reply to the applicant's telex message. If this procedure were also to be permitted as against the Council, in spite of the fact that the telex message was not addressed to it, this would amount

to infringing the first sentence of the second paragraph of Article 175 of the EEC Treaty.

The telex message of 16 January 1976 lists three dates none of them going back more than five years from that date. Thus the applicant asserted its rights as a precaution. The application which it lodged on 17 May 1976 is thus in fact an application for damages and not a 'genuine application for failure to act' based on the failure of the Commission to reply. Although the Council has stated that so far as it is concerned only the date of 17 May 1976 is relevant the applicant only accepts the date of 15 June 1972. Nevertheless the applicant continues to claim interest from 1 May 1971 although it concedes that it only suffered the damage one year later.

If the occurrence of the event giving rise to the proceedings differs from the occurrence of the damage only the former is taken into account. It is thus unnecessary to consider whether the events giving rise to the proceedings must be regarded as occasioned by the behaviour of the Council before 16 January 1971 or whether they took place between 16 January 1971 and 1, 16 or 17 May 1971.

What is at stake here is not the export refund itself but damages identical in amount with the export refund which the applicant hoped to obtain. Nevertheless those 'damages' immediately succeed the 'export refund' in point of time.

At all events the applicant should have given the Council particulars of its complaint but only for the period after 17 May 1971.

(c) Substance

The *applicant* alleges that the *Commission*, through the communications which it issued from 1967 until the exports were effected, has created a situation on which the applicant thought it could rely as an exporter of goods subject to the organization of the markets. It was accordingly justified in believing that it was sufficient for the butter to have actually reached Morocco.

The Commission has also failed to inform exporters which undertakings were recognized as 'international control and surveillance companies' within the meaning of Article 8 (1) of Regulation No 1041/67, or to ensure that the Member States empowered to do so published a list of such undertakings.

Regulation No 876/68 of the Council makes payment of the variable refund dependent on proof that the product has 'reached the destination' fixed. In addition, at the time when the applicant requested that the refunds should be fixed in advance Regulations Nos 1201/70, 1420/70 and 1593/70 of the Commission did not require any other conditions of fact for payment of the refunds than proof of their 'arrival' in the country of destination. Only in the case of Romania was it necessary for the butter to have been definitively imported.

This clear legal situation was clarified even further by the interpretation which the Commission itself placed upon Article 8 of Regulation No 1041/67 in its said reply to Mr H. Vredeling in which it was stated that, with regard to exports to Morocco, it was sufficient to prove that the goods have actually arrived in the country of destination. After the Commission can no longer follow what becomes of the goods exported.' In this connexion the applicant was in no way interested in the sales which it effected on other markets being hampered by competition encountered from the goods which it thought it had sold to the Maghreb.

On 6 October 1971 the Commission notified the applicant by telephone that the fact goods had actually reached Morocco was sufficient and thereafter it

has not replied to the applicant's requests for confirmation.

The legal situation in which the applicant reposed its trust was also based on the constant practice adhered to up to that point by the competent German administration. The applicant offers to prove this.

The practice of the other Member States, which was the same in this sphere, was also adhered to until the entry into force of Regulation No 2110/74 (OJ L 220, p. 1) amending Regulation No 1041/67. The applicant also offers to prove this.

The Commission has infringed Articles 40 (2) and (3) and 155 of the EEC Treaty by tolerating up to the beginning of 1971 a practice on the part of all the Member States which, according to the view that it has adopted from 1976, was illegal and to which the Member States continued to adhere from the beginning of 1971 until the entry into force of Regulation No 2110/74 whilst the Federal Republic of Germany imposed stricter requirements. In accordance with the case-law of the Court it must be concluded that an amendment of a regulation from 1967 effected nine years later is out of time.

In its observations in Case 125/75 the Commission, contradicting its previous communications and relying on the economic objective, suddenly interpreted the concept of 'country of destination' in Regulation No 1041/67 as the 'market defined' by the national territory of destination and required that the goods qualifying for the refund 'actually reach the market'. The Commission thus adopts stricter requirements than it did in Regulation No 2110/74.

If the applicant had been aware of the new requirements of the Commission before it requested the advance fixings it would not have suffered any damage. It would then have required Corman to obtain customs clearance in Morocco and proof of it; Corman would have imposed similar requirements on its purchaser.

In addition the applicant would have been able and compelled to make a quite different appraisal of the marketing opportunities and to estimate what quantities could in fact be definitively imported and sold in North Africa. If the new requirements had been known after the advance fixings were made but before the contract with Corman was concluded the damage would have been considerably reduced (cf. judgment in Case 74/74 [1975] ECR 533).

With regard to claim 1 (a) the amount of the damage was occasioned by the combined effect of the decisions of refusal. The claim for interest for the period until 19 May 1973 is based on the fact that the applicant was able to claim a bank credit for DM 1 335 900 on which it had itself paid interest; for the period from 11 May 1973 the damage is based on the fact that the applicant invested money which it did not require and it would have done the same with the abovementioned sums. With regard to claim 1 (b) the applicant would have to pay the DM 823 417.75 to the customs office if the judgment in Case 125/75 was unfavourable to it. A decision would therefore have to be taken; meanwhile the applicant submits a list of the discount rates of the Deutsche Bank.

The other expenses (lawyers' and court fees and the like) are not yet known; the rate of interest might increase in the meantime. Since this would constitute additional damage the applicant must request a declaration that it is entitled to compensation; this also holds good should other harmful consequences be occasioned by the event described in head 2 of the conclusions.

The Court has not yet considered whether such a request for a declaration is admissible. In Joined Cases 56 to 60/74 the Advocate-General overlooked an important aspect of the present case: the need to interrupt the period of limitation. Proceedings are always admissible when the cause of the damage

is in existence when the application is lodged. Furthermore the alternative head 2 (b) pursues the same aim (interruption of the period of limitation) as head 2 (a).

The *Commission* maintains that in this case none of the conditions required by the case-law of the Court (for example the judgment in Case 153/73, *Holtz* [1974] ECR 675) to involve the liability of the Community has been fulfilled.

(a) The event giving rise to the damage

In accordance with Article 4 of Regulation No 1041/67 Member States had the right, which they already possessed under Article 8, to require for payment of refunds other documentary evidence than that proving the arrival of the goods. The actions of the customs office in requiring proof of a commercial transaction or evidence of a purchaser residing in the country of destination were fully in accordance with the said regulation. The agencies paying refunds in other Member States were in general extremely cautious in applying Article 4. For this reason the Commission associates itself with the request for proof which the applicant has submitted in this connexion.

However the Commission emphatically denies that any member of its staff assured the applicant that the customs office could not exercise the powers conferred upon it by Articles 4 and 8 of Regulation No 1041/67.

It is not illegal to express a specific legal view before the Court (as is confirmed moreover by the judgment in Case 125/75) nor can it serve as a basis for claims for compensation.

Finally with regard to the list of control and surveillance companies, when the German authorities checked whether the conditions for granting the refund had been fulfilled they quite properly acted on their own initiative.

(b) The causal connexion between the behaviour of the institution and the loss claimed

The behaviour of the Commission which was subsequent in point of time to the exports in dispute could not have led the applicant to rely upon the belief that it could obtain refunds applicable to Morocco for deliveries to Czechoslovakia.

The behaviour of the Commission prior to the exports in question did not adversely affect the rights of the applicant. If the applicant did not receive the refunds to which it thought it was entitled that is its own responsibility. Even if its hopes had been falsely aroused by the Commission the applicant did not acquire any right. With regard to the lawyers' and court fees the applicant has been obliged to incur costs because the customs office acted in accordance with the requirements of Regulation No 1041/67.

In any event the Commission does not accept the applicant's statement that it acted in good faith. The constant practice of the customs office was known at least to the applicant's legal adviser and the applicant could only rely on the fact that the customs office would not notice what was really happening and that it would grant the refunds as a matter of routine.

(c) Unlawfulness

The applicant does not comment on this point. The Commission's view of the legal situation coincides with the official point of view of the Court. Actions in conformity with the law are not illegal.

(d) Damage

With regard to head 1 (a) of the conclusions only the other parties to the contract with the applicant are responsible for the fact that the butter did not reach the Moroccan market. Since in accordance with the agreements of the members of the pool, losses arising

from operating the pool were divided amongst all the members, and since, at the meeting of 3 November 1970 with the Commission, Corman had guaranteed the payment of the refund, the applicant has not suffered any damage.

With regard to head 1 (b) the applicant improperly received the amounts paid since it was not entitled to a refund. There has been a judicial composition between it and its creditors, including the customs office. Of the total sum of DM 823 417.75 there was security for the reimbursement of DM 164 617.65. Under the judical composition the remainder, that is DM 658 800, was reduced by 50% The balance remaining, DM 329 400, was the subject of a guarantee and the applicant thus suffers no further damage so far as this sum is concerned.

Rights to interest are assimilated to the principal debt which in this case never came into being. On the contrary the interest which the applicant enjoyed from the DM 823 417.75, which it improperly received, must be set off against the debt which it claims.

With regard to lawyers' fees the Commission disputes that the fees incurred in acting on behalf of the applicant outside court proceedings and only with regard to the exports in question amount to DM 24 354.10.

The *Council* remarks that the 'wrongful act' committed by it is alleged to consist in laying down in Regulation No 876/68 in the first sentence of Article 6 (2) that 'the refund shall be paid ... provided it is proved that the product has reached the destination for which the refund was fixed'. The judgment of the Court in Case 125/75 dealt with the accusation of the applicant that 'the Council has rendered itself jointly liable'. Since Regulation No 876/68 is not unlawful the Commission does not understand why it ought to have requested the Commission to submit to it a new regulation.

The *applicant* replies that the Commission is trying to discredit it and to encourage the Court to overlook an absolutely essential factor: when it requested the advance fixings in August and September 1970 the rates of the refund for European and non-European third countries were in principle the same, that is 133 u. a. The supplementary refund of 4 u. a. which was provided for the countries of the Maghreb was not even enough to cover the increased transport costs.

How could the applicant have known before the end of March 1971 that the Court of Justice would decide in June 1976 that the mere fact of arrival of the butter in Morocco was not sufficient and that the product must in addition have been put into free circulation there? The decisive importance which the Court attached to the fourth recital of the preamble to Regulation No 876/68 could not have been clear to a trader without legal training and from whose point of view the only provision of the said regulation to be borne in mind was Article 6 which requires it to be proved that the product has reached the destination for which the refund was fixed. Moreover the Commission does not dispute that in Case 6/71 it still maintained that the criterion of entry into free circulation could not be adopted, or that the first time it laid down entry into free circulation as a general requirement was in Regulation No 2110/74 of 30 September 1974 whereas, before that date, it had merely required entry into free circulation in certain regulations dealing with individual cases differing from the present case. It is undeniably false that the Commission has always based its action on legal concepts approved by the Court of Justice in Case 125/75. Likewise it is incorrect to assert that the applicant, or its legal adviser, and the Commission were aware of the invariable practice of

the customs office (which only dated from February or March 1971).

During the period prior to 30 September 1974 the competent authorities of the other Member States on no occasion applied Article 4 of Regulation No 1041/67.

The applicant has never maintained that Corman had obtained refunds 'for devious transactions'.

The applicant was unaware at the outset that the goods in question would be sent to Czechoslovakia. It only learned of this when it had long since lost its power to dispose of the goods and to influence the course of the transaction.

Accepting the allegation of the *Commission* as correct, any onward transmission of the goods to Czechoslovakia (of which the applicant has never received any clear evidence) is to be explained by the fact that after the pool bought 41 000 tonnes of butter surpluses had practically ceased to exist in the EEC and when Czechoslovakia wished to import butter it could only obtain it in Morocco. Since the pool had absorbed the EEC 'butter mountain' prices began to rise on the world market and therefore refunds, which still amounted to 133 u. a. on 2 September 1970, were at zero from 12 March 1971.

The damage suffered by the applicant amounts to approximately DM 2 300 000 to which must be added interest and court and lawyers' fees. Thus the total loss considerably exceeds DM 3 000 000.

The applicant denies that it has a claim against Corman since the member of the selling pool which was responsible to the pool for the refunds was in this case the applicant itself. Corman, in its capacity as the undertaking which purchased 2 000 tonnes of butter from the applicant, did not act on that occasion as a member of the pool and the applicant could equally well have sold the butter to any other undertaking.

The applicant's complaint against the Commission does not relate to the legal view which it advanced in Case 125/75 but to its communications dating from 1967 which have occasioned the court fees, procedural costs and lawyers' fees.

There is no ground for complaint against the exporter in the fact that it approached a firm in Morocco which it properly considered as an international control and surveillance company but which the national authority responsible for refunds subsequently did not recognize as such.

The judicial composition which the applicant had to seek to avoid bankruptcy contained a clause covering the contingency of a recovery in its fortunes. If the outcome of the proceedings were to be favourable to the applicant this would in fact lead to the customs office's benefiting to the extent of DM 329 400.

A set-off of the nature suggested by the Commission is impossible since the creditors and debtors are not identical. The creditor for the DM 823 417.75 (which, according to the judgment in Case 125/75 was improperly obtained by the applicant) is the customs office whilst the debtor with regard to the interest claimed in the present application is the defendant. The claim for interest put forward under head 1 (b) arises from the fact that, pursuant to the judgment in Case 125/75, the customs office is entitled to claim interest from the applicant.

The *Commission* replies that the applicant's conclusion to the effect that the goods need not necessarily be consumed in the country of destination has nothing to do with the fact that they must first be put on the market there before a right to variable refunds arises. The fact that the applicant has been involved in numerous lawsuits is due in particular to the fact that the competent officials of the Commission did not share

its point of view. Moreover the finding that none of the competent organizations paid the variable refund when they suspected that the exports in question were in the nature of a 'devious transaction' proves that neither those organizations nor the Commission (by its toleration of this practice) could have misled the applicant.

The applicant's statement that it honestly believed that in all cases it would be paid the refund on mere production of the document attesting arrival in Morocco is contradicted by its previous behaviour. Can it be believed that the Czechoslovakian state undertaking, Koospol, urgently requiring butter for its own market, would put German butter on the Moroccan market in particular and buy from the applicant the product which the latter could not dispose of there?

The Commission suggests that the applicant should be required to produce the report which followed the official inquiry carried out in the Federal Republic of Germany after the discovery of the disputed transactions of the applicant.

With regard to damage, the applicant forgets that there was then no room and no purchaser for its butter on the Moroccan market since, in its own words, the annual requirements of Morocco had been 'met by other means'. What would then be the point of its clients' importing into Morocco butter intended for Czechoslovakia? How can there be a right to refunds for a loss for which the applicant wishes to obtain compensation when it asserts that if it had been notified in time it would have refrained entirely from obtaining the certificates and effecting the exports? The applicant cannot now claim as damages a sum which it could not have obtained in any case.

And what is the basis for the claim for injury unlawfully caused by a wrongful act or omission of the Commission committed the same error as the applicant and if that error was only discovered by the Court in the course of Case 125/75?

The applicant, represented by Mr Wendt, of the Hamburg Bar, the Council of the European Communities, represented by its Legal Adviser, Mr Schloh, acting as Agent, and the Commission of the European Communities, represented by its Legal Adviser, Mr Kalbe, acting as Agent, presented oral argument at the hearing on 12 January 1977.

The Advocate-General delivered his opinion at the hearing on 8 February 1977.

In accordance with Article 91 (1) of the Rules of Procedure the *applicant* requested that the Court should declare by an interlocutory judgment that a sentence in the Commission's defence should be deleted. Since the Commission has amended that sentence the applicant's request has been complied with and is thus no longer relevant.

Law

1 The present application for compensation, which was lodged on 12 May 1976, must be regarded as directed against the European Economic Community represented by the Council and the Commission pursuant to the second paragraph of Article 215 of the EEC Treaty.

2 On 2 September 1970 the applicant obtained export certificates for Morocco, Algeria or Tunisia fixing in advance refunds for certain quantities of butter obtained from the German intervention agency, for the marketing of which it had entered into a pooling agreement ('the butter pool').

On the basis of those certificates the applicant sold to a Belgian undertaking, a party to the pooling agreement, 2 000 tonnes of butter for delivery to Morocco.

3 The competent customs office initially paid the amount of the refund fixed in advance for part of the said exportation but subsequently rejected the claims for payment of the refunds for the remainder and demanded proof of marketing in Morocco.

Since it did not receive such proof the said customs office reclaimed from the applicant the amount which had been paid to it.

4 These events have given rise to a number of cases before the Finanzgericht Hamburg, one of which led to a request for a preliminary ruling (judgment of 2 June 1976 in Case 125/75 [1976] ECR 771).

During the course of that application for a preliminary ruling the applicant submitted this application after lodging with the Commission an initial request, in the form of a telex message, on 16 January 1976.

5 In this application the applicant claims damages for the injury occasioned it by the behaviour of the Commission which, through its 'communications' from 1967 onwards, led the defendant to assume that payment of the refunds fixed in advance depended solely upon the condition of the goods' having actually arrived in the territory of Morocco.

The application is also directed against the Council on the ground that it failed to establish clearly the legal situation regarding export refunds and that, contary to Article 152 of the EEC Treaty, it omitted to request the Commission to submit to it appropriate rules.

6 The main claim is for:

— Payment by the defendants of DM 1 355 900 constituting the refund refused to the applicant by the customs office together with interest from

1 May 1971 since the refund should have been paid at the latest on the day before that date; and

— Discharge by the defendants of the customs office's claims for repayment of the sum disbursed, namely DM 823 417·75, together with interest from 5 February 1971, the defendants paying these sums on behalf of the applicant to the said customs office.

It is claimed in the alternative that the defendants should pay the lawyers' fees already incurred (DM 72 922·96 together with interest from the date of commencing the proceedings), the court fees (DM 28 145·60) together with legal fees (DM 551·50) and that in addition the Court should declare that the defendants are obliged to compensate the applicant for all damage which it has suffered or will suffer on account of its assumption during the period from August 1970 to March 1971 that payment of the refunds depended solely on the butter's having actually arrived in Morocco.

Admissibility and the objection that the application is out of time

7 The Commission disputes the admissibility of the requests for a declaration on the grounds that the nature of any damage suffered, relating exclusively to the 2 000 tonnes of butter in dispute, must be known with certainty and that if the requests relate to other exports the application is lacking in precision.

The applicant replies that the said claims refer solely to the 2 000 tonnes in dispute but that, in the cases pending before the national court, there are other court and lawyers' fees which cannot yet be assessed.

8 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.

The objection of inadmissibility is thus unfounded.

9 The Council and the Commission maintain that pursuant to Article 43 of the Protocol on the Statute of the Court of Justice of the EEC claims for compensation arising out of any acts whatever 'from the years 1967 to 1970' were out of time at the latest by the end of 1975.

10 Before considering whether this objection is well founded it is appropriate to examine whether the Community is liable.

Substance

11 The main complaint which the applicant puts forward against the defendants amounts to claiming that Regulation No 876/68 of the Council of 28 June 1968 laying down general rules for granting export refunds on milk and milk products and criteria for fixing the amount of such refunds (OJ, English Special Edition, 1968, (I), L 155, p. 234) and Regulation No 1041/67 of the Commission of 21 December 1967 on detailed rules for the application of export refunds on products subject to a single price-system (OJ, English Special Edition, 1967, L 314, p. 323) make payment of the 'variable' refund depend solely on the requirement of proof of arrival in the territory of destination.

12 The reason why the refund varies according to the destination of the products is, according to the fourth recital of the preamble to Regulation No 876/68 that 'markets in the countries of destination are at [varying] distances from Community markets and special conditions apply to imports in certain countries of destination'.

It follows from Article 4 and the recitals of the preamble to the aforementioned regulation that the amount of the refund depends on the conditions of the market on which the product in question is to be placed and as a result on the actual import of the product into the given country of destination.

13 In the abovementioned judgment of 2 June 1976 the Court ruled that 'if it sufficed for the goods simply to be unloaded to qualify for payment of the refund at a higher rate, the *raison d'être* of the system of varying the refund would be disregarded and abuse would be made possible to the detriment of Community interests' and 'it is therefore necessary for the goods to have been cleared through customs and put into free circulation at the destination'.

14 Accordingly it cannot be alleged that the Council failed to establish clearly the legal situation regarding variable refunds in Regulation No 876/68 of the Council and this fact alone means that the proceedings against the Council are unfounded.

15 Pursuant to Article 4 of Regulation No 1041/67 of the Commission Member States may 'require, as a condition for payment of the refund, proof not only

that the product has left the geographical territory of the Community, but also that the product in question has been imported into a third country ...'.

Article 8 (1) of the same regulation lays down the procedure whereby proof of importation into a third country shall be furnished and provides in particular that the competent national authorities may 'require additional forms of proof'.

16 It is clear from the file that, even before 1971, the competent German customs office had often required proof of marketing in the country of destination — a requirement which was justified in particular by the need to avoid fraudulent practices in connexion with the refunds.

Moreover the applicant itself has conceded that, in any event, since the demand on the Moroccan market was limited, only part of the butter dispatched to Morocco could remain there and that it proved necessary to effect a re-consignment to other countries with a less favourable rate of refund.

The applicant has not provided a scintilla of evidence in support of its allegation that the Commission had by its various communications led it to believe that proof of marketing in the country of destination could not be required.

It must thus be held that neither the Commission nor the competent national authorities could have induced doubts on the part of the applicant as to what could be required by way of proof in connexion with the payment of variable refunds.

17 In those circumstances the proceedings against the Commission are also unfounded.

18 It is consequently unnecessary to consider further the objection put forward by the Council and the Commission to the effect that the application is out of time.

Costs

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

Since the applicant has failed in all its submissions it must be ordered to bear the costs.

On those grounds,

THE COURT

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear all the costs.**

Kutscher Pescatore Mertens de Wilmars

Sørensen Mackenzie Stuart O'Keeffe Bosco

Delivered in open court in Luxembourg on 2 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL REISCHL DELIVERED ON 8 FEBRUARY 1977 [1]

Mr President,
Members of the Court,

There is not much to say about the facts of the case with which we are concerned today. They are largely known from the reference for a preliminary ruling in Case 125/75.

From that we know that the applicant in August and September 1970 entered into a pooling agreement with three other undertakings (whilst retaining its legal and economic independence) for the sale outside the Community of butter held by the German intervention agency. In August and September 1970 the applicant obtained the necessary export certificates fixing the refunds in advance as provided for in Regulation No 1100/68 of the Commission (JO L 184, p. 14). The certificates covered exports

1 – Translated from the German.