of production refunds between maize groats and meal for the brewing industry and maize starch.

3. In the particular circumstances of the case, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No 665/75 is invalid. The illegality of Article 3 of Regulation (EEC) No 665/75 cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision was in part or in whole invalid. As the situation created, in law, by Article 3 of Regulation (EEC) No 665/75, is incompatible with the principle of equality, it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

In Joined Cases 124/76 and 20/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal Administratif (Administrative Court), Nancy, for a preliminary ruling in the action (Case 124/76) pending before that court between

SA MOULINS ET HUILERIES DE PONT-A-MOUSSON, (France)

and

OFFICE NATIONAL INTERPROFESSIONNEL DES CÉRÉALES, Paris

and by the Tribunal Administratif (Administrative Court), Châlons-sur-Marne, in the action (Case 20/77) pending before that court between

SOCIÉTÉ COOPERATIVE 'PROVIDENCE AGRICOLE DE LA CHAMPAGNE', Rheims,

and

OFFICE NATIONAL INTERPROFESSIONNEL DES CÉRÉALES, Paris,

on the validity of Regulation (EEC) No 665/75 of the Council of 4 March 1975 amending Regulation No 120/67/EEC on the common organization of the market in cereals (OJ L 72, p. 14) and of Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ L 281, p. 1) in that they provide for the abolition of the production refund previously established for the benefit of manufacturers of maize meal for the brewing industry,

THE COURT

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

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

gives the following

JUDGMENT

Facts and issues

The facts of the case, the course of the procedure and the written observations submitted under Article 20 of the Statute of the Court of Justice of the EEC may be summarized as follows:

I - Facts and procedure

1. The manufacture of beer involves the use, in addition to malt, of starch products derived from coarse-grained cereals capable of being processed into alcohol during fermentation: maize groats and maize meal (hereinafter called gritz) manufactured by the maize industry, starch produced by the starch manufacturing industry, and other starch products (broken rice, wheat flour etc.).

2. Gritz is manufactured by the maize industry by a purely mechanical method of processing maize grains. The brewing industry represents an important market for gritz.

Starch is manufactured by starch-producing undertakings, which form part of the chemical industry even when they use maize as the basic product. There are numerous outlets for the products of the starch industry (starch, gluten, glucose, dextrose etc.). The starch industry is accordingly in competition not only with the maize industry but also with those sectors of the chemical industry which manufacture oil-based substitute products.

3. Regulation No 19 of the Council of 4 April 1962 on the progressive establishment of the common organization of the market in cereals (JO of 20. 4. 1962, p. 933), introduced a system of levies for certain cereal products. Article 24 of the regulation provided however that the Council might adopt measures derogating from that system.

Such measures were adopted by Regulation No 55 of the Council of 30 June 1962 relating to the system in respect of processed products based on cereals (JO of 2. 7. 1962, p. 1583). Article 17 of that regulation established a system of discretionary refunds for certain starches. The thirteenth recital in the preamble to the regulation reads:

'Whereas because of the special situation on the market in starches and in particular the need for that industry to keep prices competitive with those for substitute products, it is necessary by way of derogation from the provisions ... of Regulation No 19 of the Council, to ensure by means of a production refund that the basic products used by the industry are made available to it at a lower price than that which would result from applying the system of levies ...

Regulation No 11/65/EEC of the Council of 26 January 1965 on the grant of a production refund for maize groats and meal used in the brewing industry (JO of 5. 2. 1965, p. 251) established a discretionary production refund for maize groats and meal used by the brewing industry. The recitals in the preamble to this regulation were worded as follows:

'Whereas the application of the levy system set up by Regulation No 19 has on the one hand caused maize groats and meal to increase in cost and has on the other hand given rise to difficulties as regards their use in the brewing industry, by reason of the competition from products with a similar use; whereas the grant of a production refund is a suitable remedy for this situation and whereas such refund should be authorized, in derogation from Regulation No 19;

whereas, because of its nature, such measure must be only temporary.'

The arrangements introduced by the definitive basic Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ, English Special Edition 1967, p. 33) made the grant of the production refund compulsory. In the tenth recital in the preamble to that regulation it is *inter alia* stated:

'Whereas ... because of the interchangeability of starches with quellmehl and maize groats and meal, production refunds should also be granted in respect of the latter products.'

Article 11 (1) of the regulation reads:

'1. A production refund shall be granted:
(a) for maize and common wheat used by the starch industry for the manufacture of starch and quellmehl;
(b) for potato starch;
(c) for maize used in the maize industry for the manufacture of maize groats and meal (gritz) used by the brewing industry.

No 138/67/EEC of the Council of 13 June 1967 fixing the refund to producers for groats and maize meal used by the brewing industry (JO of 22.6.1967, p. 2404) adopted in inplementation of Regulation No 120/67/EEC declared in its sole recital:

'Whereas the refund to be granted to producers of maize used by the maize industry for the manufacture of groats and maize meal for the brewing industry should be fixed at a level allowing a balance to be achieved between brewery prices for supplies of maize starch, on the one hand, and groats and maize meal on the other; whereas this objective will be achieved by fixing the refund for maize for the manufacture of groats and maize meal at the same level as the refund for maize for the manufacture of starch.'

Article 1 of the regulation accordingly provided as follows:

'Member States shall grant a production refund for maize used by the maize industry for the manufacture of groats and maize meal for the brewing industry equal to the refund granted at the same date for maize for the starch industry.'

Regulation No 138/67/EEC was replaced by Regulation No 367/67/EEC of the Council of 25 July 1967 fixing production refunds on maize groats and meal and broken rice used in the

brewing industry (OJ, English Special Edition 1967, p. 216) which in its sole recital declared *inter alia* that

'... the production refund on maize used by the maize industry for the manufacture of groats and meal for the brewing industry and on broken rice for the brewing industry should be fixed at such a level as to achieve a balance between the costs of supplying the brewing industry with maize starch on the one hand and with maize groats and meal and broken rice on the other?... Subsequent regulations amending Regulation No 120/67/EEC and those fixing the amount of the production refund maintained the parity between starch and gritz.

Accordingly Regulation (EEC) No 1132/74 of the Council of 29 April 1974 on production refunds in the cereals and rice sectors (OJ L 128, p. 24) had, in consolidating in a single regulation all the provisions relating to production refunds in the cereals and rice sectors, maintained a system which was the same for starch and gritz. But the effect of the regulation was to reduce to 24·60 units of account per metric ton [hereinafter called 'tonne'] the production refund for maize and common wheat used for the manufacture of starch and it no longer provided for a production refund for quellmehl.

Regulation (EEC) No 3113/74 of the Council of 9 December 1974 amending Regulation (EEC) No 1132/74 on production refunds in the cereals and rice sectors (OJ, L 332, 1974 p. 1) had resulted in the reduction to 15·55 u. a. per tonne of the refund granted for maize used in the manufacture of starch and for gritz.

In February 1975 the Commission proposed to the Council that the production refund should be made discretionary for maize and common wheat used in the Community for the manufacture of starch and for gritz used by the brewing industry (OJ C 31, 1975, p. 26).

In adopting Regulation (EEC) No 665/75 of 4 March 1975, which took effect from 1 August 1975, the Council made all production refunds provided for by the regulation discretionary but abolished all production refunds in the case of gritz for use by the brewing industry. The second recital in the preamble to Regulation (EEC) No 665/75 states *inter alia* that

'... it no longer appears necessary to grant a refund for the production of maize groats and meal for use by the brewing industry in the manufacture of beer.'

Article 3 of the regulation is accordingly worded as follows:

'1. A production refund may be granted
   (a) for maize and common wheat used in the Community for the manufacture of starch;
   (b) for potato starch;
   (c) for maize groats and meal (gritz) used in the Community for the manufacture of glucose by the process known as 'direct hydrolysis.'

In consequence, no provision was made for a production refund in the case of gritz by Regulation (EEC) No 1955/75 of the Council of 22 July 1975 on production refunds in the cereals and rice sectors (OJ L 200, 1975, p. 1) which replaced Regulation (EEC) No 1132/74. In addition, that regulation provided for a further reduction in the amount of the refund granted for maize used for the manufacture of starch, which it fixed at ten units of account per tonne.

Nor did Regulation (EEC) No 2727/75 of the Council of 29 October 1975 on the common organization of the market in cereals (OJ L 281, 1975, p. 1), which replaced Regulation No 120/67/EEC, privide for production refunds for gritz.

In June 1975, the Commission once again proposed to the Council that production refunds should be restored in the case of maize groats and meal for use by the brewing industry (OJ C 159, 1975, p. 9). It was not until July 1976 that this proposal was considered by the Council, which decided not to go on with it. This decision resulted in Regulation (EEC) No 1862/76 of 27 July 1976 amending Regulation (EEC) No 2742/75 on production refunds in the cereals and rice sectors (OJ L 206, 1975, p. 3). But Regulation (EEC) No 1862/76 raised the refund to 14 u. a. per tonne.

4. On 5 February 1976 (Case 124/76) and 10 February 1976 (Case 20/77) the respective plaintiffs in the main actions, who are producers of gritz, applied to the defendant in the main actions for the sums of FF 413 221 and FF 708 060 as production refunds for the quantities of maize utilized by them between 1 August and 31 December 1975 for the manufacture of gritz for the brewing industry. These applications were rejected on the ground that Community regulations no longer provided for the grant of production refunds for gritz.

The plaintiffs in the main actions brought the present proceedings before the Tribunal Administratif, Nancy, and the Tribunal Administratif, Châlons-sur-Marne, against these decisions rejecting the applications.

Before those courts, the plaintiffs in the main action urged in particular that Regulation (EEC) No 665/75 had not been adopted in accordance with the procedure provided for in Article 43 of the Treaty and that both that regulation and Regulation (EEC) No 2727/75 were contrary to the general principle of free competition between undertakings in that they provided for the abolition of the production refund for gritz.

The defendant in the main actions contended that the applications should be dismissed arguing *inter alia* that in adopting the contested decisions it had merely applied the relevant Community provisions.

5. Holding that the cases raised questions of interpretation of Community law, the Tribunal Administratif, Nancy, and the Tribunal Administratif, Châlons-sur-Marne, by orders dated respectively 25 November 1976 and 1 February 1977, stayed the proceedings and requested the Court of Justice under Article 177 of the EEC Treaty to give a preliminary ruling:

'... on the validity of Regulations (EEC) Nos 665/75 and 2727/75 of 4 March and 29 October 1975 of the Council of the European Economic Community in that they provide for the abolition of "the production refund" previously established for manufacturers of maize meal (gritz) for use by the brewing industry.'

6. The orders making the references were registered at the Court Registry on 21 December 1976 and 8 February 1977 respectively.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main actions, represented by Guy Lesourd, Advocate at the Conseil d'État and the Cour de Cassation, Paris, and by Etienne Jaudel, Advocate at the Cour d'Appel, Paris, by the Council, represented by Daniel Vignes, Director of its Legal Service, acting as Agent, assisted by Yves Crétien, a member of the said service, and by the Commission, represented by its Legal Adviser, Richard Wainwright, acting as Agent, assisted by Jacques Delmoly, a member of the Legal Service.

By order of 25 May 1977 the Court decided to join the cases for the purposes of the procedure.

After hearing the report of the Judge-Rapporteur and the views of the

Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

Nevertheless the Court requested the parties, the Council and the Commission to give certain explanations in writing either before or during the hearing.

7. The question of the abolition of the production refund for gritz is also the main issue in Joined Cases 64 and 113/76, *Dumortier Frères et Maïseries du Nord* v *Council.*

II — Written observations submitted to the Court

1. The *plaintiffs in the main actions* claim that Regulation (EEC) No 665/75 is invalid in that it provides for the abolition of the production refund for gritz.

(a) In the first place the Council can abolish the production refund for gritz only in accordance with the provisions of Articles 43 and 149 of the Treaty. As the proposal for a regulation drafted by the Commission in February 1975 did not provide for the abolition of the refund granted to the maize industry for gritz for the brewing industry, the Council had the choice of only two alternatives: either to adopt the draft drawn up by the Commission of to reject it. Under Article 149 of the Treaty, unanimity is required for it to be able to amend the proposal and adopt a wording which has not received the approval of the Commission.

Since there is nothing in any official publication to show that, before the decision of the Council which led to Regulation (EEC) No 665/75, the Commission had amended its original proposal or that the decision of the Council was unanimous the regulation appears to be out of order, and liable on this account to be declared void.

In its defence in Cases 64 and 113/76 the Council argues, as regards the alleged formal irregularity when Regulation (EEC) No 665/75 was adopted, that during the discussions in the Council the Commission had altered its original proposal and proposed that the production refund for gritz should be abolished.

The plaintiffs in the main actions point out in this connexion that, during the negotiations concerning Regulation (EEC) No 665/75, the Commission did not amend its original proposal on the basis of abolishing all refunds for gritz because this step was approved by only one of its members. On the contrary, when, in June 1975, the Commission proposed that the refund should be restored, it dissociated itself from the attitude adopted by the member concerned.

On the question whether the decisions of the Council were adopted unanimously, the plaintiffs in the main actions are content to suggest that the Court should see fit to require formal proof that the decision was unanimous.

(b) Secondly, the plaintiffs in the main actions point out that it is not the purpose of the actions to deny that the expediency of support measures is a matter for the Council's discretion. Nevertheless the contested regulations are arbitrary; they produce an unlawful disparity between two products which are manufactured from the same raw material and put to the same use. In this connexion the applicants point to Article 2 of the Treaty, under the terms of which the Community shall have as one of its tasks to promote a harmonious development of economic activities and a continuous and balanced expansion, and also to Article 3 (f) of the Treaty. The Council must comply with Article 3 (f) and under Article 38 (2) of the Treaty the rules for the establishment of the common market shall, save as otherwise provided in Articles 39 to 46, apply to agricultural products.

(c) Regulation No 11/65/EEC was intended to create a balance between starch and gritz but this balance was only fully established by Regulation No 120/67/EEC. The reason why this balance was only gradually achieved is that Articles 3 and 39 of the Treaty provide for development to be gradual. Nevertheless once this balance is achieved there is no authority in the Treaty for a sudden step backwards.

Article 11 (1) of Regulation No 120/67/EEC established a system of aids which was indirect in the sense that its essential aim was to enable the maize industry to enjoy, in particular on the market for the brewery industry, conditions of competition which were fair compared with those for the starch industry. In thereby establishing equality of treatment between the two branches of industry, the Council was merely complying with the aforesaid provisions of the Treaty and with Article 40 thereof. Moreover, the recitals in the preamble to Regulation No 120/67/EEC make it quite clear that the production refund for gritz would remove any discrimination between starch manufacturers and gritz manufactures with the result that, even if this measure was not immediately adopted because of the need to develop the common agricultural policy by degrees, the Council could, without flying in the face of the wording of the Treaty itself, no longer compromise the rule of equality of treatment which from then on existed between the two competing industries.

(d) The plaintiffs in the main actions are therefore entitled to rely on a superior rule of law for the protection of the individual which the Community authorities are bound to observe.

Furthermore the rule of equality of treatment underlies *inter alia* Articles 85, *et seq.* and 92 *et seq.* of the Treaty.

Even though, in respect of agriculture, Article 42 of the Treaty lays down that the application of the rules on competition must be reconciled with other requirements, it is clear from that article and also from Article 29 of Regulation No 120/67/EEC that the Community authorities must comply with the objectives referred to in Article 39 (1) of the Treaty, which include that of stabilizing markets.

It is also the view of the Court that the organs of the Community must comply with certain principles including those relating to freedom of trade and of industry, and those relating to free competition and equality of treatment as between the various parties concerned: judgment of 17 February 1976 in Case 45/75, *Rewe-Zentrale des Lebensmittel-Großhandels GmbH* v *Hauptzollamt Landau-Pfalz* ([1976] ECR 181). It was this spirit which inspired the regulations enabling gritz to benefit from the same subsidy measures as starch.

(e) Regulations (EEC) Nos 665/75, 2727/75 and 1862/76 created a fundamental disparity between the starch industry and the maize industry, affecting two competing products which, at the same stage of marketing or production, have, from the consumers' point of view, similar properties and answer the same needs. But while, even for those of its products which could be used in brewing, the starch industry continued to receive a discretionary production refund, there was no refund at all for the maize industry.

This disparity constitutes a breach of the principle of free competition between the various branches of industry and, in consequence, a breach of the general principles of law which the Community authorities must observe. While providing Community agriculture with some protection against the world market, any intervention measure must allow for the need to ensure that the support measures have absolutely no effect on normal conditions of

intra-Community competition whether this is between the nationals of the various States in the Community, between the various competing branches of Community industry or between undertakings. Both the recital in the preamble to Regulation No 367/67/EEC and the Commission's proposal of June 1975 were based on this superior rule of law.

The undertakings in the maize industry were sacrificed for economic reasons which did not achieve their purpose because there was no reduction in the expenditure of the EAGGF since the brewers purchased starch instead of gritz. This is clear from the Commission's proposals of June 1975, from the report of 13 October 1975 of the Committee on Agriculture of the European Parliament regarding the proposal (Working Document No 303/75), and from the report of the debates of the European Parliament of 19 December 1975 (Annex OJ: Debates of the EP No 197 of December 1975).

The plaintiffs in the main actions state that, in consequence, the Court cannot fail to declare illegal regulations of the Council which arbitrarily create disparity of treatment between the maize industry and the starch industry in respect of products which compete with each other on the market supplying the brewing industry.

(f) With regard to the Council's contention in Joined Cases 64 and 113/76 that there is a closer relationship between gritz and quellmehl than between quellmehl and starch for brewing, the plaintiffs in the main actions state that this argument arises from an erroneous reading of the words of the tenth recital in the preamble to Regulations No 120/67/EEC. It is clear from this recital that, on some markets, there can be competition between quellmehl and starches and on other markets competition between gritz and starches. As regards some outlets, therefore, quellmehl can compete with starches but it cannot be used in the brewing industry for the manufacture of beer.

(g) With regard to the Council's observation in Joined Cases 64 and 113/76 that there is a complicated relationship not only between gritz and starch but also between a whole range of products, the plaintiffs in the main actions point out that there cannot be discrimination in respect of products which are not entitled to the production refund in question, since they are not derived from maize. This case cannot therefore affect broken rice or other starch products. On the other hand, the plaintiffs are right in maintaining that no discriminatory measure can be permitted in respect of the grant of a production refund on maize used in the Community for the manufacture of beer, whether the maize is processed by the starch industry or by the maize industry.

(h) The plaintiffs in the main actions claim that the Court should declare Regulations (EEC) No 665/75 and 2727/75 to be out of order and void in that they provide for the abolition of the production refund on maize previously established for the benefit of manufacturers of gritz used by the brewing industry while maintaining it on maize for the benefit of manufacturers of starch which is put to the same use.

2. The *Council* considers that the Court should reject all the arguments relied upon by the plaintiffs in the main actions before the courts making the references.

(a) In connexion with the alleged procedural irregularity the Council points out that, when Regulation (EEC) No 665/75 was adopted in the course of the discussions at the Council, the Commission changed its original proposal and proposed that the production refund for gritz should be abolished. Moreover the Council adopted

Regulation (EEC) No 665/75 unanimously. In this way the Council fully satisfied the two conditions in Article 149 of the Treaty.

(b) With regard to the alleged infringement of the rules of the Treaty on competition, the Council points out that Articles 85 to 90 of the Treaty apply exclusively to undertakings. There can be no connexion between those rules and regulations of the Council adopted in connexion with the management of an agricultural market.

The same applies to Article 92 *et seq.* of the Treaty relating to aid granted by the States. In any case the principle of non-discrimination has nothing to do with regulations on competition between undertakings.

As for Article 42 of the Treaty, the Council recalls that its object is to suspend the application of the provisions of the Treaty relating to the rules on competition but nevertheless it empowers the Council to make them applicable to the extent which it may determine. The intention of the provision is to facilitate the introduction of a system of competition which is both more flexible and better suited to the needs of agriculture than that produced by Articles 85 to 94. The indication in subparagraphs (a) and (b) of the aids which the Council may, in particular, authorize to be granted is evidence of that intention.

(c) The Council rejects the notion that, by abolishing the refund for gritz while maintaining it for maize starch, it infringed a non-discrimination rule and put an end to the existing parity between the starch industry and the maize industry without justification.

(d) The Council emphasizes that the distinction drawn by it between the maize industry and the starch industry when it abolished production refunds in the case of one and maintained them in the case of the other was based on objective criteria and genuine reasons.

The Council does not deny that it did at times wish to preserve a certain balance in the arrangements for these two products: Regulations Nos 11/65/EEC, 120/67/EEC and 138/67/EEC. However, in a reference to the tenth recital in the preamble to Regulation No 120/67/EEC, it states that the last regulation takes account of a complicated relationship not only between gritz and starch but between a whole range of products: starches on the one hand and groats and meal on the other. This situation was further complicated a few weeks later owing to the addition of a fourth product, broken rice, which was assimilated to gritz by Regulation No 367/67/EEC. Regulation No 120/67/EEC had already indicated that this extension to other products of the system of production refunds applicable to the first group of products results from 'applying the system of levies and common prices', that is to say, from the imbalance and subsequent disturbances that the level of world prices might entail in the case of certain products.

In the Council's view this situation was not a lasting one. It was behind the Council's measures until 1974 and, again, it gave rise to Regulation (EEC) No 1132/74. As world prices have risen, the magnitude of the refunds is no longer economically justified, and the institutions are disturbed by the excessive financial burden to which the system gives rise.

In consequence the Council has gradually reduced production refunds, made them discretionary and even abolished them in the case of certain products like quellmehl and gritz.

The Council does not accept that the discontinuance of the relationship between gritz and maize starch can be regarded as discriminatory or infringes any rule whatsoever relating to equality.

At one time gritz, starch for brewing, quellmehl and broken rice were in exactly the same situation. But this state of affairs was not maintained. First of all the refund for quellmehl was abolished and this resulted in its abolition for gritz. It was the recognition that there existed a closer economic relationship between quellmehl and gritz than between quellmehl and starch for brewing which led to the abolition of the refund granted for gritz.

The Council states that it had at the same time to recognize that the starch industry was very vulnerable to competition from certain chemical industries and this consideration justified its decision to maintain the refund for the benefit of maize starch.

Nor, in the Council's view, must it be forgotten that the whole of the machinery of production refunds has now been called into question by the Council; by adopting Regulation (EEC) No 1862/76 the Council has initiated a debate on the possibility of abolishing all production refunds in the cereals and rice sector from 1978 onwards and has taken official note of the Commission's intention to submit as soon as possible a report based on an examination in depth of this subject. Clearly, production refunds constitute an excessive burden and one which the Community budget could well be spared and this is a consideration which the Council had to take into account.

Nevertheless, pending the outcome of this comprehensive examination, it considered it best to maintain the refund for maize starch for the time being and it seems difficult to regard such circumspection as amounting to contravention of a rule of law: judgment of the Court of 2 June 1976, Joined Cases 56 to 60/74, *Kampffmeyer Mühlenvereinigung* v *Council and Commission* ([1976 ECR 711).

The arguments advanced by the plaintiffs in the main actions before the courts making the references are an attempt to invent new theoretical rules of law relating, on the one hand, to the maintenance of parity and non-discrimination between industries and, on the other hand, to the need to preserve the financial advantages acquired by one branch of industry so long as those advantages are granted to another branch competing in the same field. There are no such rules and, if they existed, they would appreciably restrict the discretionary power of the Community authorities.

The Council accordingly asks the Court to answer the questions submitted to it by the courts making the references by ruling that the questions raised disclose no factor of such a kind as to affect the validity of Regulations (EEC) Nos 665/75 and 2727/75 of the Council.

3. (a) On the question as to the precise circumstances in which Regulation (EEC) No 665/75 was adopted, the *Commission* states that it can only refer to the explanations supplied on this subject by the Council which the latter set out in its defence in Case 64/76. The Commission confirms however that one of its members took the action described in the Council's defence, that is to say, proposed the abolition of the production refund for products used in the maize industry for the manufacture of gritz for the brewing industry.

As regards the adoption of Regulation (EEC) No 2727/75 the Commission explains that, as this was a consolidating regulation, it in fact did no more than repeat the provisions which were in force on that date; Article 11 of its (unpublished) proposal dated 12 June 1975 was therefore consistent with Article 11 of Regulation No 120/67/EEC, as amended by Regulation (EEC) No 665/75, referred to above. There was therefore no amendment of the Commission's proposal on that point.

(b) As regards the alleged breach by Regulations (EEC) Nos 665/75 and

2727/75 of the principle of equality of treatment, the Commission disputes the arguments of the plaintiffs in the main actions in terms both of the economic grounds and the submissions relied upon.

(c) According to the Commission the available economic information does not go to prove that after 1 August 1975 the competitive position of the maize industry in France became weaker in respect of its supply of gritz to the breweries. On the contrary it is established that, in the first place, gritz supplies by the French manufacturers to the breweries rose from 87 946 tonnes in 1974/75 to 89 300 tonnes in 1975/76 and, secondly, there has since August 1975 been virtually no use of gritz instead of starch by the consuming industry. This last statement can be explained by the investment outlay necessary to substitute starch for gritz in the process of the manufacture of beer because starch requires a better filter system. Furthermore, gritz is more easily handled than starch which, being a powder, tends to 'stick'.

(d) The Commission is unable to agree that the common agricultural policy must in all circumstances comply with the principle of free competition, at least in so far as the principle is based on Articles 85 *et seq.* of the Treaty. To do otherwise would be to misinterpret Article 42 of the Treaty. In any event the Commission regards it as an exaggeration to claim, as do the plaintiffs in the main actions, that each and every intervention measure must in no way affect normal conditions of intra-Community competition. Such a requirement goes further than compliance with the non-discrimination rule as set out in the second subparagraph of Article 40 (3) of the Treaty. Moreover the rule must be considered in relation to the other objectives laid down in Article 39. The Court has recognized that there may be some conflict between these various objectives, with the result that the Community legislature is recognized by the Court as having a wide discretion both in choosing between the objectives of Article 39, for example, in the judgment of 24 October 1973 in *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* [1973] ECR 1091, and in choosing the means of attaining them, for example, in the judgment of 13 June 1972 in *Cie d'Approvisionnement* v *Commission* [1972] ECR 391.

Against this background the Council's decision to abolish the production refund on gritz must be viewed in terms of a whole range of economic choices made by the Community legislature: exclusion of quellmehl from the list of products qualifying for refund (Regulation (EEC) No 1125/74) and reduction in the amount of the refunds granted for maize for use in the manufacture of starch and for gritz (Regulation (EEC) No 3113/74). Such choices fall within the normal scope of the discretion which the institutions of the Community are recognized as having for the purpose of the conduct of economic policy in general and the control of the common agricultural policy in particular.

(e) Finally the Commission suggests that the plaintiffs in the main actions may be relying on a sort of 'prescriptive right' to the production refund. In this connexion it points out that, in its decisions, the Court has recognized that even the concept of stabilization of the markets, embodied in Article 39 (1) (c) of the Treaty, cannot wholly cover the maintenance of positions already established under previous market conditions: judgment of the Court of 2 June 1976 in Joined Cases 56 to 60/74, *Kampffmeyer* v *Commission and Council* [1976] ECR 711).

III — Written replies to the questions put by the Court

1. The Court requested the *Commission* to make a statement before the hearing in regard to:

(a) the considerations which led to the inclusion of the following recital in the draft regulation of 20 June 1975 proposed to the Council:
'Whereas the absence of such a refund for maize groats and meal (gritz) intended for use by the brewing industry in the manufacture of beer could, in the circumstances likely to obtain, disturb the balance between the cost of supplying the breweries with maize starch on the one hand and maize groats and meal on the other; whereas therefore it appears necessary to provide for a discretionary refund for production of maize groats and meal for use by the brewing industry in the manufacture of beer'; and

(b) whether, as stated in the report of the Committee on Agriculture of the European Parliament of 13 October 1975 (Working Document No 303/75), at paragraph 15, it is true that the Commission made the following statement:
'Consultation with the Commission has revealed that termination of production refunds for maize groats and meal and broken rice has not resulted in any saving to the EAGGF. Those using maize and groats and broken rice previously have simply switched to maize starch as a substitute. The end result has merely been a transfer in payments from the EAGGF from one product to another.'

In reply to the first question the Commission stated that, at the material time, it believed that the abolition of the production refund for maize groats and meal for use by the brewing industry in the manufacture of beer strengthened the competitive position of starch compared with maize groats and meal to an extent which would result in their use being completely superseded by that of starch.

According to a working document prepared by the staff of the Commission the superiority of starch in the marketing year 1975/76 is shown by the following figures:

Maize starch

u. a./1 000 kg

120·98 threshold price maize — 10 u. a. refund

1·61 feed-conversion rate maize/starch

194·78

Maize groats

u. a./1 000 kg

120·98 threshold price maize — 10 u. a. refund

1·80 feed-conversion rate maize/groats

217·76

In reply to the second question the Commission stated that it is correct that during the consultations which took place between it and the Committee for Agriculture of the European Parliament during September 1975, the Commission's representatives expressed the view that the abolition of the production refund for maize groats and meal and for broken rice would not result in a reduction of the costs of the EAGGF, for the reason that consumers of these products would use maize starch as a substitute product for them. But the Commission was not in a position in September 1975 to judge what had been the effect of the abolition of an aid as from 1 August 1975.

On this point the Commission stated that even 18 months after the abolition of this aid, the returns in its possession of the expense incurred by the Member States did not amount to 'data' of any significance concerning the interchangeability of the products involved.

2. The Court also asked the parties and the Council to comment before the hearing on the statistics showing that the supply of gritz by the French producers to breweries rose from 87 946 tonnes in 1974/75 to 89 300 tonnes (+ 1·50 %) in 1975/76 whereas supplies to the brewing

industry by millers in the north region fell from 27 708 tonnes in 1974/75 to 21 401 tonnes in 1975/76.

The *plaintiffs in the main actions* expressed their agreement with these figures which reveal, over the whole of France, an increase of 1·54 % in the sales of gritz to the brewing industry while in the case of the north region alone there was a fall of 22·76 % in sales during the same period.

However, between 1975 and 1976 beer production in France rose from 22 169 738 hectol. to 23 869 465 hectol., an increase of 7·67 %. Over the country as a whole, this increase was almost entirely in favour of the starch industry.

As far as the plaintiff companies are concerned, regard should not be paid to statistics of national results but only to the local results affecting the regions in northern France because it is there that the competition from starch is most keenly felt since the only two maize starch manufacturers in France have their factories in that region. As the conditions of competition cannot be assessed without taking comparative transport costs into account, the maize industries established in the north and north-east regions and supplying the breweries in those regions bore the main brunt of the pressure of competition from starch, which became increasingly less severe further and further away to the south.

In any case, especially over a short period of time, statistical data cannot reflect the magnitude of the damage caused to the maize industry owing to the fact that, in order to keep their trade going and not to shut down, the maize industries initially accepted sacrifices by selling their products at a loss.

The *Council* also expressed agreement with the figures in question.

The question was also asked whether the reason why supplies of gritz to the breweries in the north region fell between the 1974/75 and the 1975/76 marketing years whereas, overall, those of the French maize industry remained the same was not that the plaintiffs' French or German competitors had improved their share of gritz consumption in France.

IV — Oral procedure

At the hearing on 21 June 1977 the plaintiffs in the main actions, represented by Guy Lesourd and Etienne Jaudel, the Council, represented by the Director of its Legal Service, Daniel Vignes, acting as Agent, and the Commission, represented by its Legal Adviser, J. Delmoly, acting as assistant to the Agent, made their oral observations and gave their replies to the questions put by the Court.

In so doing the parties made statements, *inter alia*, to the following effect:

The *plaintiffs in the main actions* submitted statistical information to the effect that the sales of starch to the breweries rose from 1 500 tonnes during the 1974/75 marketing year to 6 500 tonnes during the 1975/76 marketing year and reached 8 500 tonnes during the 1976/77 marketing year.

Supplies of gritz to the breweries by foreign manufacturers amounted to 19 379 tonnes during the 1974/75 marketing year and to 20 648 tonnes (+ 6·55 %) during the 1975/76 marketing year, while the supplies made by German manufacturers were 18 924 and 17 590 tonnes (— 7·04 %) respectively.

The *Council* stated that the output of the maize industry had doubled over about 15 years.

In reply to a question put by the Court it explained that it had never claimed that gritz and quellmehl were

interchangeable. Any reference it may have made to a relationship between quellmehl and gritz was concerned with a legal relationship and not a trade relationship; the two products form part of the same group.

The Council furthermore stated that there had not only been, between the 1974/75 and the 1975/76 marketing years, a drop of 22 % in supplies to breweries from the maize manufacturers of northern France but a similar reduction had also been recorded between the 1973/74 and 1974/75 marketing years. Finally, it stated that there had been a sharp rise in imports since 1972.

The *Commission* pointed out that maize starch supplies to the brewing industry had fallen since 1970/71:

1970/71: 10 800 tonnes; 1971/72: 11 020 tonnes,

1975/76: 6 000 tonnes.

The Advocate-General delivered his opinion at the hearing on 22 September 1977.

Decision

1 By orders dated respectively 25 November 1976 and 1 February 1977, which reached the Court on 21 December 1976 and 8 February 1977, the Tribunal Administratif, Nancy, and the Tribunal Administratif, Châlons-sur-Marne, asked the Court under Article 177 of the EEC Treaty for a ruling on the validity of Regulations (EEC) Nos 665/75 of the Council of 4 March 1975 amending Regulation No 120/67/EEC on the common organization of the market in cereals (OJ L 72 of 20.3.1975, p. 14) and Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals (OJ L 281 of 1.11.1975, p. 1) in that they provide for the abolition of the production refund previously established for the benefit of manufacturers of maize groats and meal for the brewing industry.

2 Since the questions submitted by the two national courts are identical in content and purpose, it is proper to join the cases for the purposes of the judgment.

3 The questions were referred in connexion with proceedings for payment of a production refund for maize for the brewing industry which were brought against the competent national authorities by manufacturers of maize groats and meal (gritz) who claim that the provisions which abolished the production refund in that branch of industry while maintaining it for maize starch constitute discrimination contrary to the second subparagraph of Article 40 (3) of the Treaty.

4 The production refund for maize groats and meal used by the brewing industry was first introduced as discretionary by Regulation No 11/65/EEC of the Council of 26 January 1965 (JO of 5.2.1965, p. 251) and subsequently as compulsory by Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967 (OJ, English Special Edition 1967, p. 33).

5 The first recital in the preamble to Regulation No 11/65/EEC states that the refund was introduced because of the difficulties created as regards the use of maize groats and meal in the brewing industry, by reason of the competition from products with a similar use.

6 Regulation No 120/67/EEC gave the same reason when, in its tenth recital, it referred to the possibility of interchangeability of starches with maize and groats and meal.

7 With the object of achieving a balance between brewery prices for supplies of maize starch, on the one hand and of maize groats and meal on the other, Regulation No 138/67/EEC of the Council of 13 June 1967 (JO of 22.6.1967, p. 2404) fixing the production refund in respect of maize groats and meal used by the brewing industry fixed the refunds for the two products at the same level.

8 These identical arrangements for the two products were maintained until 1 August 1975, the date of entry into force of Regulation (EEC) No 665/75 whereby Article 11 of Regulation No 120/67/EEC was replaced by a new text which, while making the grant of a production refund for starch discretionary, no longer provided for a production refund in the case of maize groats and meal for the brewing industry.

9 The only reason for this change, contained in the second recital in the preamble to Regulation (EEC) No 665/75 was that, it no longer appears necessary to grant a refund for the production of maize groats and meal for use by the brewing industry in the manufacture of beer'.

10 By virtue of the possibility provided for by the new wording of Article 11 of Regulation No 120/67/EEC, a production refund for maize for use in the manufacture of starch was fixed by Regulation (EEC) No 1955/75 of the

Council of 22 July 1975 (OJ L 200 of 31.7.1975, p. 1) and the regulations which subsequently replaced it.

11 The system thus established, which provided for a discretionary refund for maize for use in the manufacture of starch but for none in the case of maize for the brewing industry, was continued by Article 11 of the new basic Regulation No 2727/75 of 29 October 1975 on the common organization of the market in cereals (OJ L 281 of 1.11.1975, p. 1).

12 Nevertheless the Commission which, apparently, did not consider the different treatment of the two products to be justified, submitted to the Council on 20 June 1975 a proposal for a regulation which would reintroduce the refund for maize groats and meal for the brewing industry on the ground that the absence of such a refund 'could, in the circumstances likely to obtain, disturb the balance between the cost of supplying the brewing industry with maize starch on the one hand, and with maize groats and meal on the other' (OJ C 159 of 16.7.1975, p. 9).

13 Nothing came of the proposal submitted to the Council on these lines.

14 The second subparagraph of Article 40 (3) of the Treaty provides that the common organization of agricultural markets 'shall exclude any discrimination between producers or consumers within the Community'.

15 Whilst this wording undoubtedly prohibits any discrimination between producers of the same product it does not refer in such clear terms to the relationship between different industrial or trade sectors in the sphere of processed agricultural products.

16 This does not alter the fact that the prohibition of discrimination laid down in the provision cited is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of Community law.

17 This principle requires that similar situations shall not be treated differently unless differentiation is objectively justified.

18 It must therefore be ascertained whether maize groats and meal on the one hand and maize starch on the other are in comparable situations, in particular in the sense that starch can be substituted for maize groats and meal in the production of beer and that the choice of the brewing industry between the two products mainly depends upon the cost of supply.

19 In this connexion the Council's representative before the Court denied the existence of such a relationship between the two products.

20 On the other hand it is clear that the Commission's action in this field over the years was invariably based on the possibility of interchangeability between the two products in the manufacture of beer.

21 This possibility of interchangeability was confirmed during the proceedings by the statements put in by the plaintiffs in the main actions which emanated not only from their brewer customers but also from independent experts on brewing.

22 In view in particular of the length of time during which the two products were given equality of treatment with regard to production refunds, it has not been established that there are objective circumstances which could have justified altering the previous system as was done by Regulation (EEC) No 665/75 which put an end to this equality of treatment.

23 It is clear from the foregoing that the abolition as a result of Regulation (EEC) No 66/75 of the refund for maize groats and meal, while, under the terms of that regulation in conjunction with Regulation (EEC) No 1955/75, the refund was maintained for maize starch amounts to a disregard of the principle of equality.

24 In the particular circumstances of the case, however, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No 665/75 is invalid.

25 It must first of all be borne in mind that the amendment of Article 11 of Regulation No 120/67/EEC effected by Article 3 of Regulation (EEC) No

665/75 took the form not of the deletion of that part of the text which relates to maize groats and meal for use by the brewing industry but of the replacement of the previous wording by a new wording in which there is no mention of those products.

26 Thus the provision is unlawful because of something for which it makes no provisions rather than on account of any part of its wording.

27 However, this unlawfulness cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision is in part or in whole invalid.

28 On the other hand, the conclusion must be drawn that, in law, the situation created by Article 3 of Regulation (EEC) No 665/75, whereby the previous text was replaced by a new wording of Article 11 of Regulation No 120/67/EEC, is incompatibile with the principle of equality and that it is for the competent institutions of the Community to adopt the necessary measures to correct this incompatibility.

29 The need for a reply to this effect to the questions asked is borne out by the existence of several courses of action which would enable the two products in question once again to be treated equally and to make good any damage sustained by those concerned and by the fact that it is for the institutions reponsible for the common agricultural policy to assess the economic and political considerations on which this choice of action depends.

Costs

30 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

31 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT

in answer to the questions referred to it by the Tribunaux Administratifs, Nancy and Châlons-sur-Marne, by orders of 25 November 1976 and 1 February 1977, hereby rules:

1. **The provisions of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967 as worded with effect from 1 August 1975 following the amendment made by Article 3 of Regulation (EEC) No 665/75 of the Council of 4 March 1975 and repeated in Regulation (EEC) No 2727/75 of the Council of 29 October 1975, in conjunction with Regulation (EEC) No 1955/75 of the Council of 22 July 1975 and the subsequent regulations which replaced it, are incompatible with the principle of equality in so far as they provide for a difference of treatment in respect of production refunds between maize groats and meal for the brewing industry and maize starch.**

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

Kutscher Sørensen Bosco Donner Pescatore

Mertens de Wilmars Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxemburg on 19 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI
(see Joined Cases 117/76 and 16/77, p. 1773)