selling prices the disadvantages for which he claims compensation.

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

In Joined Cases 241, 242 and 245 to 250/78

DGV, DEUTSCHE GETREIDEVERWERTUNG UND RHEINISCHE KRAFTFUTTERWERKE GMBH, Frankfurt am Main (Federal Republic of Germany) (Case 241/78),

WERHAHN HANSAMÜHLE, Neuss am Rhein (Federal Republic of Germany) (Case 242/78),

S.A. MAÏSERIES BENELUX N.V., Wilsele (Belgium) (Case 245/78),

S.P.R.L. MASÉLIS FRÈRES, Roeselare (Belgium) (Case 246/78),

CODRICO B.V., Rotterdam (Netherlands) (Case 247/78),

HANSA-LAGERHAUS STRÖH, Hamburg (Federal Republic of Germany) (Case 248/78),

B.V. MEELFABRIEK "WEERT" V/H GEBR. VAN DE VENNE, Weert (Netherlands) (Case 249/78),

CONTIFEX GETREIDEPRODUKTE GMBH & CO. KG, Oldenburg (Federal Republic of Germany) (Case 250/78),

represented by the Advocates of the Chambers of Fritz Modest and Others, Hamburg, with an address for service in Luxembourg at the Chambers of J. Hansen-Housse, 21 Rue Aldringen,

applicants,

v

THE EUROPEAN ECONOMIC COMMUNITY, represented by its organs:

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

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

defendants

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

THE COURT

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

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

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

1. In its judgment of 19 October 1977 in Joined Cases 124/76 and 20/77 *S.A. Moulins et Huileries de Pont-à-Mousson* and *Société Coopérative "Providence Agricole de la Champagne"* v *Office National Interprofessionnel des Céréales* [1977] ECR 1795, the Court decided that:

"(1) The provisions of Article II 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."

2. By Regulations No 1125/78 of 22 May 1978, amending Regulation No 2727/75 on the common organization of the market in cereals (Official Journal L 142 of 30 May 1978, p. 21) and No 1127/78 of 22 May 1978, amending Regulation No 2742/75, on production refunds in the cereals and rice sectors (Official Journal L 142 of 30 May 1978, p. 24) the Council reintroduced until the end of the 1978/79 marketing year a scheme of production refunds for the maize used for the manufacture of groats and meal (hereinafter referred to as "gritz") intended for the brewing industry. The main features of those regulations are:

— Equality of treatment between the processing of maize into gritz or into starch;

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

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

Article 4 of Regulation No 1570/78 provides as follows:

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

3. The applicants manufacture maize groats and meal which they sell to the brewing industry and which are used in the brewing of beer.

These applications, which were submitted on 3 November 1978 (Cases 241 and 242/78), 6 November 1978 (Cases 245 to 249/78) and 10 November 1978 (Case 250/78), seek in particular an order that the European Economic Community compensate the applicants for the damage arising from the failure to restore the production refund for the gritz sold by them between 1 August 1975 and 19 October 1977.

4. A claim for damages following the abolition of production refunds for gritz is also the main issue in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *Dumortier and Others* v *Council.*

5. By an order of 22 November 1978 the Court decided to join the present cases for the purpose of the written and oral procedure.

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

II — Conclusions of the parties

A — The applicants claim that the Court should:

— Order the defendant to pay them the sums of

DM 9 425 280.50 (Case 241)

DM 1 909 488.82 (Case 242)

Bfr 45 990 977 (Case 245)

Bfr 27 564 886 (Case 246)

Hfl 2 551 531.63 (Case 247)

DM 188 685.60 (Case 248)

Hfl 1 791 901.03 (Case 249)

DM 311 836.93 (Case 250)

plus interest at 6% from 1 October 1978 (Cases 241, 242, 245 and 248), from 6 November 1978 (Cases 246 and 249), from 1 November 1978 (Case 247) and from 10 November 1978 (Case 250);

— In the alternative, authorize and compel the Federal Republic of Germany (Cases 241, 242, 248 and 250), the Kingdom of Belgium (Cases 245 and 246), and the Kingdom of the Netherlands (Cases 247 and 249) to pay them by way of damages owed by the Community and for its account, a production refund for the quantities of maize which they processed into groats and meal between 1 August 1975 and 18 October 1977 (Cases 241, 242, 246, 247, 249 and 250), between February 1976 and 18 October 1977 (Case 245), and between August 1975 and December 1975 (Case 248), and which they subsequently sold to breweries, the said damages to be calculated by reference to the conversion factor of 1.8 tonnes of maize to 1 tonne of groats or meal, at the same rate as the production refund which was fixed and paid for the processing of maize into starch during the corresponding period plus interest at 6% from the aforesaid dates;

— Order the defendant to pay the costs.

B — The *Council* and the *Commission* claim that the Court should:

— Dismiss the applications as inadmissible;

— In the alternative, dismiss them as unfounded;

— Order the applicants to pay the costs.

III — Submissions and arguments of the parties

A — Admissibility

1. The *Council points* out that under the relevant regulations the national authorities are responsible for the payment of production refunds. Therefore the applicants should have sought payment of the refunds from the national authorities. Consequently, the Council considers that the applicants' claims for damages are inadmissible. In this regard, it cites the judgment of the Court of 26 November 1975 in Case 99/74 *Société des Grands Moulins des Antilles* v *Commission* [1975] ECR 1531.

2. The *Commission* observes, with regard to the applicants' principal claim, that they could not secure the adoption of regulations entitling them to the payment of the refunds requested by bringing an action under Articles 173 and 175 of the Treaty, which, in their view, argues against the admissibility of an action for damages with the same object.

However, the Commission leaves it to the Court to rule on the question of the dividing line between actions for damages and actions to enforce the grant of a benefit.

The Commission observes further that by the alternative claim the applicants seek to obtain damages by means of a "restitution in kind". In its view, the laws of most of the Member States on actions for damages against public authorities do not allow such a procedure. In any case, the claim is inadmissible, according to the Commission, for still other reasons: if it means that the applicants are thus seeking to obtain the adoption of certain regulations, it is inadmissible under paragraphs (1) and (3) of Article 175 of the Treaty, since it is not a question of acts addressed to the applicants; an action which is inadmissible under Article 175 cannot become admissible by using Article 215.

If the claim seeks the adoption of a decision benefiting the applicants in particular, it is likewise inadmissible under the third paragraph of Article 175 of the Treaty, since it is seeking a decision addressed not to the applicants but to the Federal Republic of Germany, the Kingdom of Belgium and the Kingdom of the Netherlands.

3. The *applicants* reply that their principal claim does not seek to obtain the adoption of a regulation: they merely seek to enforce an individual right to compensation for an infringement of the principle of equality lying in the failure of the institutions of the Community to adopt such a regulation in the first place. The issue of the applicants' entitlement to such compensation is a question affecting the substance and not the admissibility of the claim.

The applicants explain that their alternative claim is intended solely to save the Court the trouble of ascertaining whether during the period in question they actually manufactured and sold gritz intended for use in the brewing industry. The applicants add that they will not maintain their alternative claim

in the oral procedure, since the Council and Commission have not joined issue with them on that point.

4. The *Council* points out in its rejoinder that the applicants have brought proceedings against the Community in order to obtain a payment to which, under the legislation applicable, they are not entitled. Consequently, the Council asks whether the applications are not in reality meant to secure the adoption of a regulation. It adds that if that is the case these actions are no different from an action for annulment and in reality seek by means of a claim for payment to obtain the restoration by the Council of a right to refunds for a particular period. Doubting whether such an action is in accordance with the decision of the Court in Case 43/72 *Merkur* v *Commission* [1973] ECR 1055, judgment of 24 October 1973, the Council concludes that the actions are inadmissible.

Finally, the Council asks whether in this case the Court could not treat such a claim as an action for a failure to act brought by an individual in order to compel it to adopt a general measure. Once again, such a claim is inadmissible according to the settled case-law of the Court.

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

B — Substance

1. The *applicants* claim that by adopting Article 4 of Regulation No 1570/78, the organs of the Community limited their discretionary power regarding the manner of eliminating, and retroactively, the discrimination against gritz. In their opinion, the principle of equality requires that the discrimination during the period from 1 August 1975 to 19 October 1977 be eliminated in the same way.

Article 4 of Regulation No 1570/78 therefore infringes the principle of equality inasmuch as it does not make provision for payment of the production refund for gritz in respect of that period.

The applicants conclude that to that extent the organs of the Community are obliged to make good the damage caused.

The applicants add that, in order to remain competitive against maize starch and wheat starch, they did not increase their selling prices as a result of the abolition of the production refund.

Finally, they state that in order to relieve the Court of preparatory inquiries and to accelerate the procedure, they submitted their alternative claim, which allows the question of principle to be dealt with alone without inquiries, namely the question whether the Community is required to grant the production refund for maize intended for the manufacture of gritz for use in brewing also in respect of the period prior to 19 October 1977.

2. The *Council* explains that the starch sector represents a heavy financial

burden for the Community budget and that in Regulations Nos 1125 and 1127/78 it was actuated by a double concern — on the one hand, to restore order in that sector, and, on the other hand, to take into account the judgment of the Court of 19 October 1977.

After explaining the measures taken by the Community institutions in May 1978, the Council concludes that it fully complied with the requirements laid down by the Court. It notes, moreover, that the Court had indicated that there existed other legislative solutions by which the incompatibility established could be remedied. Thus it could have abolished all the refunds either for starch products used by the brewing industry or for all starch products; by the same token, it could have reduced the amount of the refunds.

The Council considers that it chose the solution most favourable to the producers concerned. It stresses that in its judgment the Court did not require the Community to take measures of a retroactive nature. It observes further that the Commission's proposals did not envisage any retroactivity. Consequently, in theory, as soon as the judgment was delivered it should have taken the measures suggested therein. In view of the delay in the adoption of those measures, a delay which was due to the complexity of the Community procedures, the Council intended to avoid penalizing the producers by making the measures taken retroactive as from 19 October 1977. That date was chosen, according to the Council, because the judgment of the Court had created a new legal situation.

As regards the applicants' claim for damages, the Council submits that they have not suffered any damage satisfying the conditions under which damage may be taken into consideration or having a relationship of cause and effect with the policy impugned.

In this regard the Council points out that the use of gritz or any other raw grain in the brewing of beer is prohibited in the Federal Republic of Germany, except for beer intended for export.

None the less, the German gritz market is flourishing. In fact, it is argued, German exports of gritz have increased rather impressively since 1974: 135 923 tonnes in 1974, 141 754 tonnes in 1975, 175 437 tones in 1976 and 191 296 tonnes in 1977.

The Council also points out that the German undertakings tend to be large and sound, well-structured, practising a very flexible commercial policy; they do not depend solely on the production of gritz: they are all well situated geographically, along the Rhine or on the Main, which enables them to reach numerous regions at modest transport costs. The Council adds that all the applicants greatly increased their production and their sales between 1975 and 1977.

Moreover, the German producers have benefited very considerably from the system of monetary compensatory amounts.

The Council concludes that the abolition of the refund can have had only a minimal effect on the gritz market in the Federal Republic of Germany and that the existence of the alleged damage can in no way be proved.

The fact that the German producers did not pass on the loss of the subsidy in the selling prices cannot, according to the Council, be blamed on the abolition of that refund: that has to do with the situation of the market, in particular, the attitude of the brewers.

The Council then produces figures illustrating the situation of the Belgian, Netherlands and Luxembourg markets:

Exports of gritz to all countries

	Netherlands	Belgium/Luxembourg
1974	6 760 t	14 598 t
1975	7 806 t	8 016 t
1976	17 166 t	21 995 t
1977	16 835 t	28 141 t

According to the Council, those figures prove that for the Netherlands and the Belgo-Luxembourg gritz markets the abolition did not cause a slump or any real commercial difficulty.

Besides, the situation of that market is comparable to that of the German market in many respects, including the effect of the monetary compensatory amounts.

The Council adds that the applicant in Case 245/78 only started producing gritz in February 1976 and none the less achieved an output of 8 600 tonnes in the second half of the 1975/1976 marketing year, that is to say, 720 tonnes per month. Then in 1976/1977 it managed to raise its production to over 26 000 tonnes, that is to say, 3 300 tonnes per month.

The Council concludes that any economic loss which may have been suffered by the German, Netherlands and Belgo-Luxembourg producers of gritz as a result of the abolition of the refund clearly did not go beyond the limits of the economic risks inherent in the activities of that sector of production and is therefore not sufficient to give rise to liability on the part of the Community.

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

The Commission adds that the applicants have not given the slightest indication of the extent of the damage which they claim to have suffered. In view of the production figures supplied by the applicants for the period in question, they would have found that very difficult because the abolition of the refunds did not prevent the undertakings from continuing to market the same quantities of gritz as before. That is particularly obvious in the case of the applicant in Case 245/78 whose undertaking was only set up after the abolition of the refund. If that activity had not been profitable, the applicant would not have undertaken it. In the opinion of the

Commission, it is particularly surprising that that applicant was able to develop its undertaking from one marketing year to the next without the benefit of any subsidy. The Commission goes on to state that, as regards the other applicants, those in Cases 247, 249 and 250/78 were able, during the period when they did not benefit from any refund, to increase their sales of gritz considerably from one marketing year to the next. In the case of the applicant in Case 242/78, sales had more than doubled in relation to the previous year.

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

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

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

In the Commission's opinion all those considerations lead to the following conclusions with regard to the present cases: it is indisputable, following the judgment of the Court of 19 October 1977, that by abolishing the production refund for gritz on 1 August 1975 the institutions infringed the principle of equality as against the applicants; hence, if the other legal conditions were satisfied, the applicants could claim damages from the Community institutions; however, that possibility of entitlement to damages did not imply *prima facie* the granting *ex post facto* of the unpaid refund, because, as the substance of the benefits *stricto sensu*, that refund should not be regarded as constituting damage; it is in order to elude the consequences of that legal situation, unfavourable for them, that the applicants declare that following the judgment of the Court of 19 October 1977, the institutions were obliged in any event, by virtue for the principle of equality, to re-introduce the refund for gritz retroactively as from 1 August 1975; that is the reason why they claim compensation; according to the Commission that is wrong because, in accordance with the aforesaid judgment of the Court, the Community institutions were under only a contingent obligation to compensate the applicants according to the principles of Article 215 of the Treaty.

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

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

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

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

Finally, the Commission points out that after the abolition of the refund, the undertakings obviously did not have any great difficulty in maintaining the volume of sales of gritz at its former level and were to some extent even able to expand production. Thus the measures taken by the Community did not in any event affect the applicants in such a way that the liability of the Community inevitably follows from the gravity of its action.

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

The applicants further submit that a comparison could be made between the facts of these cases and those of Case 74/74 *CNTA*, which concerned the abolition of monetary compensatory amounts, only if the institutions had suddenly abolished the production refund both for gritz and for starch. Since it is a question in these cases not of the infringement of the principle of the

protection of legitimate expectation, as in the *CNTA* case, but of the principle of equality, the manufacturers of gritz were entitled, according to the applicants, to enjoy a production refund as long as their competitors were receiving the refund.

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

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

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

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

According to the applicants, the question whether that damage was reduced after the event or could have been, in so far as the person injured passed the damage on to the purchaser, or could have done so, is an entirely separate question which in German law comes under the concept of "Vorteilsanrechnung" (bringing into account benefits received). The applicants go on to state that according to the German case-law only circum-

stances bearing an adequate relationship of causality with the act causing the damage must be taken into consideration for that purpose. The applicants conclude that if that case-law is to be applied in this case there is no ground for taking into consideration the passing on to the customers of the increased costs arising from the abolition of the refund: even if the applicants had been able to pass on the increase, that result would have been obtained solely by virtue of their own initiative, and not as a result of the unlawful withholding of the refund. Moreover, the Community would be relieved of its obligations for no good reason if in the last analysis it were to benefit from the fact that the manufacturer of gritz, who passed on to his customers the increase in costs connected with the withholding of the production refund, were to be deprived of that advantage. The applicants consider that the German case-law must also be valid in Community law.

The applicants in Cases 241, 242, 246, 247 and 249 further state in their replies that the Commission is mistaken in so far as it concludes from the fact that they maintained or even increased their sales of gritz to the breweries that the abolition of the refund did not cause them any damage.

The applicants add that even if their turnovers show increases, these are due above all to the fact that they had to ensure that the breweries did not switch to the use of starch and thus had to attempt to make up for any lost sales from that quarter, even if they incurred losses as a result.

The same considerations apply to the long-term contracts which had been concluded before the abolition of the refund and which had to be honoured after that event.

The applicant in Case 245/78 points out that is was founded early in 1976 in order to manufacture gritz for use in the manufacture of isoglucose. In order to keep losses at a low level until the manufacture of that product started, and after it had been abandoned as a result of the introduction of a levy on the production of isoglucose, the applicant started to manufacture gritz for breweries. The applicant considers that it is entitled to claim damages from the Community since the established infringement of the principle of equality affected it to that extent. In its opinion, the infringement of that principle cannot compel it to refrain from commencing and continuing production of gritz intended for the brewing industry.

The applicant in Case 248/78 explains that it mills maize and manufactures gritz for the Deutsche Conti Handelsgesellschaft mbH, Hamburg. Following the abolition of the refund, the applicant and Deutsche Conti continued with that production in October and November 1975, but terminated it at the end of 1975. In order to be able to continue production after the abolition of the refund, the applicant was forced to allow Deutsche Conti unusual conditions as regards the price for milling. As a result of the abolition of the production refund Deutsche Conti also suffered damage in respect of the gritz delivered to breweries in October and November 1975. Deutsche Conti assigned to the applicant the part of the amount of that

damage which, along with the direct damage suffered by the applicant, is the subject of the present dispute.

The applicant in Case 250/78 points out that it is one of the smaller millers. Following the abolition of the refund it was not able to maintain its turnover at the level of previous years. During the 1973/74 marketing year the applicant produced and sold to breweries established in the Community over 14 000 tonnes of gritz and during the 1974/1975 marketing year over 12 000 tonnes. After the abolition of the refund the applicant was able to sell to those breweries only 1 047 tonnes of gritz, and that was during the 1975/1976 marketing year; between August and 18 October 1977 sales fell to 46 tonnes.

In order to prove even more comprehensively that the increase in costs caused by the abolition of the refund was not passed on, the applicants carried out calculations which show that during the 1973/1974 and 1974/1975 marketing years their gross incomes varied relatively little in spite of the increase in the threshold price. However, the loss of income increased in 1975/1976 and 1976/1977 marketing years.

The applicants go on to state that if they had been able to pass on the increase in the threshold price and the abolition of the production refund, which both occurred on 1 August 1975, the gross profits calculated during the later marketing years would not have differed greatly from the figures for the 1974/1975 marketing year. The sharp increase in the loss of profit and the fact that it begins exactly at the time when the refund was abolished show, according to the applicants, that they passed on the increase in the threshold price only partially and that they did not pass on the abolition of the production refund at all in their selling prices to the breweries and that, moreover, they were not able to do so.

5. The *Council* emphasizes in its rejoinder that when the Court declares a regulation unlawful and that finding implies that the competent institution is required to take measures amending or replacing that regulation, it cannot be regarded as settled that those measures must have retroactive effect as from the date of the said regulation's entry into force: such retroactivity could in certain cases cover a considerable period of time; the economic consequences of that retroactivity might be regarded as unacceptable by the Community legislature; systematic retroactivity would by implication entail a finding that the institution whose measure was declared unlawful had manifestly and seriously disregarded the limitations imposed upon the exercise of its powers; such a consequence cannot be accepted where it is a question of legislative measures of a general nature involving choices of economic policy.

The Council adds that it appeared both to it and to the Commission that the abolition of the refund did not cause the sector in question any real economic or commercial damage.

It concludes that it adopted a legislative solution, general in scope, which was highly favourable to the interests of the gritz producers. It considers that it thus sufficiently remedied the detrimental effects which might have been inflicted upon the interests in question.

The Council recognizes that it is possible to use the two types of raw grain in brewing indiscriminately, but it adds that in practice the Community brewers, and

in particular the French and Belgian brewers, did not in any way alter their traditional use of gritz for the brewing of beer, even after the abolition of the refund.

The Council observes further that following the abolition of the refund the production and consumption of gritz in the brewing industry in the Community did not fall. In this regard, it refers to its observations in Joint Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79.

The Council notes that all the applicants, except in Case 246/78, increased their production of gritz between the 1975/1976 marketing year and the 1976/1977 marketing year:

Case	Production in 1975/1976 marketing year	Production in 1967/1977 marketing year
241/78	53 073.000 t	56 282.000 t
242/78	6 709.028 t	13 298.815 t
245/78	8 664.290 t	26 749.350 t
246/78	11 941.070 t	11 496.619 t
247/78	13 775.182 t	16 351.169 t
249/78	8 265.295 t	11 793.064 t
250/78	1 047.514 t	2 731.191 t

The Council adds, with a reference to its observations in Joint Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, that gritz exports from the Federal Republic of Germany are directed especially at the French market, and at the Alsatian market in particular. It emphasizes that the German gritz is often of better quality than the gritz produced in France.

As regards the question whether the applicants have produced sufficient proof of significant damage, the Council observes in the first place that the failure of the German producers to pass on the loss from the refund in their selling prices cannot in any way be blamed on the measures taken in 1975 by the institutions of the Community. In fact, the Council questions whether, in view of the technical and historical monopoly of gritz, the brewers would have turned to starch if those producers had increased their prices.

The Council points out secondly that it is wrong to claim that the infringement of the principle of equality which the Court established did not entail any legal consequences: in fact, the institutions of the Community have had to adopt the measures necessary to restore equality for the future.

The payment of damages for the illegal act committed is, in the opinion of the Council, quite a different matter. Citing the judgment of the Court of 25 May 1978 in Joined Cases 83 and 94/76, 4, 15 and 40/77, *HNL*, the Council points out that the general rules of law on civil liability cannot be applied in this context. In this regard, therefore, it cannot regard the reference made by the German applicants to German law as relevant.

In the opinion of the Council, it follows from these observations that it is not possible either to accept the proposition that the damage for which compensation was payable is the difference between the financial situation which would exist if the harmful act had not taken place and the financial situation directly caused by that act. Moreover, it is impossible to evaluate in precise financial terms the financial situation which would exist if the harmful act had not taken place and

the financial situation directly caused by that act.

6. The *Commission* points out in its rejoinder that if the applicants' argument to the effect that they are entitled to receive a production refund for gritz for the period from 1 August 1975 to 18 October 1977 by virtue of the principle of equality is correct in these cases, it follows that they are not entitled to damages, because they are still in a position to bring proceedings directly for the enforcement of their claim. As long as that possibility exists, the applicants cannot in any event claim to have suffered damage.

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

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

The Commission emphasizes that only the applicant in Case 250/78 has dealt thoroughly with the question of the nature and extent of the damage suffered by it. In fact, that applicant states that it suffered a considerable fall in its sales as a result of the abolition of the refund. The Commission adds that the applicant has not, however, put a figure on the damage for which compensation is payable and has not claimed damages from the Commission.

In the opinion of the Commission, the considerations discussed with regard to the threshold price of maize do not seem relevant, as the manufacturers of starch were affected by that price just as much as the manufacturers of gritz.

Finally, the gross receipts calculated by the applicant for the marketing years 1973/1974 to 1976/1977 show, according to the Commission, that it carried out its calculations on the basis of incomplete figures: as the information supplied shows a minus figure for each year, the applicant must always have sold the gritz which it manufactured at a loss; that is not the case, since the applicant states that the sales of secondary products enabled it to record a profit per tonne of maize. Therefore, according to the Commission, the applicant must state clearly whether the income obtained by

the sale of secondary products more than compensated for the loss recorded in the gross proceeds from the sales of gritz in the 1975/1976 and 1976/1977 marketing years. The Commission adds that it is in possession of information which shows that the minus figures indicated are compensated for by the proceeds obtained from the sale of secondary products. In its view, if that factor is taken into consideration it becomes apparent that the applicant could still be assured of a profit from the processing of maize for the purpose of the manufacture of gritz after the abolition of the refunds.

Finally, the Commission points out that the refunds have hitherto been granted uniformly for the manufacture of certain products, but that does not mean that a particular product would cease to be competitive if the refund were no longer granted. Contrary to the view put forward by the applicants, the decision as regards the products to be used in the brewing of beer does not depend solely on the price of each of those products, but is on the contrary determined by very many considerations; if it were otherwise, it would not be possible to explain why the German breweries, which refrain from using, even for export, products for which refunds are payable, remain competitive. Finally, the applicants are wrong in their submission that the abandonment of gritz in favour of starch for a short period does not necessarily entail considerable cost.

All the considerations which have just been discussed prove, in the opinion of the Commission, that the applicants' dependence on the breweries was less strong than they have maintained and that it was perfectly possible, at least partially, to compensate for the abolition of the refunds by means of price increases.

IV — The parties' replies to written questions put by the Court

The Court invited the applicants to submit their written observations on the information and figures concerning the state of the gritz market contained in the Council's rejoinder and in particular on the consumption of gritz and starch in the brewing industry, given for the different regions of France.

In reply to that question the applicants stated that the figures for exports given by the Council are not very relevant, in the first place because they relate to maize gritz in general and not only to gritz intended for the brewing industry, and secondly because they include exports to non-member countries.

The applicants further emphasized that the Council's figures on the increase in production, in the Member States, of maize gritz intended for the brewing industry give a false impression in so far as the reference year 1975/1976 does not indicate the quantities of the product which were actually delivered: after learning of Regulation No 665/75, whereby the refund was abolished, and until 31 July 1975, the applicants used their entire capacity to produce gritz for brewing in order to continue to benefit from the production refund: as from 1 August 1975, they then specialized in the production of gritz intended for other uses or for export to non-member countries; that is why the figures for the production of brewing gritz for 1975/1976 are lower than they would have been normally.

With regard to the figures given in the Council's pleadings on the total consumption of maize gritz in France

and on German exports to France, the applicants pointed out that only two of the German maize millers, namely the applicants in Cases 241/78 and 242/78, exported maize gritz intended for the brewing industry to France:

Applicant	1973/74	1974/75	1975/76	1976/77
Case 241/78	8 580 t	10 800 t	15 200 t	13 736 t
Case 242/78	4 344 t	4 200 t	2 750 t	6 731 t

The applicants added that as regards the figures on all exports it is necessary to take into account the fact that, according to the figures given by the Council, the total consumption in France of maize gritz intended for brewing increased by approximately 50%; that also explains the increase in the level of exports from Germany.

If a comparison of the figures given by the Council is attempted, it becomes apparent, according to the applicants, that the Council's conclusions to the effect that German exports of gritz end up mainly on the French market are false: in 1974 German exports to France represented 10.5% of the total of German exports, in 1977 11%. The Council's figures do not justify the conclusion that the competition from German exports is very keen on the French market: in 1974 imports from Germany represented 13.4% of the total French consumption of maize gritz intended for brewing, whilst in 1977 the figure was 16.7%.

The Court also put to the Commission the following question:

"As certain observations of the parties suggest that the system of monetary compensatory amounts might benefit German, Belgian and Netherlands exports to France, the Commission is asked to supply the Court with any explanation which may be of use on this matter."

It appears from the Commission's reply to that question that in its opinion the pattern of trade in goods within the Community was not decisively influenced by the application of monetary compensatory amounts to maize meal and its secondary products, but that it is governed essentially by other circumstance.

V — Oral procedure

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

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

Decision

1 The applicants in these cases request that the European Economic Community, represented by the Council, be ordered, pursuant to the second paragraph of Article 215 of the EEC Treaty, to compensate them for the loss

which they claim to have suffered on account of the abolition of the production refunds for maize groats and meal ("gritz") intended for the brewing of beer as a result of Regulation No 665/75 of the Council of 4 March 1975 amending Regulation No 120/67 on the common organization of the market in cereals (Official Journal 1975 L 72 of 20 March 1975, p. 14).

2 The cases were joined for the purpose of the procedure and it is appropriate to maintain the joinder for the purpose of the judgment.

3 In its judgment of 19 October 1977, delivered pursuant to references for preliminary rulings from two French administrative courts in Joined Cases 124/76 and 20/77 *S.A. Moulins et Huileries de Pont-à-Mousson and Société Coopérative "Providence Agricole de la Champagne"* v *Office National Interprofessionnel des Céréales* [1977] ECR 1795, the Court ruled that the disputed provisions of the Council regulations were incompatible with the principle of equality in so far as they provided for maize groats and meal for the brewing industry and maize starch to receive different treatment in respect of production refunds. The Court said further that it was for the institutions competent in matters of common agricultural policy to adopt the measures necessary to correct that incompatibility.

4 Following that judgment production refunds for maize gritz used by the brewing industry were re-introduced by Council Regulation No 1125/78 of 22 May 1978 amending Regulation No 2727/75 on the common organization of the market in cereals (Official Journal L 142 of 30 May 1978, p. 21). The amount of the refunds was fixed by Council Regulation No 1127/78 adopted and published on the same date as Regulation No 1125/78 (Official Journal L 142 of 30 May 1978, p. 24). Both regulations entered into force on the third day following their publication in the Official Journal of the European Communities. However, pursuant to the last paragraph of Article 1 of Regulation No 1125/78 and Article 6 of Regulation No 1127/78, the refunds were granted at the request of the interested party as from 19 October 1977, that is to say with retroactive effect from the date of the judgment of the Court in the above-mentioned preliminary rulings.

5 Thus the object of the applicants' claims is to obtain compensation for the damage which they claim to have suffered as a result of the absence of refunds during the period between 1 August 1975, on which date Regulation No 665/75 was first applied, and 19 October 1977. The alleged damage consists, as regards all the applicants, in the loss of receipts equal to the amounts of the refunds which would have been paid to them if maize gritz had benefited from the same refunds as starch.

Admissibility

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

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

Substance

8 Since by its judgment of 19 October 1977, the Court has already established that the abolition of the refunds for maize gritz for the brewing industry, together with the retention of the refunds for maize starch, was incompatible with the principle of equality, the first problem which arises in these cases is whether the unlawfulness thus established is of such a nature as to render the Community liable under the second paragraph of Article 215 of the EEC Treaty.

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

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

11 In the first place it is necessary to take into consideration that the principle of equality, embodied in particular in the second subparagraph of Article 40 (3) of the EEC Treaty, which prohibits any discrimination in the common organization of the agricultural markets, occupies a particularly important place among the rules of Community law intended to protect the interests of

the individual. Secondly, the disregard of that principle in this case affected a limited and clearly defined group of commercial operators. It seems, in fact, that the applicants in these cases and in the related Cases 64/76 and others *P. Dumortier Frères S.A. and Others* v *Council* comprise the entire maize gritz industry of the Community. Further, the damage alleged by the applicants goes beyond the bounds of the economic risks inherent in the activities in the sector concerned. Finally, equality of treatment with the producers of maize starch, which had been observed from the beginning of the common organization of the market in cereals, was ended by the Council in 1975 without sufficient justification.

12 The Council's disregard of the limits imposed upon its discretionary power is rendered all the more manifest by the fact that, as the Court pointed out in its judgment of 19 October 1977, the Council has not acted upon a proposal made by the Commission in June 1975 to re-introduce the refunds for maize gritz on the ground that the absence of such refunds could foreseeably upset the balance between the breweries' raw materials costs in maize gritz and maize starch.

13 For those reasons the Court arrives at the conclusion that the Community incurs liability for the abolition of the refunds for maize gritz under Regulation No 665/75 of the Council.

14 This said, it is necessary to go on to examine the damage resulting from the discrimination to which the gritz producers were subjected. The origin of the damage complained of by the applicants lies in the abolition by the Council of the refunds which would have been paid to the gritz producers if equality of treatment with the producers of maize starch had been observed. Hence, the amount of those refunds must provide a yardstick for the assessment of the damage suffered.

15 The Council and the Commission objected to that method of calculating the damage on the ground that the gritz producers eliminated, or could have eliminated, the damage by passing on the loss resulting from the abolition of the refunds in their selling prices. In principle, in the context of an action for damages, such an objection may not be dismissed as unfounded. In fact, it

must be admitted that if the loss from the abolition of the refunds has actually been passed on in the prices the damage may not be measured by reference to the refunds not paid. In that case the price increase would take the place of the refunds, thus compensating the producer.

16 For their part, the applicants dispute that the loss was passed on in the way alleged. They state that, faced with the competition from the starch producers benefiting from refunds, they chose, as a matter of commercial policy, to sell gritz at a loss in order to retain their markets, rather than raise the prices at the risk of losing those markets. The price increases referred to by the Council and the Commission are, in the applicants' submission, due to the rise in the threshold price of maize and to the increase in production costs.

17 The parties have put forward statistics and other data in support of their respective submissions. Those data do not permit the conclusion advanced by the Council and the Commission to be accepted. The conclusion which emerges is rather that during the period in dispute the prices for gritz charged by the applicants and the price of starch developed along similar lines without reflecting the absence of refunds for gritz.

18 It follows that the loss for which the applicants must be compensated has to be calculated on the basis of its being equivalent to the refunds which would have been paid to them if during the period from 1 August 1975 to 19 October 1977 the use of maize for the manufacture of gritz used by the brewing industry had conferred a right to the same refunds as the use of maize for the manufacture of starch.

19 However, one of the applicants, namely S.A. Maïseries Benelux N.V. (Case 245/78), is in a special situation. It appears from the file in the case that the undertaking was founded and commenced production of maize gritz only in February 1976, that is to say some time after the Council's decision in May 1975 to abolish the refunds for gritz. According to the explanations given by the applicant, its formation as an independent legal person was part of a reorganization carried out by the German firm DGV (the applicant in Case 241/78) with a view to manufacturing maize gritz for the production of isoglucose. Pending the implementation of that plan, and after its subsequent abandonment owing to the introduction of a levy on the production of

isoglucose, the maize gritz produced by the applicant was sold to the brewing industry. In that way the applicant wished to reduce its losses to a lower level than that which would have arisen from the closure of its plant. In such circumstances the damage alleged by that applicant cannot be said to have been caused by the abolition of the refunds for gritz and the Community cannot be required to make good that damage. Therefore its application must be dismissed and the applicant must be ordered to pay the costs in accordance with Article 69 (2) of the Rules of Procedure.

20 The other applicants submitted a number of documents to the Court as proof of the quantities of gritz for which they claim to be entitled to compensation and of the amounts of the refunds not paid respect of those quantities. However, the Court is not in a position at this stage of the procedure to give a decision on the accuracy of those data. Therefore, it is necessary to lay down by interlocutory judgment the criteria whereby the Court considers that the applicants must be compensated, leaving the amount of the compensation to be determined either by agreement between the parties or by the Court in the absence of such agreement.

The claim for interest

21 The applicants further claim that the Community should be ordered to pay interest at a rate of 6 % from dates which are slightly earlier than the dates on which the actions were brought, it being alleged that the Community's liability for the unpaid refunds arose at those earlier dates.

22 As it is a question of a claim made in relation to the non-contractual liability of the Community, pursuant to the second paragraph of Article 215, it must be considered in the light of the principles common to the legal systems of the Member States, to which that provision refers. It follows that a claim for interest is in general admissible. Taking into account the criteria for the assessment of damages laid down by the Court, the obligation to pay interest arises on the date of this judgment, in that it establishes the obligation to make good the damage. The rate of interest which it is proper to apply is 6 %.

On those grounds,

THE COURT,

A. As to the application submitted by S.A. Maïseries Benelux N.V., hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs;

B. As an interlocutory decision, hereby:

1. Orders the European Economic Community to pay to

1) DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH, Frankfurt am Main,

2) Werhahn Hansamühle, Neuss am Rhein,

3) S.P.R.L. Masélis Frères, Roeselare,

4) Codrico B.V., Rotterdam,

5) Hansa-Lagerhaus Ströh, Hamburg,

6) B.V. Meelfabriek "Weert" V/H Gebr. van de Venne, Weert,

7) Contifex Getreideprodukte GmbH & Co. KG, Oldenburg,

The amounts equivalent to the production refunds on maize gritz used by the brewing industry which each of those undertakings would have been entitled to receive if, during the period from 1 August 1975 to 19 October 1977, the use of maize for the production of gritz had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch;

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

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

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

5. **Reserves the costs.**

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg on 4 October 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI
(see Case 238/78, p. 2976)