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 Luxembourg on 19 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL CAPOTORTI DELIVERED ON 22 SEPTEMBER 1977 [1]

Mr President,
Members of the Court,

1. The opinion which I have to deliver today is concerned with six cases (Joined Cases 64 and 113/76, Joined Cases 117/76 and 16/77 and Joined Cases 124/76 and 20/77) relating to agriculture and they have one important feature in common: they all raise the issue of observance of the principle of non-discrimination by the Community legislature. More specifically, the central issue is whether and under what conditions the principle of non-discrimination must be considered to have been breached when, by means of regulations, the Community authorities decide to abolish aids granted for a time to particular products while maintaining aids already granted to a product in competition with them.

I should state at once that the products which in the present case no longer benefit from aids (in the form of 'production refunds') are 'quellmehl' and 'gritz'; the product which continues to benefit from them is starch. Quellmehl, which is produced by the processing of maize, wheat or broken rice by means of a heat treatment helps to keep dough damp in the breadmaking process and is traditionally used in Germany and Denmark as an additive in the manufacture of rye bread. Gritz is meal which is made from maize by means of a purely mechanical operation and is mainly used in the brewing of beer. For the main purpose for which they are used, each of the two products can, technically speaking, be replaced by starch.

During the stage at which the common organization of the market in cereals was being progressively established, the similar treatment of starch and quellmehl in the matter of production refunds was the outcome, in particular, of

1 — Translated from the Italian.

Regulations Nos 141 and 142/64/EEC of the Council of 21 October 1964. Article 17 (1) of Regulation No 141 instituted a system of production refunds 'in respect of maize and common wheat used by the starch and 'quellmehl' industry... Regulation No 142, which was intended to provide a provisional solution of the problem for the period 1 November 1964 to 31 March 1965, left the Member States free to grant production refunds for maize, soft wheat and broken rice used in the manufacture of starch and quellmehl, and, in Article 1 (1) (e) provided as follows: 'For quellmehl, the refund in respect of maize, common wheat and broken rice used for the manufacture of this product shall be equal to that allowed on the same cereal when used for starch manufacture'. In this connexion it should be noted that the condition under which the amount of the refunds was the same had been applied in Germany since 1930 to maize used both for the manufacture of starch and for the production of quellmehl.

Regulation No 11/65/EEC of the Council of 26 January 1965 gave the Member States the right to grant a production refund on gritz on a temporary basis. In the preamble to the regulation, the reason given for that measure was that 'the application of the levy system... 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'.

Regulation No 120/67/EEC of the Council of 13 June 1967 introduced a compulsory production refund both for maize and common wheat used by the starch industry for the manufacture of starch and quellmehl and for maize used in the maize industry for the manufacture of maize groats and meal (gritz) used by the brewing industry (Article 11 (1) (a) and (c)). There is in the tenth recital of the preamble to the regulation a clear indication of the circumstances calling for the production refund for starch and also of the grounds justifying the extension of the grant to quellmehl and to gritz. On the first aspect there is a reference to '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*'. On the second aspect there is a reference to 'similar reasons... because of the interchangeability of starches with quellmehl and maize groats and meal'. In essence, therefore, Community aid was given to starch producers to enable them to meet competition from synthetic substitute products: at the same time, aid was granted to quellmehl and gritz producers in order to prevent starch, which benefited from the production refund, from being used instead of quellmehl in baking and instead of gritz in the manufacture of beer.

On the matter of the amount of the refund, Regulations Nos 138/67/EEC of 13 June 1967 and 367/67/EEC of 25 July 1967 adhered to the principle that the level fixed for starch should be the same as that applicable to gritz and Regulations Nos 178/67 of 27 June 1967 and 371/67 of 25 July 1967 provided likewise in the case of quellmehl. In the sole recital in the preamble to Regulation No 138, which was substantially reproduced in the recital in Regulation No 367, it is stated that 'the production refund on maize used by the maize industry for the manufacture of groats and meal for the brewery industry... should be fixed at such a level as to achieve a 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' and that 'this object will be achieved by fixing the refund on maize for the manufacture of groats and meal *at the same level* as the refund on maize for the manufacture of starch'. Article 1 of the regulations in question provided

accordingly. In turn, Regulations Nos 178 and 371 of 1967 provided for a single level of production refund for maize and common wheat for the manufacture of starch and quellmehl.

These identical arrangements for the three products with which we are concerned, which, as we have seen, go back to 1964 in the case of quellmehl and to 1965 in the case of gritz, were maintained for about ten years, that is to say until the adoption of Regulation (EEC) No 1125/74 of the Council of 29 April 1974, which introduced certain amendments to Regulation No 120/67/EEC on the common organization of the market in cereals. In particular, it amended the wording of the above mentioned paragraph (1) of Article 11 by abolishing the grant of a production refund for maize and common wheat used in the Community for the manufacture of quellmehl while maintaining the refunds for maize and common wheat for the production of starch and for maize for the manufacture of gritz used in the Community by the brewing industry. On the same date, 29 April 1974, another regulation of the Council (No 1132/74) consolidated in a single instrument the provisions on production refunds for cereals and rice and was naturally to the same effect as Regulation (EEC) No 1125. A few months later, however, gritz suffered the same fate as quellmehl: Regulation (EEC) No 665/75 of 4 March 1975, in fresh amendments applied to Regulation No 120/67/EEC (in particular to Article 11 (1) thereof), ceased to provide for any production refund in respect of maize for the manufacture of gritz used by the brewery industry while merely making the refunds granted for maize and common wheat used in the manufacture of starch optional instead of compulsory, without abolishing them. The latter refund, however, again became compulsory by virtue of Regulation (EEC) No 1955/75 of the Council of 22 July 1975 which fixed them at a lower amount than previously.

What grounds did the Council give for changing its attitude on the subject of aids for quellmehl and gritz? In the third and fourth recitals in the preamble to Regulation (EEC) No 1125/74, it is stated that 'the production refund for quellmehl was initially granted with a view to promoting certain specific uses of quellmehl as a food for human consumption, account being taken of the possibility of its competing with a number of other products' and that 'experience has shown that the opportunity for such substitution is economically slight, if not non-existent' with the result that 'the production refund for quellmehl should therefore be abolished'. As for gritz the second recital to the said Regulation (EEC) No 665/75 merely states 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'.

It should be noted in this connexion that less than a year earlier the Council, in the fourth recital to Regulation (EEC) No 1132/74, indicated that it still believed that the level of the production refund for maize used in the manufacture of gritz for use by the brewing industry should be 'such as to achieve a balance between the cost of supplying the brewing industry with maize starch, on the one hand, and with maize groats and meal and broken rice, on the other' (these words being repeated from the sole recital in the preamble to Regulations Nos 138 and 367 of 1967). I ought also to add that the Commission on two occasions proposed to the Council that it should continue to grant the same type of aid and at the same level for maize used in the production of starch and for maize used in the manufacture of gritz for use by the brewing industry. I refer to the proposal for a regulation of 8 February 1975 and that of the following 20 June which, in its statement of the reasons on which it was based repeated the considerations set out in the preamble, referred to above, to

Regulation (EEC) No 1132/74. Despite this, the Council decided to limit the production refund for maize and common wheat used in the manufacture of starch and this attitude was confirmed by Article 11 (1) of Regulation (EEC) No 2727/75 of 29 October 1975 the preamble to which again refers to the 'special market situation for ... starch'. A more recent regulation (No 1862/76) dated 27 July 1976, raised the amount of the refund for starch from 10 to 14 units of account.

2. The proceedings which are the subject of this opinion fall into three groups, each containing two cases. The first group comprises Joined Cases 64 and 113/76, which arise from applications for damages brought against the Council by the two French undertakings Dumortier Frères and Maïseries du Nord, who are gritz producers. The second group comprises Joined Cases 124/76 and 20/77, which arise from requests for a preliminary ruling submitted to the Court by the Tribunaux Administratifs of Nancy and Châlons-sur-Marne in connexion with the cases of *Moulins Pont-à-Mousson* v *ONIC* and *Providence Agricole de la Champagne* v *ONIC*, which, too, raise the question of the abolition of Community aids for gritz. Finally, the third group comprises Joined Cases 117/76 and 16/77, which arise from requests for a preliminary ruling submitted by the Finanzgericht Hamburg in connexion with the cases of *Ruckdeschel and Hansa-Lagerhaus Ströh*, v *Hauptzollamt Hamburg* and *Diamalt* v *Hauptzollamt Itzehoe*, which are concerned with the question of the discontinuance of the aids for quellmehl.

As regards the cases in the first group, it must be borne in mind that, in addition to the applications for damages before this Court, the Dumortier and Maïseries du Nord undertakings have brought two actions before the Tribunal Administratif of Lille against the rejection by the French intervention agency for cereals (ONIC) of their applications for a production refund for maize used as from 1 August 1975 for the production of gritz for use by the brewing industry. They also contend, however, that the damage they have suffered includes the reduction in the quantities of gritz which they have been able to sell off during the 1975/76 marketing year and the concomitant loss of customers. In their applications, they seek accordingly an order that the Council should be ordered to pay compensation both for the financial loss arising from the absence of the grant of the refund which the undertakings concerned declare that they have been unable to claim from the purchasers and for the damage arising from the reduction in sales and outlets.

As regards the cases in the second group, the proceedings pending before the Tribunaux Administratifs of Nancy and Châlons-sur-Marne were brought by other French undertakings which are producers of gritz on the basis of applications against the rejection by the said national intervention agency of their applications for the production refund in respect of the maize used by them.

In connexion with those proceedings the Tribunal Administratif, Nancy, by order of 25 November 1976, and the Tribunal Administratif for Châlons-sur-Marne, by order of 1 February 1977, seek a preliminary ruling from the Court of Justice under Article 177 of the Treaty 'on the validity of Regulations Nos 665/75 of 4 March 1975 and 2727/75 of 29 October 1975 of the Council of the European Communities in so far as they abolish the production refund established previously for manufacturers of maize meal intended for use by the brewing industry'.

Finally, *as regards the cases in the third group*, it should be noted that certain German producers of quellmehl requested the competent national institution to continue to pay them the production refund in respect of maize

used in the manufacture of quellmehl and that, after their request was rejected, they brought proceedings before the Finanzgericht Hamburg against the decision refusing their request. By orders of 8 November 1976 and of 18 January 1977 the Finanzgericht referred to the Court under Article 177 of the EEC Treaty a request for a preliminary ruling on the following questions:

'1. Do Article 11 of Regulation No 120/67/EEC as last amended by Regulation (EEC) No 665/75 of 4 March 1975 (OJ L 72 of 20. 3. 1975, p. 14) and Article 1 of Regulation (EEC) No 1955/75 of 22 July 1975 (OJ L 200 of 31. 7. 1975, p. 1) or does Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975 (OJ L 281 of 1. 11. 1975, p. 1) infringe the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty and are they invalid in so far as they do not grant a production refund of the same amount on maize for the manufacture of quellmehl as they do for the processing of this product into starch?

2. If the answer to Question 1 is in the affirmative, have manufacturers of quellmehl a direct claim to the same production refund as the manufacturers of pre-gelatinized starch or is a legal measure adopted by the Council required for this?'

It is clear therefore that the issue as to the validity of the regulations of the Council which put an end to production refund arrangements for gritz and quellmehl arises in all the cases to which I have referred. However the grounds of the alleged invalidity are not quite the same in the different groups of cases. The applicants in the actions for damages have argued that there has been a breach of the principles of freedom of trade and industry and of freedom of competition as well as of the principle of equality of treatment (adding a procedural ground which they did not however pursue in their oral submissions). The Finanzgericht Hamburg specifically referred to the prohibition of discrimination enshrined in Article 40 (3) of the EEC Treaty, whereas the French administrative courts went no further than to seek a ruling from this Court on the validity of the regulations concerned. If is of course true that the provisions and matters of fact involved concern two different products, in the context of different procedures, so that it is essential to bear in mind the features distinguishing each group of cases. On the other hand there van be no doubt that the central issue raised by the six cases is, as I pointed out at the beginning of this opinion, that of observance of the principle of non-discrimination. Because of this I regard my first task as being to consider the scope of that principle in Community law in the light of the precedents established by the Court.

3. In so far as it is concerned with public authority whether in the form of the Member States or of the Community institutions, the principle of non-discrimination is the counterpart of the principle of equality of treatment of individuals who are subject to that authority. In national law, it is in the first place an essential item in any catalogue of human rights and because of this it generally has constitutional force. But step by step with the development of State or Community intervention in the economy the principle has also been applied for the benefit of undertakings in the context of law in the economic field. The prohibition of discrimination in the economic field first became important in American case-law towards the end of the last century, especially in connexion with the principles safeguarding freedom of competition. But the concept was later widened so as to restrict the freedom of public authorities to intervene in the economic field, with the object of protecting undertakings from unwarranted differences in treatment.

The prohibition contained in Article 4 (b) of the ECSC Treaty of any

discrimination between producers, between purchasers or between consumers also applies, without doubt, to the Community institutions, as, in relation to the subject of concentrations, is clear from the provisions of the second subparagraph of Article 66 (2), which lays down that when the High Authority is assessing whether it should authorize a concentration, it must take account of the size of like undertakings in the Community, to the extent it considers justified *in order to avoid or correct disadvantages resulting from unequal competitive conditions.* As we are aware, the EEC Treaty in the second subparagraph of Article 40 (3) requires the Community, specifically in respect of agriculture, in creating a common organization of the market in pursuit of the objectives set out in Article 39, to 'exclude any discrimintation between producers or consumers within the Community'. In addition to contributing to the establishment of healthy conditions of competition, in so far as this is compatible with requirements inherent in the pursuit through the intervention by the authorities on the market of the objectives of Article 39, the second subparagraph of Article 40 (3) is mainly intended to ensure equality of treatment for individuals affected by exercise of the Community's power to intervene in the organization of agriculture.

The case-law of the Court of Justice clarifies the Community concept of discrimination and throws light on three essential aspects, laying it down that (a) discrimination consists of the dissimilar treatment of comparable situations; (b) Community measures which provoke disturbances in the competitive capacity of undertakings must be considered discriminatory; and (c) differentiation based on objective criteria is permissible but any unjustified difference of treatment constitutes discrimination.

As regards (a) above, reference must above all be made to the judgment of 17 December 1959 in Case 14/59, *Société des Fonderies de Pont-à-Mousson* v *High Authority of the European Coal and Steel Community* (Rec. 1958 and 1959, p. 445, *et seq.*). As part of the grounds of its judgment with regard to the second complaint, (b), the Court declared *inter alia* that discrimination consists in the dissimilar treatment of comparable situations; it therefore declared that there was no discrimination on the part of the High Authority in exempting certain foundries (the so-called integrated steel foundries) from the payment of compulsory contributions whilst at the same time refusing to grant a similar exemption to other foundries of a different type (foundries engaged in pre-melt) since the categories of undertakings involved did not operate with the same production plant or use the same raw materials, with the result that the competitive positions of the two were not comparable.

Subsequently, in the judgment of 10 May 1960 in Joined Cases 3 to 18, 25 and 26/58, *Barbara Erzbergbau AG and Others* v *High Authority of the European Coal and Steel Community* the Court declared that the meaning of the concept of discrimination 'is primarily that unequal conditions are laid down for comparable cases'. In that judgment two important matters are clarified: on the one hand, the Court rejected the view that any comparison between several undertakings must take into account all the circumstances in which they are placed (observing that this 'would lead to the result that an undertaking is only comparable with itself, and thus the concept 'comparably placed' and, therefore, that of 'discrimination' would become devoid of all meaning'); on the other hand, the Court declared that 'the concept of discrimination does not imply, by definition, the fact that direct damage is caused' whilst recognizing that 'the application of such unequal conditions may, it is true, bring about damage, which can then be considered as the

consequence by which that discrimination may be detected'.

The same reasoning underlies the judgment of 17 July 1963 in Case 13/63, *Government of the Italian Republic* v *Commission of the European Economic Community* [1963] ECR 165 in which it was declared *inter alia* that 'the different treatment of non-comparable situations does not lead automatically to the conclusion that there is discrimination' and that discrimination in substance consists 'in treating either similar situations differently, or different situations identically'.

To recapitulate therefore: in order to determine whether provisions which introduce a difference in treatment are discriminatory, it is first of all necessary that the conditions and situations in which undertakings are placed shall be comparable in the sector to which the rules in question apply. Clearly the concept of comparability of situations does not mean that they should be exactly alike. Comparability must be determined against the backround of competition (see the above mentioned judgment of 17 December 1959, *Société des Fonderies de Pont-à-Mousson)* and in each case in the light of the objectives of the measures at issue; it is principally in the light of those objectives that it is possible to determine whether certain differences existing between undertakings are sufficient to make it impossible to treat them as comparable cases and, in consequence, to subject them to different treatment. In other words, the principle of non-discrimination must, in the case of intervention by a public authority affecting the economy, be regarded as violated where two situations which are comparable are treated differently in terms of the objectives pursued by such intervention. This was the view expressed by Mr Advocate-General Lagrange in his opinion in Case 13/63, referred to above, *Government of the Italian Republic* v *Commission* [1963] ECR 190.

As regards (b) above, reference must be made to the judgment of 17 July 1959 in Joined Cases 32 and 33/58, *Société Nouvelle des Usines de Pontlieue, Aciéries du Temple (SNUPAT)* v *High Authority of the European Coal and Steel Community* (Rec. 1958 and 1959, p. 275 *et seq.).* In that judgment the Court, in a reference to the second paragraph of Article 2 and Articles 3 (b), 60 and 67 of the ECSC Treaty, held *inter alia:* '... there may be considered as discriminatory in principle and, accordingly, prohibited by the Treaty, *inter alia,* measures or interventions, even those emanating from the High Authority, which are calculated, by substantially increasing differences in production costs otherwise than through changes in productivity, to give rise to an appreciable disequilibrium in the competitive position of the undertakings concerned. In other words, any intervention attempting to distort or actually distorting competition artificially and significantly must be regarded as discriminatory and incompatible with the Treaty'.

Finally, as regards (c) above, reference should be made to the judgments of 29 November 1956 in Case 9/55, *Société des Charbonnages de Beeringen* (Rec. 1955 and 1956, p. 317 *et seq.)* of 24 October 1973 in Case 43/72, *Merkur* v *Commission* [1973] ECR 1055, of 2 July 1974, in Case 153/73, *Holtz & Willemsen* [1974] ECR 675, of 11 July 1974 in Case 11/74, *Union des Minotiers de la Champagne* v *France* [1974] ECR 877, and of 12 July 1977 in Case 2/77, *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld.* The first of those decisions rejected the argument that the adjustment of equalization according to the situation of individual undertakings constituted a prohibited discrimination under the ECSC Treaty and declared that a contention to that effect would be valid 'only if the High Authority had not applied an objective and uniform criterion in order to check whether the individual situation of the

undertakings satisfied the conditions fixed for the award of equalization'. In its judgment in *Merkur,* the Court had occasion to emphasize that different treatment 'would not be a violation of the principle of non-discrimination unless it appeared to be arbitrary'. The judgment in *Holtz & Willemsen,* after recalling that the objectives set out in Article 40 of the EEC Treaty 'presuppose the adoption of common rules and criteria' in respect of farmers and consumers of agricultural products continues: 'In this light various factors in the common organization of the markets, protective measures, aids, subsidies, etc. may be distinguished according to the areas and other conditions of production or consumption only in terms of criteria of an objective nature which ensure a proportionate distribution of advantages and disadvantages for those concerned without distinguishing between the territory of Member States'. Even though in that case the question of discrimination was looked at mainly from the standpoint of the nationality and the location of the undertakings, it is important that the Court recognized, in general terms, the need to abide by objective criteria in differentiating between Community aids in agriculture and in each case to ensure that the distribution of advantages and disadvantages is equally balanced. In the decision in *Union des Minotiers de la Champagne* it was reiterated that 'Difference in treatment cannot be regarded as constituting discrimination which is prohibited unless it appears arbitrary'. And very recently, in the case of *Hoffmann's Stärkefabriken AG* that principle was again applied when the Court held that a difference in treatment (between potato-starch producers and maize-starch producers) which was objectively justified did not constitute discrimination.

4. I now come to the cases before the Court. I shall deal first with the issues raised in the proceedings for a preliminary ruling in Cases 117/76 and 16/77 in respect of quellmehl both because Community aids were cut off in the case of that product before those in the case of gritz and because the questions referred to the Court by the Finanzgericht Hamburg have the advantage of being clearcut and detailed.

The facts relating to the proceedings before the national courts in connexion with which the German court considered it necessary to refer to this Court, are on all material points the same. The only difference to be noted is that the case which gave rise to proceedings for a preliminary ruling in Case 117/76 is concerned with the validity of the Council regulations adopted in respect of the 1974/75 marketing year whereas the case which gave rise to the proceedings in Case 16/77 is concerned only with the regulations adopted in respect of the 1975/76 marketing year, in particular Regulations (EEC) No 665 and 2727/75, to which the Finanzgericht Hamburg expressly refers. However, this difference is one which does not affect the burden of the questions submitted by the German court; it does not in any way change the basic terms of the issues to be considered; which are the same in both cases.

As we have seen, the producers of quellmehl contend that they have been discriminated against ever since the Community aid (production refund) which they previously enjoyed was withdrawn whilst the aid was continued for the benefit of starch producers. According to the Council experience has shown that the opportunity for replacing quellmehl by pre-gelatinized starch for use as a food for human consumption is 'economically slight, if not non-existent'. I have already quoted from this recital which appears in the preamble to Regulation No 1125/74; it expressly refers to the experience acquired which can only be that in the period in which quellmehl enjoyed the same refund as that granted for starch. However, in order to justify the difference in treatment

introduced by the regulation referred to, the recital must continue to be valid in the new situation created by the abolition of the refund for quellmehl and its continuation for starch.

The Council and the Commission contend that the reduced pressure of competition both from industrial products used as substitutes for starch and from maize-starch from third countries, due to the increase in the world prices for raw materials, has resulted in starch becoming a less formidable competitor of quellmehl. There is therefore less likelihood of pre-gelatinized starch being offered at lower prices than quellmehl. This, together with the inherent difference in cost between the two products combine to justify the abolition of the refund previously granted for quellmehl. On the same lines the Commission points out that, compared with the quellmehl industry, the starch industry requires more sophisticated plant and heavier investment and that it would therefore be more vulnerable to cost increases affecting labour and energy.

The applicants in the main actions recognize that, in the absence of action by a public authority which is liable to distort competition, quellmehl can be manufactured and sold at a lower price than pregelatinized starch because the yield from the raw material is greater in the manufacture of quellmehl than in that of starch. They point out, however, that in the baking process the efficacy of starch, that is to say its capacity to absorb and retain water, is greater than that of quellmehl. For this purpose starch is, accordingly, able to compete with quellmehl even though it is sold at a higher price. On the other hand, the cost advantage of quellmehl is in any case lower than the amount of the production refund granted for starch, so that the abolition of the refund for quellmehl producers put the producers of 'pre-gelatinized starch' made from maize in a position to establish their product which, because it benefits from the refund, can now be offered at lower prices than quellmehl on the market for the manufacture of rye bread.

The plaintiff undertakings add that, whilst it is true that, notwithstanding the competition from pre-gelatinized starch, quellmehl had maintained the position it had long gained on that market, this was precisely because of the equal treatment of the two products which has lasted in Germany without interruption for no less than 44 years. This balanced situation changed with the advent of different treatment in respect of Community aid.

The Commission agrees that the result of the abolition of the refund for quellmehl may be that this product does not succeed in wholly maintaining the position it had previously gained in comparison with starch as far as bread manufacture is concerned. Notwithstanding this it maintains that there is no reason to fear that quellmehl will no longer be able to stand up to the competition with starch, and draws attention both to the reductions made by Regulation (EEC) No 1955/75 in the level of the aids granted for starch and to the fact that in the production of quellmehl it is possible to use lower quality raw materials which can thus be obtained at an advantageous price. However, the plaintiff undertakings strongly deny that there is any truth in this statement.

Finally, according to the Commission, the only effect of the abolition of the refund for quellmehl was to reduce or at most to cancel out the price advantage of approximately 20 % which quellmehl enjoyed compared with starch. Because of this the Commission contends that the contested provision merely established conditions of equality of competition between the two products and did not therefore infringe the prohibition of discrimination in Article 40 (3) of the Treaty of Rome.

5. In order to establish whether this prohibition has in fact been infringed it is first of all necessary to make this clear: the two products involved are manufactured from the same raw materials (maize, common wheat or broken rice) and compete with each other in the sense that starch or, to be more exact, a particular type of starch called 'pre-gelatinized starch' (Quellstärke) (Quellstärke) has amongst its numerous outlets the much more limited number available to quellmehl. Moreover, the fact that starch can be substituted for quellmehl was expressly recognized in the tenth recital to Regulation No 120/67/EEC of the Council, referred to above.

As regards the statement of reasons on which that regulation is based I have already pointed out that the extension to quellmehl of the refund provided for in respect of starch was intended to protect quellmehl from the competition which, as a result of Community aid, it would have had to face pre-gelatinized starch in the sector where it was traditionally used (baking). Clearly if one product can be substituted for another and there is in consequence competition between them this undoubtedly raises the issue of equality of treatment. Nor is it reasonable to object, as the Council has done, that the fact that the two competing products are not identical rules out any possibility of discrimination. There is no support for this argument in the judgment of the Court, referred to by the Council, in Case 5/73, *Balkan-Import-Export* v *Hauptzollamt Berlin-Packhof* (judgment of 24 October 1973, [1973] ECR 1091, especially paragraph 26 of the decision), where the Court had merely to make it clear that Article 40 prohibits only discrimination between producers or between consumers but does not deal with the question of the balance to be held between the conflicting interests of those groups. But under the terms of Article 40 a comparison may very well be made between producers of different products. If products competing with each other are involved, there is nothing to prevent the principle of non-discrimination from being applied. In a case where two commercially different products are put to the same use the principle of equality of treatment means that the producers concerned must not be subjected to rules which are so different that their competitive relationship is distorted.

Nor, in my opinion, is it possible to argue that the difference in treatment between starch and quellmehl is justified by the difference in cost between the two products. Normally, in applying the Community Treaties a difference between the production costs of undertakings in respect of identical or competing products cannot amount to a differentiation factor capable, in itself, of making it impossible to compare the position of the undertakings in question and accordingly to permit differences of treatment. This does not, of course, affect the application of particular rules designed to enable less productive undertakings to meet the requirements of competition within the Common Market (see the judgment of 29 November 1956 in Case 9/55, *Charbonnages Belges* v *High Authority* (Rec. 1955 and 1956, p. 323) or of protective measures exceptionally allowed under specific derogative provisions (in this connexion, reference may be made to the judgment in Case 13/63, *Italian Government* v *Commission* already mentioned).

In so far as two different products are interchangeable, the same principle must apply both when the differences in the costs of production in each case are attributable to the way in which the undertakings are run and where they are due to the greater or lesser complexity of the techniques which the undertakings have to use in the manufacture of one product or the other. This is the effect of the general rule in Article 3 (f) of the Treaty of Rome, under the terms of which any measure liable to distort

competition in the Common Market is incompatible with the Treaty. Moreover, as regards agriculture in particular, it is important to bear in mind the need to increase agricultural productivity by ensuring the rational development of agricultural production in accordance with the first of the objectives laid down in Article 39 (1) of the Treaty. In circumstances in which two different products are equally suitable for a particular purpose whilst one is intrinsically dearer than the other it would clearly conflict with that objective if the costs were artificially equalized by subsidies at the expense of the Community.

It is true that in certain circumstances preference may be given not to the pursuit of the objective indicated but to the satisfaction of other pressing requirements such as, for example, ensuring a fair standard of living for the agricultural community, stabilizing markets or ensuring the availability of supplies; for one of these purposes there might conceivably be preferential treatment of certain categories of producers who were in a less favourable position than others. But in the absence of specific reasons capable of justifiying such a difference of treatment, the provision in Article 40 prohibiting discrimination stands in the way of any measure the effect of which is to place one group of producers in a privileged position compared with another group of undertakings which are their competitors. By virtue of the principle of non-discrimination the Community authorities must be regarded as prevented from taking action on the market which distorts the conditions of competition, and the Court gave a clear ruling to that effect in the above mentioned judgment of 17 July 1959 in *Société Nouvelle des Usines de Pontlieue, Aciéries du Temple.*

The Council further argues that there is no discrimination in any case since quellmehl is of no economic importance in the sector in which it is mainly used within the Common Market, namely in the food industry. I cannot however attach any importance to this argument in view of the concept of discrimination embodied in the decisions of the Court which are essentially based on qualitative and not quantitative considerations; the fact is that the principle of equality of treatment must hold good regardless of the magnitude of the economic operation involved.

Finally the contentions of the Council and of the Commission do not, in my view, succeed in refuting the decisive consideration that, for the purposes of the system of production refunds, producers of starch and producers of quellmehl are in a comparable position and now receive different treatment although there are no objective reasons to justify their being subject to different rules. The situation of the two products is comparable as a result not only of the technical possibility that quellmehl can be used instead of starch and that, in consequence, the two products compete with each other on the market but also because of their absolutely parallel treatment over ten years, in the rules on refunds for starch and for quellmehl and of the fact, expressly recognized by Regulation No 120/67/EEC, that the grounds on which the refunds were granted to each product were the same. The difference in the manufacturing processes did not affect this parallel treatment, nor have the two institutions been in a position to demonstrate that, since 1974, there has been such a change in production and marketing conditions for starch and quellmehl as to make it no longer possible to compare the situations of those who produce them, notwithstanding that they use the same raw materials. I ought to add, however, that even if it were true that the amount of the refund to starch producers merely made up for the inherent cost difference as compared with quellmehl, the unfavourable economic effect which this would produce contrary to the first objective, referred to above, of Article 39

would be acceptable only if there were weighty reasons, based on other objectives of that article, justifying the advantage granted to starch producers. An intention to relieve the Community budget by removing an item of expense would certainly not suffice since it is clear that such an intention cannot be carried out at the expense of a specific group in competition with starch producers.

6. According to the Council and the Commission the alleged increase in the use of quellmehl for animal feeding-stuffs represents a new development which is sufficient to justify the abolition of the aid to quellmehl producers. In this connexion it is well to bear in mind what was stated in the third recital to Regulation (EEC) No 1125/74 of the Council, which is that the production refund for quellmehl was initially granted 'with a view to promoting certain specific uses of quellmehl as a food for human consumption ...'. The Council argues that there has been an 'unreasonable' use of quellmehl, which costs less than pre-gelatinized starch because its production is less complicated, has been able to make increasing headway on the market in animal feeding-stuffs at the expense both of skimmed-milk powder and of starch. Thus, the refund granted for quellmehl in order that it should not, as regards food for human consumption, be placed at a disadvantage compared with starch resulted in enabling quellmehl producers to invade one of the market outlets for starch, at the expense of that product, and placed the quellmehl industry in an artificially privileged position compared with starch.

The plaintiffs strongly deny that quellmehl has been increasingly used for animal feed. They state that, while large quantities of maize-based starch is in fact put to this use, German quellmehl producers, who belong to a group of manufacturers of ingredients of products for baking have never sold quellmehl for animal feed, and that this has been established by the association. In Germany only one or two unimportant undertakings producing quellmehl do not form part of the group referred to; accordingly, even supposing that those undertakings did carry out sales of quellmehl for animal feed, no large quantities could have been involved. There are no quellmehl producers in the other Member States except for one undertaking in Denmark and one or two undertakings in the Netherlands all of which, however, have a relatively small output.

Towards the end of last May, some weeks before the hearing, the Court asked the Council and the Commission to supply information in support of their statements relating to the use of quellmehl for animal feed.

The Council has not replied on this point. The Commission went no further than to produce a telex message from the Federal German Minister of Food, dated 7 June 1977, in which the information is given that the German association of animal feed producers had protested against the abolition of the refund previously granted for quellmehl. This communication was not however accompanied by any information concerning the volume of quellmehl sales for animal feed.

The Council and the Commission have not therefore been in a position to provide the information requested of them by the Court. In the circumstances the conclusion must be drawn that there is no evidence of the facts to which the two institutions attached importance in explaining why quellmehl was no longer treated, as it had been hitherto, on an equal footing with starch.

In any case the fact that the use of quellmehl for animal feed is a departure from its traditional use is insufficient to justify describing that use as 'unreasonable'. It is not unusual for a

product to find new markets and outlets where this is consistent with economic and rational criteria. Even if we assume it to be a fact that it was only on account of the refund that quellmehl was able to impose itself on the market in animal feed, it would have to be regarded as all the more unreasonable to encourage, by means of the refund, the use of starch for the same purpose since the latter costs more to manufacture than quellmehl and is of less nutritional value.

As a matter of fact if the Community legislature had wished to discourage the use of quellmehl for animal feed it ought, from the beginning, to have confined aid to quellmehl used for human consumption. If, subsequently, there had been a desire to pursue a wider objective, namely to follow a policy of restraint regarding Community expenditure by abolishing the refund in respect of quellmehl, it would have been necessary to adopt the same course both for starch used for animal feed and for starch used in place of quellmehl in the manufacture of rye bread. On this point, since the object of the refund for starch is to maintain its competitiveness against chemical substitutes which cannot be used for food, Community aid must be regarded as unnecessary in so far as starch is intended for use in food. In this connexion the undertakings concerned referred to the Community rules governing the production refund for sugar in order to argue that, as has already been done in the case of sugar, there would be no difficulty in restricting the refund for starch to cases where it was in competition with substitute chemical products. If, however, on grounds which lie within its discretion, the Council considered it necessary to continue to grant the refund for starch, regardless of the purpose to which it was put, it would have been necessary to maintain parity between that product and quellmehl to satisfy the requirement of equality of treatment which was the basis of the original grant of the refund for quellmehl.

7. The foregoing considerations lead to the conclusion that the difference in treatment between quellmehl producers and starch producers which arose as a result of discontinuance of Community aid for the first of these two products is not based on any general objective criterion. It accordingly constitutes discrimination which is incompatible with the second subparagraph of Article 40 (3) of the EEC Treaty.

This makes it necessary to consider which Community provisions, if any, must be held to be invalid for infringement of Article 40 of the Treaty of Rome. In its first question, the Finanzgericht Hamburg envisaged the possibility that the provisions of three regulations might be invalid: Article 11 of Regulation No 120/67/EEC as amended by Regulation (EEC) No 665/75 of 4 March 1975, Article 1 of Regulation (EEC) No 1955/75 of 22 July 1975 and Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975. But it must be borne in mind that none of those provisions does more than *omit* any reference to the production refund for quellmehl; they are silent on the subject and consequently the refund is provided solely in respect of other products, which are specified. In particular, Article 11 (1) of Regulation No 120/67/EEC, as amended by Regulation (EEC) No 665/75, provides that a production refund may be granted for maize and common wheat use for the manufacture of starch, for potato starch, and maize meal (gritz) used for the manufacture of glucose by direct hydrolysis; Article 1 of Regulation (EEC) No 1955/75 is concerned with production refunds for starches, and Article 11 of Regulation (EEC) No 2727/75 provides for refunds to be available in the same terms as those used in Regulation (EEC) No 665/75. On the other hand the first provision in a regulation which, by amending Article 11 (1) of Regulation No. 120/67/EEC, abolished the production refund for quellmehl, was Article 5 of Regulation

(EEC) No 1125/74 of the Council of 29 April 1974. In this case too, the new text of Article 11 (1) merely provided for a production refund for the benefit of certain products (starch from maize and common wheat, potato starch, and gritz used for the manufacture of glucose or beer) and consequently affected the previous refund for quellmehl only in the sense of *no longer making provision therefor,* but two clear indications of the intention to rescind the provision by virtue of which the refund had been introduced are provided by the fact that Article 11 (1) was amended for the first time and the express reference in the fourth recital to the regulation to the intention that 'the production refund for quellmehl should therefore be abolished'. This intention was carried out by substituting the words 'for maize and common wheat used in the Community for the manufacture of starch' for the words, in Article 11 (1) (a), 'for maize and common wheat used by the starch industry for the manufacture of starch *and quellmehl*'. It seems to me therefore that it is above all Article 5 of Regulation (EEC) No 1125/74 which, *as the provision which rescinded* the provision instituting the production refund for quellmehl, must be regarded as invalid as a direct consequence of its established incompatibility with the second subparagraph of Article 40 (3) of the Treaty of Rome.

Its invalidity must be recognized within strict limits and as having specific consequences. It arises from the unlawful difference in treatment as between starch and quellmehl and clearly, therefore, cannot apply to the products which formed no part of this comparison (for example potato starch or gritz, subject to what I shall have to say shortly concerning gritz used in the manufacture of beer).

But from the point of view of both form and of substance, it would be going too far to regard as also illegal the provision which continued to grant the aid to starch producers. It is true that the aid granted only to them constitutes discrimination against the producers of quellmehl but the discrimination lies in the fact that simultaneous aid to the producers of quellmehl is abolished and all the criticisms have been directed to that aspect or rather to that effect of the Community rules of 1974 in the amendement which they made. I shall accordingly refer to Article 5 of Regulation (EEC) No 1125/74 as invalid in so far as, in replacing Article 11 of Regulation No 120/67/EEC, it has abolished Community aid for quellmehl producers. To put this in another way: in Article 5 of Regulation (EEC) No 1125/74 it is the provision implying abrogation which is invalid. On the other hand, in my view the provisions of the article which had the *positive* effect of ensuring that the refund was granted to producers of starch, potato starch and gritz (in particular, gritz used for the manufacture of glucose) are not invalid. As for the subsequent regulations referred to by the Finanzgericht Hamburg they can be described as invalid only in so far as they maintain and confirm by implication the absence of a Community aid for quellmehl while confirming the production refund for starch.

8. In its second question, which clearly assumes that the answer to the first question will be that the provision in regulations under which the aid to manufacturers of quellmehl ceased is invalid, the Finanzgericht Hamburg asks whether the latter have an automatic claim to the same production refund as the manufacturers of puffed starch or whether a fresh measure of the Council is required to give them that right.

Clearly consideration must first be given to the comments I made concerning the limits and effects of the invalidity of Regulation (EEC) No 1125/74. If those comments were correct and if, therefore, the repeal in part of Article 11 (1) of Regulation No 120/67/EEC is without

effect, the inevitable conclusion is that the provision which placed manufacturers of starch and manufacturers of quellmehl on an equal footing for the purposes of the refund has never ceased to apply. However this does not, in my view, mean that those concerned can automatically claim a refund of the same amount as that granted to manufacturers of starch. In the first place, while Regulation No 120/67/EEC certainly conferred a right to the refund on manufacturers of quellmehl as well as on the manufacturers of starch, the regulation itself did not fix the size of the refund or lay down that it must be the same for the two categories of manufacturer or that it should be calculated on the same basis. Secondly, it must be borne in mind that the system of production refunds for maize and common wheat has, since 1974, undergone important changes even on the subject of whether it should be compulsory or optional. These changes are unaffected. Consequently manufacturers of quellmehl cannot be recognized as having that right to refunds, provided for under Article 11 (1) of Regulation No 120/67/EEC, which formed part of a system of compulsory refunds which was later abolished, nor however, can they automatically be subject to all the Community provisions which have governed the treatment of starch manufacturers since 1974. Automatic and comprehensive action along these lines would in my view be an unjustified extension of te invalidation of the provisions under which manufacturers of quellmehl were deprived of the benefit of Comunity aid.

I take the view, therefore, that a fresh measure is required from the Council in order to lay down the amount of the production refund due to those concerned and the way in which it should be applied. Obviously the measure must be based on the principle of equality of treatment of the two categories of manufacturer with which we have been concerned so far. In conclusion, it should be noted that whereas, so far as the past is concerned, the application of the principle must be based on the refunds which starch producers have already enjoyed there is nothing to prevent the Council as far as the future is concerned from introducing specific changes in the machinery for refunds in respect of either of the two products or of both. (I have already referred to the possibility that Community aid might be withheld both from quellmehl and from maize starch used for food and it is conceivable that starch and quellmehl used for animal feed should both be denied the benefit of the refund).

9. Consideration must now be given to the question raised by the changes in the Community rules concerning gritz for use by the brewing industry. We have seen that, in this case too, Regulation (EEC) No 665/75 marked the abandonment of the principle of equality of treatment as compared with starch in respect of refunds which had been applied since 1965 and until then.

In support of the contention that the said regulation was invalid, the gritz producers first claimed that there had been a failure to comply with essential procedural requirements in that the Commission's proposal had been amended by the Council otherwise than in the prescribed form.

It appears however that in the course of the Council's consideration of the text, the Commission agreed to amend its original proposal. Moreover the Council's decision was unanimous; there was, accordingly, nothing to prevent it from altering the Commission's proposal as provided for in Article 149 of the EEC Treaty.

Another procedural impropriety was attributed to Regulation (EEC) No 665/75 inasmuch as the Parliament had not been consulted on the amended wording.

In this connexion I would recall that in the judgment of 15 July 1970 in Case 41/69, *ACF Chemiefarma* v *Commission* [1970] ECR 661, in particular at page 702, the Court dismissed a similar objection of illegality raised against another regulation of the Council on the ground that, while the draft on which the European Parliament had expressed an opinion had been subsequently amended, the substance had not, considered as a whole, been altered.

In the present case the essential part of the proposal submitted by the Commission to the Council on 14 December 1974 (and published in the Official Journal of 8 February 1975) consisted of a change from a compulsory system to an optional system of refunds benefiting starch produced from cereals, potato starch and gritz. The Council adopted this change of system in the case of starch, potato starch and gritz for use by the glucose industry; only in the case of gritz for use by the brewing industry was the change extended so as to abolish the refund. In terms of production refunds no doubt the proposed regulation was mainly concerned with the arrangements in respect of starch, to which the arrangements for gritz have always been subsidiary. The alteration of the Commission's original proposal may therefore be regarded as not affecting its essentials and as not constituting one of those fundamental changes which, in consequence of the precedents established by the Court, and referred to above, require the Parliament to be freshy consulted.

10. In order to establish whether the abolition of the refund in respect of gritz for use in the brewing industry gives rise to an infringement of the prohibition of discrimination is must first of all be ascertained whether, in terms of the Community provisions for cereals, gritz is on the same footing as starch.

In this connexion it must be borne in mind that in France the production of beer presents the principal use for gritz. In that context gritz can, technically speaking, be replaced by starch. The interchangeability of starches, on the one hand, and maize groats and meal on the other was expressly recognized in the tenth recital, referred to above, to Regulation No 120/67/EEC; moreover, Regulation No 11/65/EEC of the Council, which for the first time authorized the Member States to grant a production refund for gritz, had already been adopted because starch and gritz for use in the manufacture of beer were in competition with each other and the market position of gritz had undergone a change for the worse as a result of the aid granted to starch since 1962. But, on the subject of the formula to be applied in fixing the level of the production refund to be granted on gritz, particular attention must be paid to the preambles to Regulations No 138 and 367/1967 and to Regulation (EEC) No 1132/74 in which there is a reference to the need to achieve a balance between the cost of supplying the brewing industry with maize starch, on the one hand, and with maize groats and meal and broken rice, on the other. This clearly implied that the brewing industry was in a position to accept supplies of either of the two products.

According to the Council, the technical adjustments which are necessary in order to change from the use gritz to the use of starch in the production of beer seriously interfere with competition between the two products in the industry concerned. But there is no question of technical problems which are difficult to solve but rather of a matter of sheer economic expediency. In a situation where, because of the refund, starch is available at a much more satisfactory price than gritz it is reasonable to assume that the brewers will find a way of replacing the dearer raw material with the cheaper one. If this entailed a change in the colour or in other characteristics of the beer we can rest assured that publicity would be used to adjust the consumer's taste accordingly.

In reply to the questions put to it by the Court in the proceedings in Cases 124/76, and 20/77, the Commission stated that when it submitted to the Council the draft regulation of 20 June 1975, in which provision was made for the restoration of the refund for gritz which had been abolished three months earlier, it considered that, if there were no refund, the result would have been to reinforce the competitive position of starch compared with gritz to such an extent as to entail the complete replacement of gritz by starch in the manufacture of beer. The Commission supplied statistical data from which it appears that the unit cost of gritz is higher than of starch, so much so that, assuming equality of treatment for gritz and starch in terms of the refunds, the cost of a tonne of starch would amount to 194·78 u.a. whereas a tonne of gritz would cost 217·76 u. a. (allowance being made for the higher coefficient for the conversion of maize into gritz compared with that of maize into starch).

This factual information undermines the argument put forward by the Council that starch can only with difficulty compete with gritz. It must be borne in mind that the Council has itself recognized that starch is more efficient than gritz. Again, as regards the information relating to the trend in gritz sales before and after the abolition of the refund, on which the Council dwelt at some length, it may assume importance when consideration is given to the existence or otherwise of the damage claimed by the plaintiffs, represented by reduced sales and lost customers, and to the possibility of establishing a causal link between such damage and the contested measures. At this stage, however, since we are concerned merely with establishing whether the measures at issue infringe the prohibition of discrimination, this information would be material only if it demonstrated that there was no competitive relationship between starch and gritz. This is manifestly not the case. The only conclusion which the Council draws from its inquiry is that the competition which starch provides for gritz in the brewing industry is not overwhelming but it does not deny that the competition exists.

11. Clearly starch and gritz are in comparable positions: they were considered to be so for more than ten years by the Community authorities when they laid down that they should be treated in parallel for the express reasons which I have described, and so they remain as a matter of economic fact. The difference in treatment which has occurred with effect from Regulation (EEC) No 665/75 would be lawful only if it were justified by new economic or technical developments which have been assessed on the basis of objective considerations. The question is whether it is possible to discern developments of this kind.

The Council has argued that, as the Community starch industry is no longer exposed to the pressure of strong competition from the chemical substitute industries and has found other outlets, it no longer exercises on manufacturers of gritz and on the maizeprocessing industry in general such pressure as to make it necessary for this industrial sector to continue to receive a production refund. But if, despite the reduced pressure on starch by competition from artificial substitutes, it was considered necessary that it should continue to receive the refund, it is not easy to understand why the same course was not followed in the case of gritz, since the improved position of starch on the market, together with Community aid, has obviously increased its competitiveness compared both with synthetic products and with gritz for use in the brewing industry.

There has also been reference to the increase which has taken place in recent years in maize prices on the world market. Since, however, this did not

result in the abolition of the refund for starch it does not afford any explanation for its abolition in the case of gritz. As the undertakings producing gritz have rightly stated, the refund was granted to them not in order to enable their industry to take advantage of world prices but solely in order that they should be in a position to meet competition from the starch industry on the brewing market and so as to ensure that the support measures granted to starch manufacturers should not upset the balance.

I mentioned earlier that, simultaneously with the abolition of Community aid for gritz, the refund system for starch became discretionary instead of compulsory and the amount of the refund was reduced. It was the declared intention of the Council that, in the case of starch also, aid should be progressively abolished. But this did not happen; on the contrary, the amount of the refund for starch has been increased as a result of Regulation (EEC) No 1862/76. In this way, the difference in treatment between starch and gritz which might at the beginning have appeared to be merely a transitional stage of the change of policy regarding production refunds was compounded and has remained in operation without any justification.

Credit must certainly be given to the Commission for having realized in time, as is clear from its draft regulations of 8 February and 20 June 1975, referred to above, that this difference of treatment was undesirable, if not illegal. For example it may be seen from the minutes of the 330th meeting of the Council held in Brussels on 10 and 11 February 1975 that the member of the Commission responsible for agriculture stated that it did not seem to him to be consistent to keep up the price of beer by means of Community refunds granted for maize, amounting to approximately 20 million u. a., while beer on the other hand was still subject to national charges. This comment was made in support of the proposition to make the refund compulsory instead of discretionary as a step towards the abolition of any refund at all not only for gritz but also for starch in so far at it is used in the manufacture of beer. If, for practical reasons, it had not been possible to abolish the refund for gritz it would have been possible to avoid the risk of distorting competition between gritz and starch in that industry by imposing a levy on starched-based products for use in the manufacture of beer. This was pointed out by a member of the European Parliament during the debate on the subsequent proposal of the Commission to reintroduce the refund for gritz (see OJ Debates of the European Parliament No 194, September 1975, p. 293).

This is not the place for detailed consideration of such alternatives. It suffices to refer to them to show that neither the pursuit of the objectives of the Common Agricultural Policy nor the understandable need to avoid unnecessary burdens on the Community budget can justify the difference in treatment described between starch producers and gritz producers at the latter's expense.

No am I able to agree with the assertion of the Council that the prohibition of discrimination recorded in the second subparagraph of Article 40 (3) of the EEC Treaty might be 'modified' in view of the need to pursue one of the objectives of Article 39. This assertion must in all probability be taken to mean that, in the light of the requirements associated with the pursuit of specific general objectives of the agricultural policy, the positions of undertakings which are manufacturers of different products may objectively assume a different aspect and thus lend themselves to a different assessment and to different treatment. But, as I have stated, the fact remains that such difference in treatment in relation to the grant by the Community of an advantage which affects the competitive ability of undertakings would be justified only if

reference could be made to objective criteria. It is not a question therefore of introducing exceptions to or limitations of the prohibition of discrimination but merely of determining in what circumstances and to what extent discrimination can be said to exist. On this point, I believe that the case-law reviewed in the first part of this opinion provides clear and adequate guidance.

The fact is that, in the present case, the difference in treatment between starch and gritz was introduced, after a long period in which they were treated on the same basis, without Regulation (EEC) No 665/75 providing any explanation other than the sentence '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'. In this connexion, the Council and the Commission have, in my view, adduced no convincing evidence that there are objective reasons to justify the different system of aids provided since 1975 for the two competing products. For this reason I consider that Article 3 of Regulation (EEC) No 665/75 must be considered invalid as infringing the prohibition of discrimination on account of the implied repeal of Article 11 (1) of Regulation No 120/67/EEC, as amended by Regulation (EEC) No 1125/74, in respect only of the part which referred to a production refund for maize used in the Community by the maize industry for the manufacture of maize groats and meal (gritz) used in the brewing industry. The effect of such invalidity is that the said part of Article 11 (1) of Regulation No 120/67/EEC must be regarded as being still in force and that the manufacturers of gritz for use in the brewing industry must, in consequence, be allowed to receive the Community aid in the same way as starch manufacturers but under the conditions and to an extent to be determined by a special measure of the Council. Finally, in view of the fact that Regulation (EEC) No 665/75 of the Council has infringed the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty and that the provision embodies a general rule of law underlying the Common Market, its infringement involves the Community in liability for damage thereby incurred by individuals whose rights are directly protected by that rule.

12. In conclusion I propose that the Court should:

(a) as far as Cases 117/76 and 16/77 are concerned, answer the questions of interpretation submitted, by orders of 8 November 1976 and 18 January 1977, by the Finanzgericht Hamburg to the effect that the Community provisions which abolished and have continued to withhold the production refund in respect of maize for use in the manufacture of quellmehl whilst maintaining it for maize for processing into starch are incompatible with the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty and are therefore invalid within the limits, indicated above, of their rescissory effect: that, accordingly, the provision in Article 11 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967 in so far as it granted, in the form of a production refund, entitlement to Community aid both to manufactures of starch and to manufacturers of quellmehl, must be regarded as being still in force without prejudice to subsequent amendments other than those held to be

invalid; and that it is the duty of the Council to adopt a special measure laying down the amount and the rules for the application of the production refund for manufacturers of quellmehl for the period subsequent to the entry into force of Regulation (EEC) No 1125/74 of 29 April 1974;

(b) as so far as Cases 124/76 and 20/77 are concerned, answer the questions of interpretation submitted, by orders of 25 November 1976 and 1 February 1977, by the Tribunaux Administratifs of Nancy and Châlons-sur-Marne respectively to the effect that the Community provisions which abolished and continued to withhold the production refund from manufacturers of maize meal (gritz) for use in the manufacture of beer, whilst maintaining it for maize to be processed into starch, are incompatible with the prohibition of discrimination contained in Article 40 (3) of the Treaty of Rome and are therefore invalid within the limits, indicated above, of their rescissory effect; that, accordingly, the provision in Article 11 (1) of Regulation No 120/67/EEC of the Council of 13 June 1967, as amended by Regulation (EEC) No 1125/74 of 29 April 1974, in so far as it granted, in the form of a production refund, entitlement to Community aid both to manufacturers of starch and to manufacturers of maize groats and meal (gritz) for use by the brewing industry must be regarded as being still in force without prejudice to subsequent amendments other than those held to be invalid; and that it is the duty of the Council to adopt a special measure laying down the amount and the rules for the application of production refunds for manufacturers of gritz for the period subsequent to the entry into force of Regulation (EEC) No 665/75 of 4 March 1975;

(c) as far as Cases 64 and 113/76 are concerned, rule that subject to proof of the existence of damage suffered by the plaintiff undertakings and the causal link between infringement of the said Article 40 and such damage, the Community is liable for the damage which the plaintiff undertakings may have incurred through the abolition of the production refund for manufacturers of maize meal (gritz) used in the manufacture of beer, on the ground that the Community provisions bringing into force and maintaining such abolition, whilst retaining the production refund for maize for processing into starch, have infinged the prohibition of discrimination contained in Article 40 (3) of the Treaty of Rome, which represents the expression of a superior rule of law intended for the direct protection of individuals.