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 261 and 262/78

INTERQUELL STÄRKE-CHEMIE GMBH & CO. KG, Grossaitingen (Federal Republic of Germany)

and

DIAMALT AG, Munich (Federal Republic of Germany),

represented by E. Eckelt, A. Kallenbach and K.-D. Ratke, Augsburg, with an address for service in Luxembourg at the Chambers of A. Bonn, 22 Côte d'Eich,

applicants,

v

The EUROPEAN ECONOMIC COMMUNITY, represented by its institutions:

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

2. COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, J. H. Bourgeois, acting as Agent, assisted by J. Sack, a member of its Legal Department, 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 and 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 117/76 and 16/77 *Ruckdeschel & Co.* and *Hansa-Lagerhaus Ströh & Co.* v *Hauptzollamt Hamburg-St. Annen,* and *Diamalt AG* v *Hauptzollamt Itzehoe,* [1977] ECR 1753 (hereinafter referred to as the judgment of 19 October 1977), the Court decided that:

(1) The provisions of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967, as worded with effect from 1 August 1974 following the amendment made by Article 5 of Regulation (EEC) No 1125/74 of the Council of 29 April 1974, and repeated in subsequent regulations, are incompatible with the principle of equality in so far as they provide for quellmehl and pregelatinized starch to receive different treatment in respect of production refunds for maize used in the manufacture of these two products;

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

2. By 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) 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 and common wheat used for the manufacture of quellmehl intended for use in the bakery industry. The main features of those regulations are:

— Equality of treatment between the processing of maize and common wheat into quellmehl 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 the 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).

3. The applicants manufacture quellmehl from maize and common wheat. The quellmehl produced by the applicant in Case 261/78 is intended for use in food for human consumption and in animal feed, whilst the applicant in Case 262/78 manufactures quellmehl intended only for the first of those sectors.

These applications, which were submitted on 15 December 1978, seek in particular an order that the European Economic Community compensate the applicants for the damage arising from the failure to re-introduce the production refund for sales of quellmehl made between 1 August 1974 and 19 October 1977.

4. A claim for damages following the abolition of production refunds for quellmehl is also the main issue in Case 238/78 *Ireks-Arkady GmbH* v *Council and Commission.*

5. By an order of 18 June 1979 the Court decided to join the present cases for the purpose of the 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

1. The *applicants* claim that the Court should:

— Order the Council and the Commission to pay to them the sum of DM 2 656 499.20 (Case 261/78) and the sum of DM 472 595.57 (Case 262/78), plus interest at 8% from the date of lodgment of the application;

— Order the Council and the Commission to pay the costs.

2. The *Council and the Commission* claim that the Court should:

— Dismiss the applications as inadmissible;

— Alternatively, 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 the damages claimed in these cases represent exactly the total amount of the production refunds in question. Since the latter can, according to the regulations in question, be paid only by the national authorities, the Council is of the opinion that it is therefore from the German national authorities that the applicants should have claimed payment of the refunds, bringing proceedings, in the event of a refusal, before the national courts, which could then make a reference to the Court of Justice for a preliminary ruling. In this regard the Council refers to the judgments of the Court of 26 November 1975 in Case 99/74 *Grands Moulins des Antilles* v *Commission* [1975] ECR 1531 and of 27 January 1976 in Case 46/75 *IBC* v *Commission* [1976] ECR 65. It is of the opinion that the situation arising in those cases must be compared with that existing in the present applications and that, for that reason, the latter are inadmissible.

The *applicants* reply that the Council's reasoning is erroneous, since the national authorities cannot grant production refunds without an appropriate legal basis.

The *Council* observes in its rejoinder that in view of the pragmatic approach by the Court in the sixth paragraph of the decision in its judgment of 28 March 1979 in Case 90/78 *Granaria*, it will leave the question of admissibility to the Court.

2. The *Commission* observes that the applicants 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.

The Commission points out further that the applicants are asking to be paid, by way of compensation, the amount of the production refunds which were not granted to them. It considers that having regard to the judgment of the Court of 2 March 1978 in Joined Cases 12, 18 & 21/77 *Debayser S.A. and Others* v *Commission* [1978] ECR 553, the applications must be dismissed in order to avoid completely eradicating the distinction between actions for the provision of benefits and actions for damages.

In this regard the *applicants* contend that the actions do not concern a production refund, but rather the damage which they suffered as a result of their being subjected to unequal treatment in relation to the manufacturers of starch and that that inequality of treatment was not eliminated by measures of the sort described in the second paragraph of the operative part of the judgment of 19 October 1977.

According to the applicants, the compensation claimed has, in fact, no purpose other than to remove the legal effects upon them resulting from the unlawful abolition of the production refund and from the fact that measures of the sort described in the aforesaid judgment hat not been taken; in such a case an action for damages is admissible according to the principles laid down by the Court in Case 25/62 *Plaumann & Co.* v *Commission*, judgment of 15 July 1963 [1963] ECR 95.

The *Commission* adds in its rejoinder that under Article 215 of the Treaty an

action for damages may be brought only in respect of the damage sustained by the party concerned as a result of the infringement of the principle of equality by the Community institutions. However, the substance of a benefit to which there is allegedly a right based on the principle of equality does not come within that category of action. The position is the same in German law.

According to the Commission, an exception could at most be envisaged in a case where need arises to enable the party concerned to bring an action for damages because he would otherwise be deprived of any remedy at all.

On the other hand the applicants in these cases have the possibility of bringing actions in the national courts. It is true that those courts could not, in the absence of a legislative provision, recognize the applicants' right in such an action, but they could refer the case to the Court of Justice and thus obtain a decision on the question whether the refusal to pay the refund to the applicants between 1 August 1974 and 18 October 1977 is contrary to a superior rule of Community law.

*B — Substance*

1. The applications

(a) In these applications, the applicants claim damages for the damage which they suffered as a result of the unequal treatment arising from the abolition of the production refunds for the manufacture of quellmehl from maize and common wheat between 1 August 1974 and 19 October 1977.

(b) The applicant in Case 261/78 claims damages in respect of the quellmehl intended for human consumption and for use in animal feed, whereas the applicant in Case 262/78 claims damages only in respect of the quellmehl intended for the first of the above-mentioned purposes.

(c) The applicant in Case 261/78 observes that there is no objective reason for granting a production refund for the manufacture of pre-gelatinized starch intended for use in animal feed and not providing a production refund for the manufacture of quellmehl intended for the same use.

It recalls that a production refund for pre-gelatinized starch and quellmehl, without any limitation based on the use to which the products are put, was introduced by Regulation No 141/64 of the Council of 21 October 1964 on the system for products processed from cereals and rice (Journal Officiel 1964, p. 2666). Nor was that legal situation altered in principle by the abolition of the production refunds for quellmehl by Regulation No 1125/74.

The applicant emphasizes that considerable sums have indeed been granted by way of refunds for pre-gelatinized starch intended for use in animal feed. It follows, according to the applicant, that the abolition of the refund for quellmehl also constitutes inequality of treatment between the manufacturers of that product and the manufacturers of pre-gelatinized starch, to the extent to which quellmehl is used as animal feed. Moreover, it follows indirectly from the ninth paragraph of the decision in the judgment of the Court of 19 October 1977 that even where quellmehl is used as animal feed, there is inequality of treatment when subsidized pre-gelatinized starch is intended for a similar use. According to the applicant that is precisely the case.

Besides, in its view there is no objective reason for treating pre-gelatinized starch on the one hand and quellmehl on the other unequally when they are both used as animal feed. Just as in the case where they are used for human consumption, the two products are then completely interchangeable.

(d) The applicants go on to state that according to the judgment of the Court of 19 October 1977 the abolition of the refund for quellmehl constituted an infringement of the principle of equality. That breach of a fundamental principle of the Treaty must, according to the applicants, be regarded as wrongful conduct, for the consequences of which the Community is obliged to pay damages in accordance with Article 215 of the Treaty. The damage suffered by the applicants lies in the fact that they were treated unequally in relation to the manufacturers of pre-gelatinized starch, that is to say, they did not obtain the production refund granted to those producers.

The applicants then contend that the Community is also obliged to make good that damage for the following reason: according to paragraph 2 of the operative part of the judgment of the Court of 19 October 1977, the Community institutions were to adopt the measures necessary to correct the inequality of treatment suffered by the applicants as undertakings producing quellmehl, as against the manufacturers of pre-gelatinized starch. In fact equality of treatment for the period between the abolition of the refunds and 19 October 1977 has not yet been established. That also constitutes, according to the applicants, wrongful conduct on the part of the Community institutions which gives rise to a claim for damages.

2. The Council's defence

(a) The Council states, as regards Case 261/78, that for technical and economic reasons pre-gelatinized starch is not a perfect substitute for quellmehl as animal feed. In its opinion, it was the refunds which made it possible to use quellmehl for that purpose.

On the basis of that argument, the Council emphasizes that the aim of the scheme of refunds was never to attain equality of treatment amongst the various animal feeds, but to permit the starch industry to maintain competitive prices with regard to the prices of chemical substitutes. According to the Council, there are no chemical substitutes on the market in animal feed, so that failure to grant the refund for products intended for that market is explained perfectly by the main object of the system of refunds.

The Council's final observation in this context is that it is generally accepted that the traditional market for quellmehl is bread-making and not animal feed. Therefore the two products in question are not in comparable situations in the animal-feed market, so that different treatment of the products, in so far as they are intended for such a use, does not constitute discrimination.

(b) The Council also emphasizes that the present actions presuppose that Regulations Nos 1125/78 and 1127/78 are not only invalid, but also entail a serious breach of a superior rule of law for the protection of the individual.

It recalls that the measures involved an economic choice, therefore entailing, in accordance with the settled case-law of the Court, a wide degree of discretion on the part of the Community institutions.

The Council goes on to state that in its judgment of 19 October 1977 the Court left open the choice between the re-introduction of the refunds for quellmehl and the abolition of the refunds for pre-gelatinized starch. The Council adds that if this second alternative had been chosen, equality between the two products could have been re-established as from 1 August 1974 without, however, its being necessary to recover the refunds already paid to the producers of pre-gelatinized starch. In fact it considers that there are compelling reasons of legal certainty which go in favour of not recovering the refunds paid when the right to those refunds is abolished retroactively in order to correct an error of the administration. It emphasizes that the judgment of the Court of 9 March 1978 in Case 54/77 *Herpels* v *Commission* [1978] ECR 585, at paragraph 38 of the decision, corroborates that point of view.

Therefore, if the refund for pre-gelatinized starch had been abolished with effect from 1 August 1974, the applicants could not, according to the Council, claim any refund whatsoever for their products. If the matter is considered from that point of view, it seems difficult, in the Council's submission, to accept that it was not permissible, in choosing a solution much more favourable for the producers in question, to limit the regulations in point of time, as was done in this case. The Council goes on to note that in its judgment the Court did not require the institutions to take measures of a retroactive nature; it recalls that the proposals of the Commission did not envisage any retroactivity.

(c) The Council concludes that the aforesaid regulations do not in any way go beyond the margin of discretion available to it in this case and that consequently they are valid, with the result that they cannot be the cause of a sufficiently serious breach of a superior rule of law for the protection of the individual.

Alternatively, working on the assumption that the applicants did not in fact increase their selling prices in order to compensate for the abolition of the refunds, the Council raises the question whether there really were compelling reasons preventing them from doing so.

It recalls in this context that it is clear from the summary of the observations of the plaintiffs in the main action in the judgment of 19 October 1977 that in a situation of free competition, apart from any refund, quellmehl is, as regards the cost of its manufacture, cheaper than pre-gelatinized starch; when pre-gelatinized starch was offered at DM 85 per 100 kg, quellmehl should, on account of the abolition of the refund, have been sold at DM 100. On the basis of those prices there arises, according to the Council, by reason of the refund for pre-gelatinized starch, a competitive advantage of around 8.6% over the selling price of quellmehl. If account is taken of the increase in the price of raw materials during the period for which the refund was not paid, which increase was around 30%, it seems improbable to the Council that the applicants were unable to alter their selling prices in order to allow for that difference of 8.6%, which even becomes 6.3% as the prices of the two products have increased by 30%. In this context the Council emphasizes that the producers of pre-gelatinized starch were also affected by the increase in the prices of raw materials.

The Council concludes that the abolition of the refunds did not go beyond the limits of the economic risks inherent in the applicants' activities and that it certainly could not have endangered the profitability of their undertakings.

Finally, the Council points out that in the absence of the information necessary to form an opinion about the implications of the cost price of the quellmehl produced by the applicants, the selling prices and the increased competition from pre-gelatinized starch due to the benefit of the refund, it is not possible for it at this stage of the procedure to comment more fully on the question whether any damage was really suffered by the applicants. In any event, it has doubts on this point about the admissibility of the applications in the light of Article 38 (1) of the Rules of Procedure.

3. The Commission's defence

(a) The Commission points out that the applicants have not alleged that any real damage was inflicted on them, but that they are requesting payment of the refunds. The Commission therefore considers that it has grounds to suppose that the abolition of those refunds did not cause the applicants any real damage.

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 if the Court had considered the failure to grant refunds to the quellmehl manufacturers to be damage, it would not in its judgment of 19 October 1977 have spoken only of possible damage suffered by those concerned, but the existence of such damage would have been certain at the time, as regards the period elapsed, for it was no longer possible after the event to recover from the manufacturers of pre-gelatinized starch the refund which had been granted to them.

(b) 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 that it is clear from the judgment of the Court of 19 October 1977 that the Community institutions infringed the principle of equality to the extent to which they practised discrimination in the treatment of quellmehl and pre-gelatinized starch and that that principle constitutes a superior rule of law for the protection of the individual.

However, the Commission considers that the infringement of the principle of equality was limited to the spheres in which there exists genuine competition between quellmehl and pre-gelatinized starch, namely in bread-making, which is the main sphere in which quellmehl is traditionally used.

The Commission adds that even though a refund may have been granted for quellmehl in the past irrespective of the use to which it was put, the principle of equality does not require the status quo to be maintained if it is not possible to find comparable elements in processes using quellmehl and pre-gelatinized starch. That is what the Court recognized when it suggested in its judgment of 19 October 1977 that the refunds granted for quellmehl used as animal feed could be abolished if pre-

gelatinized starch was not used in competition. The Commission confirms that it has been able to ascertain that that was the case.

The Commission points out in this context that, since the applicants do not claim that the quellmehl manufactured by them was used for the manufacture of bread to the exclusion of other uses and since, moreover, they have not proved that quellmehl was in competition with pre-gelatinized starch in the manufacture of other food products, the Community institutions cannot, at least as far as they are concerned, have infringed the principle of equality as a superior rule of law, by no longer providing production refunds for quellmehl after 1 August 1974. It follows, according to the Commission, that there was not in this case a serious breach of a superior rule of law for the protection of the individual.

(c) The Commission observes in addition that even if it is necessary to conclude that there was an infringement of such a rule, the elements constituting a manifest and serious abuse of powers are lacking as far as the Commission is concerned.

In this connexion it states that large quantities of quellmehl have indeed been diverted from their intended use and have gone into the manufacture of animal feed. The inclusion of quellmehl in the system of production refunds favoured that development to a decisive degree. Thus it is proved after the event that when the Commission suggested abolishing the production refunds for quellmehl it did not act arbitrarily and consequently did not commit a serious and manifest abuse of powers.

Finally, the Commission states that another of the conditions required for the Community to incur liability was not satisfied: the fact that the applicants were apparently able to continue producing the same quantities of quellmehl without suffering losses, or even to increase their turnover, suggests that the measures taken by the Commission did not affect the applicants seriously enough to make the Community liable and thereby justify an action for damages.

If the abolition of the production refund for quellmehl in 1974 did not lay a duty on the Community to make good the damage suffered by the applicants, such an obligation, says the Commission, may no more be derived, contrary to what the applicants say, from the fact that the Community institutions omitted to re-introduce the refund retroactively as from 1 August 1974. On the contrary, the decision to grant the refund with retroactive effect from 19 October 1977 is itself an extremely generous solution and the limitation of the refund to bread-making is objectively justified since there is no public interest in subsidizing new spheres of use.

4. The applicant's replies

(a) The applicant in Case 261/78 replies that the doubts expressed by the Council from a theoretical standpoint on the possibility of using pre-gelatinized starch in the manufacture of animal feed are contradicted by the documents submitted by the applicant with the reply.

In its view, the same may be said of the claim that pre-gelatinized starch is too costly to be regularly used for that purpose. In this regard, the Council forgets that pre-gelatinized starch is manufactured from a cheap by-product of the manufacture of starch.

According to the applicant, the Council's claim that the use of quellmehl as animal feed was made possible by the refunds is erroneous, seeing that the product has been used for that purpose since 1962. It adds that that statement is also irrelevant, because in that case pre-gelatinized starch likewise was used in animal feed only by reason of the refunds.

The applicant observes further that it is clear from the documents submitted with the reply that pre-gelatinized starch and quellmehl are interchangeable in certain animal feeds and were used in competition with each other for the manufacture of those foods during the period concerned in the present dispute. According to the applicant, that proves that the two products are in comparable situations within the meaning of the eighth paragraph of the decision in the Court's judgment of 19 October 1977.

Further, what counts is not the traditional use of quellmehl but the actual use of the two products during the period in question. The applicant further points out that it is the granting of refunds for pre-gelatinized starch which governs the refunds for quellmehl, therefore the reference to the absence of chemical substitutes on the animal-feed market is irrelevant.

(b) The applicants state that the infringement of a superior rule of law on which they base their case lies in the abolition of the refunds for quellmehl by Regulation No 1125/74, contrary to the principle of equality of treatment, and in the failure of the Community institutions to take action for the period from 1 August 1974 to 19 October 1977, although the judgment of the Court of 19 October 1977 requires them to remove the established inequality of treatment.

The applicants do not deny that the said institutions had a choice of several measures to correct the inequality of treatment, but maintain that total inaction in respect of the disputed period could not remove such inequalities; account must be taken in this case of the fact that the proceedings in the main action which led to the judgment of the Court of 19 October 1977 concerned only the period prior to that judgment.

The only consequence, according to the applicants, of the reasons of legal certainty relied on by the Council was that in respect of the period prior to the judgment of the Court equality of treatment could not be established by abolishing the refunds for pre-gelatinized starch, whereas such a possibility did exist for the future.

When the Council adds that it was permissible for the Community institutions to limit the system of refunds in point of time, it forgets once again, in the applicant's submission, to distinguish between the period prior to 19 October 1977 and the period subsequent to that date.

The applicants add that the principle of equality is a legal rule of the highest order, so that any breach of that principle must be considered serious.

(c) The applicants further point out that the passing on in their selling prices of the increase in production costs

caused by the abolition of the refunds did not reduce their loss. That loss comprised the difference between the material situation which would exist if the event giving rise to the loss had not taken place and the actual material situation. As an increase in the selling prices, assuming that it could take place, would have been possible even if the production refunds had been maintained and, as the applicants would in fact have taken such a step in order to obtain profit, the damage assessed in that way is always equal to the amount of the unpaid refund.

Regardless of that the applicants deny that they had such an opportunity to pass on the loss; they also challenge the Council's claim that the abolition of the refunds did not go beyond the limit of normal economic risks.

In this regard the applicant in Case 261/78 points out that it purchases the flour which it uses in the manufacture of quellmehl from different mills and then processes it; in effect, the request for the refund is submitted by the applicant on behalf of its suppliers, who then each time reduce the price of the flour which they deliver by the amount of the refund paid.

The applicant adds that the abolition of the production refund increases its production costs by 38%. In relation to an average return of approximately 2 or 3% of turnover on food for human consumption, and a maximum of 5% on animal feed an increase in production costs of more than 20% cannot, in the applicant's opinion, fall within the limits of normal economic risks.

According to the applicant in Case 262/78, the reduction in turnover which it suffered as a result of competition from manufacturers of pre-gelatinized starch following the abolition of the production refunds in 1974 shows that the Council's claim that it was possible to pass on in the selling price the increase in costs due to the abolition of the production refunds is untenable. In this connexion it encloses a letter from the Verband der Backmittelhersteller [Association of Manufacturers of Bakery Additives of the Federal Republic of Germany] showing that the effects of the abolition of the refund went beyond the limits of the risks inherent in the economic activities of quellmehl manufacturers.

(d) The applicant in Case 261/78 points out, with regard to the loss actually suffered by it, that the fact that the amount of the damage which it claims is equal to the amount of the refund granted does not mean that it is asking for the refund, but that it is solely a question of placing a figure on the damage. It adds that after the abolition of the refund the price which it paid for the flour purchased increased exactly by the amount of the production refund which had previously been paid for quellmehl. The applicant emphasizes that it has already shown that it is not relevant to ascertain whether it was in a position to impose an increase in its selling price.

The applicant in Case 262/78 observes that, since the only conceivable solution was to grant to the quellmehl manufacturers sums equal to those obtained by the manufacturers of pre-gelatinized starch, its hypothetical material situation without the abolition would have been such that it would have received in respect of its quellmehl business a sum equal to that corresponding to the production refund laid down for pre-gelatinized starch. Thus one may assess the damage by taking as a yardstick the

production refund actually granted for pre-gelatinized starch, taking account of the business done in quellmehl. That is exactly what the applicant did in its application. Thus it may be seen, according to the applicant, that in no way in the present proceedings is it claiming entitlement to the production refund itself.

The applicant adds that in assessing the damage the production cost and the selling price of the quellmehl manufactured by it are irrelevant.

(e) In the opinion of the applicants, the principle of equality was also infringed to the extent to which the refund for quellmehl intended for human consumption, apart from bread-making, was abolished.

In this connexion the applicants emphasize that both quellmehl and pre-gelatinized starch are used for other food products in particular for pastry-making and confectionery and they recall that the first paragraph of the operative part of the judgment of 19 October 1977 established the existence of a breach of the principle of equality without any restriction as to particular uses.

(f) As for the Commission's argument that there has been no manifest and serious abuse of powers, having regard to the use of quellmehl in animal feed, the applicants state that it is clear from their account of the facts that the abolition of the refunds for quellmehl used in animal feed also constitutes an infringement of the principle of equality.

Besides, the occasional use of quellmehl in animal feed does not justify unequal treatment as regards food for human consumption: it would have been possible, if considered appropriate, to limit the production refund to the quellmehl used in food for human consumption.

5. The Council's rejoinder

(a) In its rejoinder the Council expresses an opinion on the applicant's argument that the damage suffered by a person is represented by the theoretical difference between the financial situation of that person if the damage had not occurred and the situation arising as a result of that damage.

Doubting the relevance even in German law of that doctrine of civil law in the context of administrative proceedings between an individual and the public authorities concerning a subsidy to which that individual claims to be entitled, the Council considers in any case that that doctrine cannot apply in the context of an action for non-contractual liability governed by Community law. The Council adds that it is clear from the judgment of the Court in Case 74/74 *CNTA* v *Commission* that the Community is not obliged to make good damage which, although apprehended, does not in fact occur.

(b) The Council also observes that 110 kg of maize or common wheat at the most are needed to produce 100 kg of quellmehl, whilst to produce the same quantity of pre-gelatinized starch 161 kg are required. That difference results in a clear advantage for quellmehl, even if it does not benefit from any refund.

In this context the Council also emphasizes that the increase due to the rise in the price of maize, in combination with the relationship between the quantities of maize required, largely compensated for the negative effect of the non-payment of the refund for

quellmehl: between August 1974 and June 1977 the production cost of pre-gelatinized starch increased by DM 24.54 on the basis of the higher price of maize during the period in question as against DM 16.76 for quellmehl. Since the difference between those two amounts is DM 7.78, whilst the average refund for pre-gelatinized starch was DM 8.62 during the period in question, the Council finds it difficult to see how the producers of pre-gelatinized starch were able to confront the quellmehl producers with keener competition and thus inflict a commercial loss on them owing to the refunds from which they continued to benefit.

(c) Finally, with regard to Case 261/78 the Council points out that pre-gelatinized starch, from which the applicant claims to suffer competition in the animal-feed industry, is not maize starch or common wheat within the meaning of the Community regulations and so is not the product for the benefit of which a production refund is provided. The applicant has not proved that "pure" pre-gelatinized starch is really used as an ingredient of the said animal feeds. Even supposing that that is technically possible, it must, according to the Council, also be economically possible.

If account is taken of the fact that the manufacturing process for pre-gelatinized starch is much more difficult than for quellmehl, it is clear, in the Council's opinion, that "pure" pre-gelatinized starch cannot be substituted for quellmehl in animal feed because of its much higher selling price.

The Council concludes that the applicant has not produced evidence of any new factor which might alter the opinion of the Court in its judgment in Case 90/78 *Granaria* that "the principle of equality is breached to the detriment of quellmehl producers only on the assumption that quellmehl is put to its traditional uses in food for human consumption".

6. The Commission's rejoinder

The Commission observes that a subsidy which was not granted to the applicants does not constitute a loss: either there exists a legal obligation to grant them the said subsidy after the event, in which case the applicants do not suffer any loss, or such an obligation does not exist, in which case the applicants may not bring an action for damages. It is not a question of an obligation to pay damages, as is clear, moreover, from the finding that one party's not receiving a subsidy which another party has enjoyed does not in itself constitute a loss for the former. That is why the argument of the applicant in Case 261/78, to the effect that the prices at which it purchased flour increased as a result of the abolition of the refunds, is misconceived.

The Commission goes on to argue that, since the aim of the subsidy is not to guarantee the applicants a particular benefit, it cannot be inferred that in the event of the abolition of the subsidy the applicants sustain material injury to the extent of the subsidy by the amount of which their profits are henceforth reduced. The Commission adds that before being paid to the beneficiary a subsidy does not form part of his assets and consequently he cannot be injured simply by its being withheld.

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 pre-gelatinized 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, be 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 adds that even if the preceding considerations are not followed, it would be difficult to argue that they are of so little weight that their having been taken into consideration in the conception of the proposals transmitted to the Council constitutes a clear example of *ultra vires* conduct on the part of the Commission within the meaning of the case-law of the Court. Such a criticism is even less justified when it is borne in mind that the refunds are being claimed for quellmehl which was used for purposes other than bread-making.

As for the question of the obligation to pay compensation in respect of the quellmehl which was used for purposes other than bread-making, the Commission states that the reason for including quellmehl in the system of production refunds was — in distinction from the case of pre-gelatinized starch — solely the consideration that the product should not be ousted from its traditional market because of its considerable interchangeability with pre-gelatinized starch. The Commission considers that in the circumstances there is no reason to subsidize quellmehl in so far as it can increasingly be put to uses which traditionally played no part in its marketing. In the opinion of the Commission, the aims of the subsidy did not include the assistance of quellmehl put to such uses; for that reason neither does the principle of equality of treatment require such assistance to be given, because different things are involved.

The Commission adds that the judgment of the Court of 19 October 1977 itself shows that the production of quellmehl need not be encouraged indefinitely as far as animal feed is concerned and that the Court confirmed that view in its judgment in Case 19/78 *Granaria.*

The Commission is not convinced by the documents produced by the applicant in Case 261/78 on the interchangeability of pre-gelatinized starch and quellmehl in the animal-feed industry. It also has doubts whether the pre-gelatinized starch to which the applicant refers is really starch within the meaning of the provisions of Community law on this subject.

## IV — 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 and the Commission, 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 quellmehl as a result of Regulation No 1125/74 of the Council of 29 April 1974 amending Regulation No 120/67 on the common organization of the market in cereals (Official Journal 1974, L 128, p. 12).

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 a reference for a preliminary ruling from the Finanzgericht Hamburg in Joined Cases 117/76 and 16/77 *Ruckdeschel & Co.* v *Hauptzollamt Hamburg-St. Annen* and *Diamalt AG* v *Hauptzollamt Itzehoe* [1977] ECR 1753, 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 quellmehl and pregelatinized 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 quellmehl intended for use in the bakery 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 1978, 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 1978, L 142, 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' claim 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 1974, on which date Regulation No 1125/74 was first applied, and 19 October 1977. The alleged damage consists in the loss of receipts equal to the amounts of the refunds which would have been paid to the applicants if quellmehl 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 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. In the circumstances of the case, moreover, 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 provision 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 that action and may be upheld, if they are well founded, without its being necessary for the defendants to adopt new legislative measures.

## Substance

8 By its judgment of 19 October 1977, the Court established that the abolition of the refunds for quellmehl as from 1 August 1974, together with the retention of the refunds for pre-gelatinized starch, was incompatible with the principle of equality. The scope of that finding of unlawfulness was the subject of argument between the parties to the present cases. The Council and the Commission maintain that the abolition of the refunds for quellmehl was recognized to be unlawful only as regards the manufacture of quellmehl intended for use in the bakery industry. Moreover, the same conception is behind Council Regulations Nos 1125/78 and 1127/78, which reintroduced the refunds only as regards the quellmehl intended for that use. The applicants maintain that equality of treatment with pre-gelatinized starch must be ensured for quellmehl irrespective of the use to which it is put, that is to say not only for quellmehl intended for human consumption in general, but also for that used as an ingredient of animal feed.

9 In its judgment of 28 March 1979, Case 90/78 *Granaria BV* v *Council and Commission,* the Court held that in establishing by its judgment of 19 October 1977 in Joined Cases 117/76 and 16/77 that the abolition of the refunds was unlawful, it considered that the principle of equality had been breached to the detriment of the producers of quellmehl only on the assumption that quellmehl was put to its traditonal uses in food for human consumption. The traditonal use of quellmehl, as it had been explained in the course of the procedure in the above-mentioned cases, was limited to bread-making, where it served as an additive to products based on rye flour. That traditonal use explained why quellmehl, as the Court recalled in its judgment, had benefited from production refunds in Germany since 1930 and in the Community since the first common organization of the market in cereals.

10 It follows that is only as regards the quellmehl used for bread-making that the abolition of the production refunds for quellmehl was incompatible with the principle of equality for the reasons accepted by the Court in its judgment of 19 October 1977.

11 The problem which then arises 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.

12 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 causes 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.

13 In the circumstances of this case, 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.

14 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 number of quellmehl producers in the Community is very limited. 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 1974 without sufficient justification.

15 For those reasons the Court arrives at the conclusion that the Community incurs liability for the abolition of the refunds for quellmehl under Regulation No 1125/74 of the Council.

16 This said, it is necessary to go on to examine the damage resulting from the discrimination to which the quellmehl 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 quellmehl 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.

17 The Council and the Commission objected to that method of calculating the damage on the ground that the quellmehl producers eliminated the damage, or could have done so, 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, or could have 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.

18 For their part, the applicants dispute the possibility of passing on the loss in that way. They state that, faced with the competition from the starch producers benefiting from refunds, they chose, as a matter of commercial policy, to sell quellmehl 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.

19 The statistical data and the arguments put forward by the parties do not permit the conclusion to be drawn that the applicants actually passed on, or could have passed on, the loss resulting from the abolition of the refunds in their selling prices.

20 In 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 1974 to 19 October 1977 the use of maize for the manufacture of quellmehl intended for use in the bakery industry had conferred a right to the same refunds as the use of maize for the manufacture of starch.

21 The applicants submitted a number of documents to the Court as proof of the quantities of quellmehl for which they claim to be entitled to compensation and of the amounts of the refunds not paid in 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

22 The applicants further claim that the Community should be ordered to pay interest at the rate of 8 % from the date of lodgment of the applications.

23 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,

as an interlocutory decision, hereby:

1. **Orders the European Economic Community to pay to**
   **(1) Interquell Stärke-Chemie GmbH & Co. KG, Grossaitingen,**
   **(2) Diamalt AG, Munich,**
   **the amounts equivalent to the production refunds on quellmehl intended for use in the bakery industry which each of those undertakings would have been entitled to receive if, during the period from 1 August 1974 to 19 October 1977, the use of maize for the production of quellmehl 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)