On those grounds

THE COURT

hereby:

1. **Dismisses the application**

2. **Orders the applicant to pay the costs.**

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen

O'Keeffe Bosco Touffait Koopmans

Delivered in open court in Luxembourg, on 12 July 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 13 JUNE 1979 [1]

Mr President,
Members of the Court,

The Court has frequently had to deal with problems of production refunds in the context of the common organization of the market in cereals and with questions connected therewith. Consequently I can limit the introduction to my opinion today to the following particulars.

The aim of the rules for production refunds, which have been in force for many years and which according to Article 11 of Regulation (EEC) No 2727/75 of the Council (Official Journal L 251 of 1 November 1975, p. 1) are optional, is to maintain the competitive strength of the starch industry in the Community, which — as a result of measures relating to the common organization of the market — has to process raw materials that have gone up in price, as against the products of non-member countries, which can usually obtain their supplies on the world market on easier

1 — Translated from the German

terms, and also as against the producers of synthetic starch products, especially those extracted from oil, with which it is in competition as far as their use in certain technical fields is concerned. Accordingly provision is made — and this is all that concerns us in the present case — that a production refund may be granted for maize used in the Community for the manufacture of starch. The rate of the production refund applicable has been fixed in Regulation No 2742/75 of the Council (Official Journal L 281 of 1 November 1975, p. 57) and has been varied from time to time in the subsequent marketing years.

Provision is also made for the same production refund to be granted for the manufacture of potato starch, because there is also competition in some of the spheres in which it is used. Since however there is no common organization of the market in potatoes and therefore no regulation of prices corresponding to that in the organization of the market in cereals, it is also provided that the refund shall only be paid if the processing industry pays the growers a minimum free-at-factory price for the potatoes. The second subparagraph of Article 11 (2) of Regulation No 2727/75 provides that this minimum price shall consist of a lump sum to be paid by the producers of potato starch plus an amount corresponding to the production refund; the production refund must therefore be passed on to the potato growers. This minimum price has also been fixed in Regulation No 2742/75 and varied from time to time in the subsequent marketing years.

When the Commission was preparing the provisions to be applied to the organization of the market in cereals for the 1978/79 marketing year it came to the conclusion that the constraints imposed on the potato starch industry could lead to a disturbance of the balance between the different starch industries and it might therefore prove necessary to provide for a premium to be paid to potato starch manufacturers (cf. sixth recital in the preamble to Council Regulation (EEC) No 1125/78 of 22 May 1978, Official Journal L 142 of 30 May 1978, p. 21). The Council considered that this was necessary and replaced Article 11 (3) of Regulation No 2727/75 by the following paragraphs contained in Article 11 of Regulation No 1125/78:

"3. A premium may be paid to potato starch manufacturers.

4. The Council, acting by a qualified majority on a proposal from the Commission, shall adopt rules for the application of this article and fix the amount of the production refund and the amount of the premium."

Council Regulation (EEC) No 1127/78 (Official Journal L 142 of 30 May 1978, p. 24) accordingly provided — in addition to fixing the production refund for maize for the production of starch at 17.00 units of account per tonne and to increasing the minimum price of potatoes from 175 units of account to 178.50 units of account — that the following Article 3a should be added to Regulation No 2742/75:

"For the duration of the 1978/79 cereals marketing year Member States shall grant a premium of 10 units of account per tonne of potato starch payable to the starch manufacturer."

The Italian Government considers that, in so far as these provisions grant a premium to potato starch manufacturers, they are for various reasons contrary to the Treaty. It has therefore claimed in an application lodged at the Court on 31 July 1978 that the Court should annul Regulations Nos 1125/78 and 1127/78

in so far as they relate to the said premium.

The defendant Council and the Commission which has intervened in this case in support of the Council contend that the Court should dismiss the application.

I — The admissibility of the application

The first thing to do in considering this action is to go into the question whether it is admissible. It is true that only a question as to its admissibility has been raised and that no actual objection has been made. But the Court naturally has to consider the question raised since according to the well established case-law questions of admissibility even have to be examined by the Court of its own motion.

The Council, the defendant in this action, raises a question of admissibility on the ground that the representative of Italy, when the rules at issue were being drawn up, from time to time voiced misgivings and opposed them, but later when the Council was considering at its 517th meeting on 22 May 1978 the formal adoption of a set of measures relating to prices and questions connected therewith, which had been decided upon during the session from 8 May to 12 May 1978 in the form of a package, voted in favour without any reservation; he did not even make his vote conditional on the consent of the Italian Government as another delegation had done with reference to another point. In this connexion the defendant also attaches importance to the fact that the Italian representative on the Management Committee for Cereals approved the proposal for the adoption of an implementing regulation by the Commission (Commission Regulation (EEC) No 1809/78 of 28 July 1978, Official Journal L 205 of 29 July 1978, p. 69) which laid down the rules for paying the premium. For these reasons the Council would like to rule out the possibility of any action being brought referable to the said rules concerning the payment of the premium. On this issue it relies on the principle of legal certainty. Furthermore the Council submits that the Italian Republic does not have the interest in the action which every litigant must have. In this connexion what might be called personal interest — the special position of a Member State — is irrelevant, whereas it may be said of the Community interest that the representatives of the Member States on the Council have already seen to it that that interest is protected. However in every case the measures in question, which are at issue in these proceedings, are economic acts presupposing a thorough evaluation of the economic situation. Consequently the Member States, which have participated through their representative in this evaluation, are not allowed to rely in legal proceedings on certain causes of action, for example in these proceedings those which relate to an alleged disregard of Italy's interests or to the principle of proportionality.

In answer to this argument the Italian Republic points out that the Council is a Community organ and not a common organ of all the Member States which is dependant on the latter. The Council therefore forms a collegiate will of its own and in this connexion the vote of an individual Member State does not have any independent significance. Since this vote does not express the view of an organ of the particular Member State, the act based on that vote cannot be imputed to the Member States but from their standpoint represents the act of a third party. Consequently in the present case, for the purpose of substantiating the admissibility of the application reliance cannot either be placed on the principle which rules out a *venire contra factum proprium*. The principle of legal certainty, which plainly has a different

meaning, in that it is intended to ensure that the wording of a rule has been stated accurately and that a law must be certain before it is applied, is just as unreliable. Similarly considerations such as those relating to waiver or approbation cannot be called in aid, because they presuppose that the measure under consideration is complete, whereas in this case the conduct of the Member State — its vote — either precedes the relevant disputed act or indeed coincides with it. Likewise the inadmissibility of the application cannot be substantiated by the lack of any legal interest to be protected, even though Article 173 of the EEC Treaty clearly confers on Member States by way of privilege a special right of action, to which no special conditions apply as they do for instance to the right of action under Article 38 of the Treaty establishing the European Coal and Steel Community. Finally there can also be no question of limiting the statement of claim, which is the Council's alternative submission, because the behaviour of the representative of the Italian Government in the Council may only be attributed to him and not to the Italian Government, whose activity is confined to the appointment of a member of the Council.

1. As far as concerns this important difference of opinion it is not disputed that the representative of the Italian Government in the Council cast a vote without any reservation in favour of the measures which are relevant to this case and also that, when the beforementioned implementing provisions to be adopted by the Commission were discussed by the Management Committee for Cereals there was no evidence of any opposition on the part of Italy. On the other hand the case-law of the Court, which is to be borne in mind in connexion with the conduct of the representative of the Italian Government during the preparatory meetings of the Council, has already stressed that reservations or statements which were made in the course of preparatory discussions have no relevance unless they are recorded in the wording of a Council decision (cf. judgment of 18 February 1970 in Case 38/69 *Commission of the European Communities* v *Italian Republic* [1970] 1 ECR 47).

If a Member State's right of action is then examined in the light of the foregoing in a case such as this, it certainly appears that a solution is without any doubt hardly to be found by relying on the principle of legal certainty. A decisive factor in support of this view — apart from the Italian Government's submissions on the substance of this principle — is also that the validity of acts of the Council of Ministers can not only be challenged by actions brought by Member States but also by taking other legal steps. It is only necessary to think of references by national courts for rulings on validity pursuant to Article 177 of the EEC Treaty of actions for damages founded on the non-contractual liability of servants and institutions of the Community under Article 215 of the EEC Treaty which can also be brought by private individuals and which involve a judicial review of legality.

On the other hand in my view less clear cut is the answer to the question whether in a case such as this considerations, which are based on the principles of waiver and approbation or on the inadmissibility of a *venire contra factum proprium*, are not nevertheless applicable even though it is not to be ruled out that these legal concepts do not apply directly and exactly to the facts of the present case. On this point it is of importance that Article 2 of the Merger Treaty provides that the composition of the Council shall be as follows:

"The Council shall consist of *representatives* of the Member States. Each Government shall delegate to it one of its members.
..."

Even if it is correct to say that the Council is not a common organ of the Member States, according to the texts which have been quoted, the principle that the conduct and acts of a representative are invariably to be imputed to the person represented must nevertheless also be borne in mind. If that is taken into account and if the underlying notions which form the basis of the legal concepts are allowed to come into play — in particular the concept of "estoppel" mentioned in Case 117/75 [which was removed from the Court register] may be called to mind — then it can in fact hardly be acceptable that, after a complex economic evaluation has taken place, to which, in the context of protracted and difficult negotiations for package deals, during which the rule *do ut des* applied, specific legal consequences were attached, a Member State which had participated in all those negotiations through a representative, should dissociate itself subsequently from them, in so far as one question is concerned, in order to have that question judicially reviewed.

Furthermore there are in addition to these matters in every case considerations which are to be placed in the sphere of the protection of a legal interest. It is true that Article 173 of the EEC Treaty does not expressly mention it, or for that matter an interest in taking proceedings. But it is with good reason assumed that this requirement that the litigant must have an interest to protect forms the basis of the system of legal protection under the Treaty, to be more precise not only as far as private applicants are concerned, which is not disputed, but also as far as the so-called privileged applicants are concerned. A number of well-known writers also make this assumption (Schlochhauer, Die Gerichtsbarkeit der EGKS, Archiv des Völkerrechts, III. Band, S. 401 [The jurisdiction of the ECSC, Archives of Public International Law, Vol III, p. 401]; Steindorff, Die Nichtigkeitsklage im Recht der Europäischen Gemeinschaft für Kohle und Stahl, 1972, S. 48 [The action for annulment under the law of the European Coal and Steel Community, 1972, p. 48]; Ehle, Klage- und Prozeßrecht des EWG-Vertrags, 1966, Anmerkungen 11 und 14 zu Artikel 173 [The law relating to the right to institute proceedings and the procedural law of the EEC Treaty, Notes 11 and 14 on Article 173]). Mr Advocate General Roemer mentioned this assumption in his opinion in Case 24/62, judgment of the Court of 4 July 1963, *Government of the Federal Republic of Germany* v *Commission of the European Communities* [1963] ECR 63, at p. 71. Although in contrast Mr Advocate General Lagrange in his opinion in Joined Cases 2 and 3/60, judgment of 13 July 1961, *Niederrheinische Bergwerks-Aktiengesellschaft und Unternehmensverband des Aachener Steinkohlenbergbaues* v *High Authority of the European Coal and Steel Community* [1961] ECR 133, at p. 154, stressed that not even evidence of an interest is required of the Member States for applications for annulment under Article 33, this may well only represent an apparent departure from that assumption. It is in fact a reasonable assumption that Lagrange is more likely to be moving in the same direction as Séché (La notion d'intérêt à agir dans le droit de la Communauté Européenne du Charbon et de l'Acier, R.G.D.I.P. [The concept of an interest in instituting proceedings under the law of the European Coal and Steel Community, General Review of Public International Law], Vol. 1962, p. 299 *et seq.*), who, in the case of the Member States, mentions a *presumption* that they have an interest in instituting proceedings and thereby acknowledges that it is quite possible to rebut it in the light of the particular facts of a specific case.

If this starting point is regarded as generally applicable so that in consequence it also covers actions under Article 173 of the EEC Treaty, then it is impossible not to proceed in the present case on the basis that the action is inadmissible, thereby following Krsjak (Note on the judgment of 21 March 1974 in Case 151/73 *Government of Ireland* v *Council of the European Communities* [1974] 1 ECR 285, in Gazette du Palais of 12 and 13 February 1975, p. 10), who described an action brought by a Member State against a Council regulation adopted unanimously as "anomalie institutionnelle" ["an institutional anomaly"]. My opinion is that to substantiate this view it is sufficient to place on record that the material problem in this case — to maintain a balance between maize starch and potato starch by means of appropriate measures — has been carefully considered and discussed in committees of the Council. At these meetings the representative of Italy had the opportunity to bring about a different evaluation, and during those meetings a solution to the conflict of interests had to be found. On the other hand I do not regard the question how far the discussions and investigations went at the time as being so important. As far as concerns this aspect of the matter one point at issue in this case, as is known, could not be completely clarified in the proceedings: although the defendant and the intervener supporting it stated that all the data had been exhaustively discussed and that the particulars of the production costs of maize starch and potato starch had not been challenged by the Italian representative, the applicant, who however does not deny that the figures for the processing costs, which it mentioned in the court proceedings, had not been produced at the time, submitted that, contrary to the requests of its representative, separate calculations of the processing costs and the value of the by-products were not produced by the Community officials and consequently not discussed either. If this is actually what happened, as the Italian Government now asserts, then its representative would have had to make an appropriate reservation when the Council regulation in question was being worked out in detail. As this was not done and what is more the representative of the Italian Government in the end voted in favour, the only possible interpretation is that the original reservations had been dropped. It is on the basis of this situation as far as concerns the interests of the parties that we must proceed and the Italian Government must also abide by it.

However, under such circumstances — and it has indeed not been alleged for example that the Italian representative had disregarded his Government's instructions, that fresh and important factors had been disclosed or that when the situation was assessed a serious mistake came to light — it cannot in my view in fact be regarded as permissible that the measures which are under discussion in this case at the request of the Government whose representative on the Council has considered them to be favourable, be subjected in court proceedings to a fresh assessment.

2. If this conclusion is thought to go too far — incidentally Daig in the Kommentar zum EWG-Vertrag [EEC Treaty Commentary], published by Von der Groeben-Boeckh-Thiesing, 2 Auflage, S. 220 ff, [2nd Edition, p. 220 *et seq.*] states that under such circumstances an action is inadmissible if certain conditions are fulfilled — nevertheless the question at least arises, as far as concerns the admissibility of some of the *grounds of claim,* whether or not a strict standard is to be applied. Even if an interest in a specific cause of action does not in principle have to be substantiated, this is certainly not to be dismissed out of hand.

On this point it is necessary to recall briefly the grounds upon which the Italian Government challenges the regulations for the payment of the premium to potato starch manufacturers: it complains, on the one hand, that the statement of reasons upon which they are based is inadequate and inconsistent, and it submits, on the other hand, as far as concerns the content of the regulations, that the granting of the premium is in breach of the prohibition of discrimination, the principle of proportionality and also — this ground ranks as a misuse of powers — contravenes the objectives of Article 39 of the Treaty.

On the first point I would consider it to be very much open to question whether a Member State, which had participated by its representative in the preparation and adoption of a specific measure, can subsequently complain that the main grounds in the statement of the reasons on the basis of which the act was adopted have only been inadequately stated. A Member State does not need to be given precise particulars of the act, because either it knows about it from the outset or it has only itself to blame, if it has neglected to use its influence to have all the main reasons discussed when the act in question was worked out in detail. I therefore do not consider that a Member State's claim that the statement of reasons is inadequate is justified at all if the act in question is one for which it was partly responsible.

As far as concerns the other claims which relate to the content of the measure which has been adopted — granting of a premium to producers of potato starch — it is important to bear in mind that the measure in question is a decision of economic policy, adopted as a result of a difficult evaluation of complex economic conditions. In this connexion the institution adopting the measure in question has, according to the well established case-law, a wide discretion and the judicial review thereof is consequently restricted to the questions whether "it [the exercise of such discretion] contains a manifest error or constitutes a misuse of power or whether the authority did not clearly exceed the bounds of its discretion" (cf. judgment of 25 May 1978 in Case 136/77 *Firma A. Racke* v *Hauptzollamt Mainz* [1978] ECR 1245). But if, with reference to such measures, a Member State acknowledges in the end through the affirmative vote of its representative that an evaluation proposed by the Commission and agreed to by the other delegations is correct, then it is in fact reasonable to assume, even if at the outset objections were raised and a thorough examination was called for, that the institution, which on the strength of such an evaluation has come to a unanimous decision, can scarcely have made a manifest error. It must therefore be accepted that with reference to a measure of this kind every Member State which actively participates in its adoption is bound to find itself in a hopeless position in legal proceedings relating thereto, unless, although this clearly does not apply in this case, it can give reasons deserving very serious consideration for the mistake it made earlier. This view applies in the present case in the same way to all aspects of the review which has been requested, that is to say, not only to the alleged breach of the prohibition of discrimination but also to the disregard of the principle of proportionality and to the alleged misuse of powers in connexion with the contravention of the objectives of Article 39.

Since however no aspects other than those mentioned are at issue, this additional consideration, which only applies to the admissibility of certain causes of action, would be bound to lead to the conclusion that, since nothing remains to be judicially reviewed, the

application must be dismissed as inadmissible.

II — The substance of the application

In view of the considerations which have just been put forward, the compelling nature of which cannot in my view be called in question, I will take the liberty of seeing to it that my further examination of this case, which I nevertheless do not intend entirely to disregard, is relatively brief.

1. Lack of reasoning

The applicant complains that Regulation No 1125/78 has two defects: in the first place the statement of the reasons upon which it is based is inadequate, because it does not disclose the kind of difficulties with which the potato starch industry is beset and that these difficulties are in fact due to the competition from maize starch. In the second place the said statement of reasons is inconsistent, because, on the one hand it stresses that under the rules for the payment of refunds competing products should be accorded equal treatment and, on the other hand, it states that it is necessary to give preferential treatment to one product, potato starch, by means of the granting of a premium to potato starch manufacturers.

Regulation No 1127/78, which fixed the amount of the premium, justified it by reference to the price of the by-products obtained from the manufacture of maize starch but nevertheless did not give any more precise particulars of this price and of production costs, which have not remained unchanged.

(a) On this aspect of the matter attention must first be drawn, as the Council has done, to the fact that according to a very large number of decided cases the requirements to be met in fulfilling the duty to give a statement of the reasons upon which acts of general application are based are less strict than those to be met in fulfilling that duty in the case of acts affecting only individuals. In the former cases a concise statement of reasons, which does not have to go into every detail but only mentions the most important considerations suffices. Furthermore the context as a whole in which the rules were adopted and the reasons stemming logically from such a context are to be taken into consideration. In particular I refer in connexion with this point to the judgment of the Court of 13 March 1968 in Case 5/67 *W. Beus GmbH* & Co. v *Hauptzollamt München* [1968] ECR 83, the judgment of the Court of 20 June 1973 in Case 80/72 *N.V. Koninklijke Lassiefabrieken* v *Hoofdproduktschap voor Akkerbouwprodukten* [1973] 1 ECR 635, the judgment of the Court of 18 March 1975 in Case 78/74 *Deuka, Deutsche Kraftfutter GmbH, B. J. Stolp* v *Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1975] 1 ECR 421, the judgment of the Court of 23 February 1978 in Case 92/77 *An Bord Bainne Co-operative Limited* v *Minister for Agriculture* [1978] ECR 497, and to the judgment of the Court of 25 October 1978 in Joined Cases 103 and 145/77 *Royal Scholten-Honig (Holdings) Limited* v *Intervention Board for Agricultural Produce; Tunnel Refineries Limited* v *Intervention Board for Agricultural Produce* [1978] ECR 2037.

(b) In considering Council Regulation (EEC) No 1125/78 which was adopted to amend Regulation (EEC) No 2727/75 it is necessary to call to mind what can already be gathered from Regulation No 2742/75 which is connected with the latter regulation. Its statement of reasons mentions the competition between "agricultural" starch and synthetic starch products and also the competition between maize starch and potato starch

and the need as far as they are concerned to maintain a balance owing to their interchangeability. This regulation makes it particularly clear that owing to the difficulties caused by the still continuing special situation of potato starch it is absolutely essential for it to be given special treatment. On the other hand the statement of reasons in the preamble to Regulation No 1127/78, which mentions the increasing pressure exerted by maize starch competing with potato starch caused by the value of the by-products, is also to be taken into consideration.

Once this correlation is understood there can hardly be any doubt that, as far as concerns the kind of difficulties with which the manufacturers of potato starch have to cope and their origin, the relevant statements of reasons are adequate.

(c) Following the Council's contentions it is also to my mind evident that the statement of the reasons upon which Regulation No 1125/78 is based is not inconsistent. The second recital in the preamble thereto, which states that products competing for the same outlets ought to be granted the same production refunds, clearly refers specifically to Article 1 of the regulation which provides for the refunds. On the other hand the sixth recital, which mentions "the constraints imposed on the potato starch industry" states the particular reason for the measure adopted at the same time, namely for the payment of a premium to producers of potato starch. In this connexion it is to be borne in mind that, as far as that is concerned, because of the differences in the regulation of the two markets — a market organization for cereals with guaranteed prices and sales on the one hand and the absence of a market organization with such arrangements for potatoes on the other hand — there has never been completely equal treatment with maize starch (cf. *inter alia* judgment of the Court of 12 July 1977 in Case 2/77 *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld* [1977] 2 ECR 1375.

(d) Finally, it seems that in the case of the statement of the reasons upon which Regulation No 1127/78 is based — because in this connexion the view and judgment of the draftsman of the regulation are determinative — the reference to the higher value of the by-products, which arise in the manufacture of maize starch, is in fact sufficient. If therefore there is no mention of production costs in this connexion this can only be understood as meaning that the Council, for its part, did not proceed on the basis that there had been substantial changes but was only afraid that the balance between potato starch and maize starch would be disturbed because of the difference in the trend of the value of the respective by-products. With reference to the fact that nothing more has been said about the by-products, it may be recalled that the statement of reasons does not have to deal with every detail of a regulation and that in this connexion the fixing of the premium also permits certain conclusions to be drawn.

(e) I am therefore of the opinion that in this case — if the assertion of a claim by a Member State of lack of reasoning is regarded as tenable — the annulment of the contested regulation by means of *this* cause of action is not justifiable.

2. Placing producers of maize starch at a disadvantage

The applicant's submission that granting the producers of potato starch a premium causes considerable disturbance

of the balance between maize starch and potato starch and leads to a substantial competitive disadvantage and to genuine apprehension on the part of producers of maize starch is undoubtedly the main issue in this case. In support of this submission the applicant's argument goes right back to 1967. The regulation adopted at that time had in fact already failed to produce a balance between maize starch and potato starch but had placed the former at a disadvantage. In those days a difference in the costs of raw materials — in the proceedings this was referred to as "delta" — of 27.68 units of account was considered to be reasonable. But if manufacturing costs were taken, and those of maize starch were much higher than those of potato starch, then, with reference to one starch unit, maize starch bears a heavier burden than potato starch, namely 127.88 units of account as against 123.10 units of account for potato starch. The position of maize starch from the 1974/75 marketing year onwards got much worse. At that time the "delta" which has already been mentioned, had widened considerably. The price of maize went up more than the minimum price of potatoes, and in view of the trend of world market prices the amount of the refund was reduced without its being correspondingly increased when world market prices fell later. When a premium for producers of potato starch was introduced during the 1978/79 marketing year this situation became quite untenable. If in this connexion the view was taken that the rate of increase in the value of the by-products of maize starch differed from that of potato starch, on that occasion the fact was overlooked that this had already been allowed for when the "delta" was widened during the preceding years. Furthermore, in this connexion the specific manufacturing costs of the by-products are also to be taken into account. If it is in addition borne in mind that the processing costs, which are anyhow higher in the case of maize starch than of potato starch, have increased considerably since 1967 then, by making an appropriate adjustment to the calculations produced by the Community institutions, the conclusion is reached that even before the introduction of the premium the manufacture of maize starch had been about 8 units of account more expensive than that of potato starch and that in consequence the latter did not labour under a competitive disadvantage which had to be offset by means of a premium.

(a) As far as this reasoning is concerned I see no occasion either to go back to the year 1967 and the trend of the following years. On the one hand the justification of the rules which applied in the past, has not till now been called in question. On the other hand I also do not believe that I can assert that the principle that a certain differential in the costs of raw materials, a certain "delta", is always to be taken into consideration, applies to the rules. Finally the rules which are alone relevant in this case and apply to the 1978/79 marketing year are not based directly on those of the preceding year in this sense that proof that maize starch has been placed at a disadvantage — either in the 1974/75 marketing year or in the following years — would thereby also automatically be evidence of such a handicap for the 1978/79 marketing year, that is to say, before the introduction of the rules for the payment of the premium. For that to be the case too many factors and constituent elements in the rules have been continually changing since 1967. For instance the costs for maize, the minimum price for potatoes, the amounts

of the refund, the processing costs and the value of the by-products.

In fact, it would probably not be possible to prove that maize starch was placed at a disadvantage as far back as 1967 if reliance is placed, not as the plaintiff does, on a Commission document of November 1965 but on a later document of June 1966. That document appears to establish — on this point I refer to the calculations on page 15 of the French version of the rejoinder — that after taking into account transportation costs and the value as well as the volume of the by-products in the various Member States maize starch had a competitive advantage of about 26 units of account. Furthermore the figures do not seem to me to establish that the increase in the value of the by-products obtained from the manufacture of maize starch — as far as the wide variety of possible uses and the increase in the volume of sales are concerned they are clearly a much more important factor than the by-products of potato starch which can only be used as feeding-stuffs — was completely offset by the widening of the "delta" in previous years and that in this respect there has been no further increase from 1977 onwards.

(b) If attention is accordingly focused on the conditions expected for the 1978/79 marketing year and the question is asked whether, after all the submissions during the proceedings, it has been established that the premium at issue led to the balance between maize starch and potato starch being stabilized, then it is necessary to proceed on the basis of the calculations of the production costs for one tonne of starch, which the Council has produced on pages 17 and 18 of its defence (French version). After taking into consideration the costs of the raw materials, the processing costs and the value of the by-products these calculations show that maize starch can be manufactured at 187.46 units of account and potato starch at 207.2 units of account. The Italian Government's answer to this is that the processing costs have gone up more than the Council has assumed, namely — since there are no Italian producers of potato starch figures were only mentioned for maize starch — not merely from 40 to 49 units of account but on average throughout the Community — even higher figures apply to Italy — to 77 units of account. The Italian Government also considers that the figure included in the calculations for the value of the by-products arising out of the manufacture of maize starch is incorrect because that value does not take account of the special processing costs involved.

It is my impression — if I may say this straightaway — that having regard to all the evidence which has been produced during the proceedings it is hardly possible to clarify this dispute fully.

(aa) As far as concerns the issue of production costs it is impossible just to rely on a reference to the fact that the values contained in the Council's calculations were furnished by the Benelux countries, which have to be considered before any other Member States, because it is there that competition is keenest — whereas there is no trade in starch with Italy — or on the statement that in the calculations for 1967 the processing costs of potato starch and maize starch were presumed to be approximately the same. In the case of Community measures the situation throughout the whole of the Community has naturally to be considered and on that basis a weighted average must then be found. Further in

view of the inflationary trend of recent years it seems to be highly unlikely that the manufacturing costs of maize starch can only have arisen in ten years by the amount taken by the Council. The possibility can not be definitely ruled out that in this connexion the trend in the case of maize starch could have differed from that in the case of potato starch, if, which the applicant disputes, originally the same values approximately were in fact applicable, so that the Council's calculations would not simply have to be adjusted in the same proportions for both potato starch and maize starch.

On the other hand, as far as concerns the value of the by-products, even if the figures used by the Council appear to be beyond dispute — 80 or even 90 to 92 units of account in the case of maize starch, 4 to 5, at the most 22 units of account in the case of potato starch — it is not quite clear how matters stand as regards their production costs. After all the submissions which have been made it is not known for certain whether, as the Council and the Commission stress, the production costs of potato starch and maize starch are in fact the same or whether, as the applicant alleges, those of maize starch are considerably higher because additional manufacturing processes have to be taken into consideration; the latter situation would mean that the difference in the value of the by-products, which moreover has not increased from 1977 to 1978, but in the case of feeding-stuffs has even fallen, would only amount to about 27 units of account as against the 50 units of account approximately taken by the Council.

(bb) It also seems to me that it is not sufficient simply to apply general considerations to these contentious issues.

— In this connexion I refer first of all to the references by both parties to the trend of the production figures for potato starch and maize starch. If the applicant wants to deduce from the fact that the production of potato starch increased from 507 000 tonnes in 1976 to over 750 000 tonnes in 1977 and up to 835 000 tonnes in 1978 that this branch of industry was clearly not in any trouble, then it is unlikely that this inference would be conclusive in this case. In 1976, because there was a poor potato harvest due to drought, there was a sharp fall in production which even in 1977 had not reached the level of the years 1971 to 1974. Furthermore it may be true that in 1977 there was in this connexion no disturbance of the balance which would have adversely affected the production of potato starch, whilst nothing can be learned from the figures for 1978 because at that time the rules for the payment of the premium had already produced their effects. Conversely it may indeed be a matter for consideration that the production of maize starch increased from 1977 to 1978 just as, according to the data produced by the Council, maize starch was able actually to increase its market share from 1972 to 1978 by 66 % to 75 %. However this only justifies the vague presumption that the rules for the granting of the premium have evidently not caused any insurmountable difficulties; precise conclusions for the purposes of the present proceedings and especially on the question to what extent the premium has resulted in distortion of the conditions of competition cannot in my view be drawn without an exact knowledge of all the production factors and the operating results.

I also draw attention to the references of the Community institutions to the general disadvantages under which the production of potato starch labours. Thus only home products, in respect of which contracts were concluded before the harvest, were processed, mainly by financially weak co-operatives; further only a short processing period is possible and storage costs incurred in respect of finished products are greater. Finally because of the very large amount of water consumed production has to fulfil environmental conditions which increase the costs, and in this connexion it is important to bear in mind that in the case of potato starch, a much higher percentage of which is used in the technical field than in the case of maize starch, there is exposure to competition from synthetic products. Even if this is acknowledged to be correct it is nevertheless impossible to get away from the fact that in this case it is not fresh facts that have come to light but problems which have been present from the outset which are at issue and which, in the arrangement of the relevant provisions, have all along been taken into consideration in the interest of establishing a balance between maize starch and potato starch. Without an objective examination of the *present* situation, during which according to the Italian Government the fact would also have to be taken into consideration that the Community institutions in making their calculations have taken as their basis a smaller yield of potato starch than there actually was, the facts alleged do not readily permit the conclusion that over and above the rules relating to production refunds special measures in the form of rules for the granting of a premium to potato starch manufacturers are now absolutely essential.

— Finally in this connexion I also draw attention to the references by the Community institutions to the specific difficulties of producers of potato starch who at the time when the rules were being prepared were operating at a loss or had been forced to close down (cf. Rapport relatif aux produits amylacés dans la Communauté et aux restitutions à la production d'amidon et de fécule [Report on starch products in the Community and production refunds for maize starch and potato starch] of 27 July 1977). Even with that information it is scarcely possible to make a start for lack of further and better particulars. Furthermore on this point the applicant was able to submit without being contradicted that the changes in question were partly structural alterations such as amalgamations of businesses and that the difficulties of one Netherlands undertaking which also produced maize starch were to be traced back rather to speculative capital investments in isoglucose which caused problems than to the production of potato starch; it is indeed not so much the number of businesses as the volume of the entire production, which at that time was not in decline, that is material.

(cc) So there now only remains the question whether the material issue in this case — placing producers of maize starch at a disadvantage by means of the rules relating to the granting of a premium to potato starch producers — can be decided on the basis of the expert opinion prepared in January 1979 using the data for the 1978/79 marketing year by Professor Grosskopf of Göttingen, who, as is known, came to the conclusion that the premium only ensures that the production disadvantages of potato starch manufacturing are offset and that the conditions of competition are thereby kept in balance.

However that does not seem to me to be tenable because too many of the points contained in this expert opinion obtained unilaterally by one of the parties were called in question by the Italian Government and this cannot be dismissed as completely irrelevant. Thus the objection has been raised that the difference in the net costs of raw

materials was determined without taking into account the fact that in Italy transportation costs and unloading charges — even if the reduction of the levy by three units of account is taken into consideration — were much higher than those of other Member States. The Italian Government also complains that in the case of the values of by-products the expert used data taken from the American market and that he did not take into consideration the costs specifically incurred in their manufacture. There is too the further general criticism that the expert has not given any figures for the production costs of the two sectors of the economy and has wrongly disregarded the fact that such costs, and especially energy and capital costs, are higher in the case of maize starch than in the case of potato starch.

(dd) In these circumstances it is in fact only possible, following the applicant's claim, to endeavour to obtain the necessary clarification with the help of an independent expert opinion, which would have to take into consideration all the important factors in dispute — average production costs in the Community, the value of the by-products and the costs incurred in connexion therewith. In any case this appears to be unavoidable if the application is held to be admissible and if — on this point I refer back to the observation that the assessment of the conditions of competition between maize starch and potato starch before the beginning of the 1978/79 marketing year included the evaluation of a complex economic situation — the existence of a manifest error is denied because the Italian representative has approved in the Council the evaluation underlying the rules.

3. For the purpose of the further consideration of the dispute I am assuming that the effect of the rules for the granting of a premium is to establish a balance between maize starch and potato starch. Should it in fact have to be assumed — possibly after obtaining an expert opinion — that the premium as well as establishing a balance gives unilateral preferential treatment to the manufacturers of potato starch and thereby causes distortion in the conditions of competition, then on such an assumption it would be absolutely clear that it would be to that extent illegal. There certainly could not then be said to be any objective justification within the meaning of the prohibition of discrimination. There would clearly also be a breach of the principle of proportionality, because the rules for the attainment of the objectives sought to be achieved by them would not be absolutely necessary.

(a) The first question which accordingly arises is whether the disputed rules rank as measures of agricultural policy and are justified in the light of the objectives of Article 39 of the EEC Treaty.

Now that the applicant has dropped the first mentioned objection that starch is quite different from processed agricultural products and that measures in favour of the starch industry in the context of the organizations of agricultural markets were consequently an abuse for the ends of industrial policy, the only matter which is still at issue is what is to be inferred from Article 39 with reference to the submissions that the premium is not a suitable instrument with which to deal with a potato production crisis, that agricultural producers do not benefit from it and that finally it hinders technical progress in the maize starch sector.

On this point the Commission has with good reason drawn attention to the fact that in its case-law the Court has repeatedly stressed that, if measures of agricultural policy are to be lawful, they

must not seek to attain all the objectives of Article 39 at the same time and in the same way; it is on the contrary possible, according to the economic situation, to give one of them more priority from time to time.

As far then as concerns the objectives sought to be attained in this case it is plainly wrong to talk of overcoming difficulties encountered in growing potatoes and of efforts to increase their cultivation for the purpose of ensuring the availability of supplies. There was never any question of that and for that reason no one even thought of granting a premium to potato growers for whom the increase in the minimum price, decided upon at the same time, is an adequate production incentive. On the contrary the Council believed that it was able to establish that the balance between maize starch and potato starch is threatened by disturbance, because the value of the by-products arising out of the manufacture of maize starch has increased and the effect of this only benefits the processors. Therefore it was anxious to see to it by means of measures applicable to the processing industry that the market equilibrium was restored. In this way the vitality of the potato industry was to be secured and, on the one hand, the sales of potatoes intended for processing, which are important for large sections of the agricultural population, were to remain effectively secured and, on the other hand, the survival of the potato industry as an instrument of market stabilization, the value of which in times of over-production must not be underestimated, was to be secured. It is therefore possible to form the definite impression that the objectives of Article 39, paragraph (2) (c) of which mentions the need to take account of the links between agriculture and the economy as a whole, were sought to be attained, that we are consequently dealing with a measure which benefits agriculture within the meaning of Article 39 (increase in productivity and ensuring a fair standard of living).

It is also in my view clear — naturally still on the assumption that the premium at issue only provides compensation for disadvantages in the field of competition — that there can be no question of impeding the production of maize starch and of thereby preventing technical progress in this field, although this might possibly — I draw attention to the observations on giving preference from time to time to individual objectives of Article 39 — appear to be tenable having regard to the fact that in the Community a large quantity of potatoes, which in some regions can hardly be replaced by the cultivation of something else, is grown, whereas there is a shortfall of maize production in the Community.

So I really do not see how in these circumstances there could be said to have been any failure to take into account the objectives of Article 39.

(b) That this does not also — and here I come now to another claim — apply to the principle of equal treatment or to the prohibition of discrimination is just as immediately apparent, at all events if no regard is had to the assumption that the premium disturbs the balance of competition between potato starch and maize starch and confers upon the former a unilateral advantage, which in any case augments the existing benefit referable to raw material costs.

It may indeed be assumed — this according to the Court's decided cases is important with reference to the conditions of competition — that maize

starch and potato starch are similar products and that the principle of equal treatment therefore applies. But reference was rightly made during the proceedings, in connexion with the disputed rules relating to the premiums, to Article 42 of the EEC Treaty under which the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the Council, account being taken of the objectives set out in Article 39. Furthermore it was with good reason stressed that in the present case there is justification for the difference in the treatment owing to the differing conditions of production — a situation which was mentioned in the Court's judgment of 12 July 1977 in Case 2/77 *Hoffmann's Stärkefabriken AG* v *Hauptzollamt Bielefeld* [1977] 2 ECR 1375 — and having regard to the objectives of Article 39, the importance of which Mr Advocate General Capotorti stressed in the case of aids for equalization of costs in his opinion in Joined Cases 117/76 and 16/77 *Albert Ruckdeschel & Co. und Hansa-Lagerhaus Strüh & Co.* v *Hauptzollamt Hamburg-St. Annen; Diamalt AG* v *Hauptzollamt Itzehoe* [1977] 2 ECR 1753 in which the Court's judgment was delivered on 19 October 1977. In this connexion it must again be recalled that, since there is no organization of the market in potatoes, potato growers are not protected at the external frontiers and do not enjoy guaranteed sales, so that it seems advisable to adopt individual measures for the benefit of this particular sector of production. Again I draw attention to the conditions of production which were discussed in detail during the proceedings, and especially to the value of the by-products which exerts a considerable influence on the costing of maize starch on the one hand and potato starch on the other in every case, even if the proportion is disputed.

Therefore on the first mentioned assumption it may be readily assumed that, even though the rules relating to the premium in question comprise a measure having unilateral effect, they are not caught by the prohibition of discrimination, either because in view of the difference in the conditions of production different treatment must be regarded as permissible, or because there are acknowledged to be objective reasons justifying the rules falling within the ambit the relevant decided cases. I would also imagine that no importance is to be attributed to the fact that the special features referred to were already present in the earlier years, even though on a different scale, in other words that the new measure at issue in this case would not only be lawful if its adoption were due to reasons of an entirely different kind. I do not understand from which provisions of the Treaty such a restrictive argument as the one put forward by the applicant could be deduced. On the contrary in my opinion the Council is right to take the view that Article 43 of the EEC Treaty gives very great freedom in the choice of measures for the purpose of pursuing the objectives of Article 39 and thereby affords the opportunity of adopting fresh measures in order to deal with a particular situation, if those adopted in the past — even without the situation having undergone any fundamental change — have proved inadequate.

(c) Finally as far as concerns the alleged breach of the principle of proportionality, as the Court is aware, the applicant takes the view that the measure adopted is not a suitable means for pursuing the objectives in question — restructuring the undertakings of potato starch manufacturers and increasing potato production. It would in any case have to be acknowledged, so the plaintiff argues, that an increase in the minimum price or in the production refund or else

the granting of a premium to agricultural producers would have been more appropriate and have caused less interference with the conditions of competition in the starch industry than measures for the benefit of potato growers, whose interests were to the fore.

On this point it must first of all be said that, according to what has been stated, the aim of the measures was not to encourage steps being taken to restructure the potato starch industry. On the contrary the issue was the disadvantages in the field of competition which are connected with the value of the by-products. Similarly it is clear that increasing potato growing, which — if the exceptionally poor crops caused by drought are disregarded — is evidently sufficient to meet the demand of the starch industry was not the objective of the measure to which exception is taken. The aim of the measure adopted is rather to maintain the competitive strength of potato starch by reducing the cost of the manufacturing process and thereby — and this indirectly guarantees agricultural incomes — securing for potato growers certain outlets. Consequently there is no question of increasing the minimum price since this would lead to an increase in the costs of the starch industry and hence would adversely affect its competitive strength. Even less suitable would be an increase in the production refund, which, if it were to apply equally to maize starch and potato starch, and this would be in accordance with the principles of the rules which have so far prevailed, would have no effect on the conditions of competition. At most a lowering of the minimum price and a unilateral increase in the refund could have been contemplated which would have provided potato growers with appropriate compensation. However it is evident that the same result could also be achieved by maintaining the minimum price, which is absolutely essential for keeping up a specific volume of production, and by granting a premium to producers of potato starch.

With reference to the objective actually pursued and to which, as has been shown, exception cannot be taken as far as concerns the agricultural policy, it may therefore neither be said that the means adopted is unsuitable nor that — if such an equilibrium in the field of competition is achieved — it exceeds what is requisite and therefore conflicts with the principle of proportionality.

4. The alternative examination of the substance of the case consequently leads to the conclusion that an unequivocal determination of the question whether the premium paid to the producers of potato starch disturbs the balance of competition with the producers of maize starch is still not possible. An expert opinion on this issue is absolutely necessary. If it were to confirm the economic assessment, which in the Council's view is correct, it would then also be clear that there cannot be said to have been any failure to take into account the objectives of Article 39 of the EEC Treaty, any breach of the prohibition of discrimination or any breach of the principle of proportionality.

III — Since I am in the first place of the opinion that the application which has been lodged is to be regarded as inadmissible I submit that the Court should dismiss it for that reason. Since neither the defendant nor the Commission which has intervened in support of it has made any application as to costs, the costs of the action including the costs of the interlocutory proceedings for the adoption of an interim measure, in which the applicant was also unsuccessful, the parties may bear their own costs.