3. In the particular circumstances of the case, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No 1125/74 is invalid. The illegality of Article 5 of Regulation (EEC) No 1125/74 cannot be removed merely by the fact that the Court, in proceedings under Article 177, rules that the contested provision was in part or in whole invalid. As the situation created, in law, by Article 5 of Regulation (EEC) No 1125/74 is incompatible with the principle of equality, it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

In Joined Cases 117/76 and 16/77,

Reference to the Court under Article 177 of the EEC Treaty by the Finanzgericht Hamburg for a preliminary ruling in the actions pending before that court, in Case 117/76 between

The consortium of:

1. ALBERT RUCKDESCHEL & CO., Kulmbach (Germany),

2. HANSA-LAGERHAUS STRÖH & CO., Hamburg,

and

HAUPTZOLLAMT HAMBURG-ST. ANNEN

and, in Case 16/77, between

DIAMALT AG, Munich,

and

HAUPTZOLLAMT ITZENHOE,

on the validity of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (OJ English Special Edition 1967, p. 33) as last amended by Regulation (EEC) No 665/75 of 4 March 1975 (OJ L 72, p. 14) and of Article 1 of Regulation (EEC) No 1955/75 of the Council of 22 July 1975 on production refunds in the cereals and rice sectors (OJ L 200, p. 1) and, if need be, of Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975 on the common organization of the market in cereals (OJ L 281, p. 1) in so far as these measures make no provision for a production refund for maize used in the manufacture of quellmehl of an amount equivalent to that of the refund granted for the processing of this product into starch,

THE COURT

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

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

gives the following

JUDGMENT

Facts and issues

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

I — Facts and written procedure

1. Quellmehl, a product processed from maize, common wheat or broken rice, and pre-gelatinized starch, which is processed from the same basic products, are to some extent in competition with each other, their common feature being that they are both used as an aid to baking, more specifically as leavening in the making of rye bread.

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

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

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

Regulation No 141/64/EEC of the Council of 21 October 1964 concerning the rules applying to processed products derived from rice and other cereals (JO of 27. 10. 1964, p. 2666) had continued the system of liscretionary production

refunds. It had however established for the first time a production refund for maize and common wheat used in the quellmehl industry.

Regulation No 142/64/EEC of the Council of 21 October 1964 providing for the extension and adjustment to 31 March 1965 of the limitations on the production refunds for cereal and potato starch (JO of 27. 10. 1964, p. 2673) and fixing the refunds provided for under Regulation No 141/64/EEC accordingly provided in Article 1 (1) (e) thereof that:

'In the case of quellmehl the refund for maize, common wheat and broken rice used in the manufacture of that product shall be the same as that granted for the same cereals used for starch manufacture.'

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

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

Article 11 (1) of the regulation reads:

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

Regulations Nos 178/67/EEC of 27 June 1967, 371/67/EEC of 25 July 1967 of the Council, fixing the production refunds for starch, potato starch and quellmehl (JO of 28. 6. 1967, p. 2617 and of 31. 7. 1967, p. 40) maintained this parity between starch and quellmehl.

The production refund for quellmehl was maintained until 1 August 1974 with effect from which date it was abolished by Regulation (EEC) No 1125/74 of the Council of 29 April 1974 amending Regulation No 120/67/EEC (OJ L 128 of 10. 5. 1974, p. 12). However the refunds for maize, common wheat and broken rice used for the manufacture of starch and consequently pre-gelatinized starch continued to be granted.

The third and fourth recitals in the preamble to the latter regulation stated that:

'the production refund for quellmehl was initially granted with a view to promoting certain specific uses of quellmehl as a food for human consumption, account being taken of the possibility of its competing with a number of other products;'

and that

'experience has shown that the opportunity for such substitution is economically slight, if not non-existent; ... the production refund for quellmehl should therefore be abolished;'

Regulation (EEC) No 1132/74 of the Council of 29 April 1974 on production refunds in the cereal and rice sectors (OJ L 128 of 10. 5. 1974, p. 24), which fixed the refunds provided for by Regulation (EEC) No 1125/74, resulted in the reduction of the production refund for maize and common wheat used for the manufacture of starch to 24.60 units of account per metric ton [hereinafter called 'tonne']. In order to give a reason for the maintenance of the refund for starch manufacture, the second recital in the preamble to the regulation states *inter alia* that

'a precise assessment of the situation resulting from the level of common prices and from the competition between, on the one hand, maize starch, rice starch, potato starch and, on the other, the substitute chemical products, indicates that the refund should be fixed at such a figure that the price of maize used in starch manufacture is brought down to 8·20 u.a. per 100 kg ...;'

Regulation (EEC) No 3113/74 of the Council of 9 December 1974 amending Regulation (EEC) No 1132/74 on production refunds in the cereals and rice sectors (OJ L 332, p. 1) resulted in a subsequent reduction (to 15.55 u.a. per tonne) of the refund granted for maize for the manufacture of starch.

Regulation (EEC) No 665/75 of the Council of 4 March 1975 amending Regulation (EEC) No 120/67/EEC (OJ L 72 of 20. 3. 1975, p. 14) which entered into force on 1 August 1975 made, *inter alia*, the production refund for cereals used in the manufacture of starch no longer compulsory. Moreover the regulation abolished the production refund for maize groats and meal (gritz) used by the brewing industry.

In Regulation (EEC) No 1955/75 of the Council of 22 July 1975 on production refunds in the cereals and rice sectors (OJ L 200 of 31. 8. 1975. p. 1) which also entered into force on 1 August 1975, the production refund on, *inter alia*, maize for the manufacture of starch was once more reduced and fixed at 10 u.a. per tonne.

3. The respective plaintiffs in the main actions, who are producers of quellmehl, applied to the respective defendants in the main actions on 22 July (Case 117/76) and 15 August (Case 16/77) 1975 for a permit relating to the grant of a production refund for maize used for the manufacture of quellmehl. These applications were rejected on the ground that Community regulations no longer provided for the grant of production refunds for quellmehl.

The plaintiffs in the main actions brought the present proceedings before the Finanzgericht Hamburg against these decisions rejecting the applications.

Before that court, the plaintiffs in the main actions urged in particular that the prohibition of discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty has been infringed in so far as a production refund was granted only for pre-gelatinized starch and not for quellmehl, a product which is in competition with starch.

The defendants in the main actions contended that the applications should be dismissed.

4. Holding that the cases raised questions of interpretation of Community law the Finanzgericht Hamburg, by orders of 8 November 1976 and 18 January 1977, stayed the proceedings and requested the Court of Justice under Article 177 of the EEC Treaty to give a preliminary ruling on the following questions:

'1. Do Article 11 of Regulation No 120/67/EEC as last amended by Regulation (EEC) No 665/75 of 4 March 1975 (OJ L 72 of 20. 3. 1975, p. 14) and Article 1 of Regulation (EEC) No 1955/75 of 22 July 1975 (OJ L 200 of 31. 8. 1975, p. 1) or does Article 11 of Regulation (EEC) No 2727/75 of 29 October 1975 (OJ L 281 of 1. 11. 1975, p. 1) infringe the prohibition of discrimination contained in Article 40 (3) of the EEC Treaty and are they invalid in so far as they do not grant a production refund of the same amount on maize for the manufacture of quellmehl as they do for the processing of this product into starch?
2. If the answer to Question 1 is in the affirmative, have manufacturers of quellmehl a direct claim to the same

production refund as the manufacturers of pre-gelatinized starch or is a legal measure adopted by the Council required for this?'

5. In the grounds for the orders making the reference the Finanzgericht Hamburg made, *inter alia,* the following comments:

'The determination of this dispute turns on the question whether the abolition of the production refund on maize for the manufacture of quellmehl is invalid because it infringes the prohibition of discrimination in Article 40 (3) of the EEC Treaty.

'There might under Community law be prohibited discrimination if — as the plaintiff maintains — quellmehl and pre-gelatinized starch are interchangeable as aids to baking in the baking industry and if as a result of the abolition of the production refund for quellmehl on the one hand and the retention of the production refund for pre-gelatinized starch on the other hand quellmehl is no longer competitive and has been ousted from its former market. The recitals in the preamble to Regulation No 120/67/EEC state that a production refund should be granted because of the inter-changeability of starches with quellmehl. Accordingly if the purpose of the production refund is the interchangeability of the products, there might be discrimination against the plaintiff in connexion with the manufacture of quellmehl if and in so far as a production refund is granted on the raw materials used in the manufacture of pre-gelatinized starch, because from the point of view of technology, economics and price quellmehl and pre-gelatinized starch are interchangeable. The plaintiff submits that the recital in the preamble to Regulation (EEC) No 1125/74, which states that the production refund for the manufacture of quellmehl should be abolished, because experience has shown that the opportunity for such substitution is economically slight, if not non-existent, does not correspond to the facts.

'The adjudicating Senate finds that it is unable to ascertain and review the actual prerequisites for the abolition of the production refund in connexion with the manufacture of quellmehl, in order to be able to decide accordingly whether there is any prohibited discrimination against the plaintiff and other similar undertakings. The recitals in the preamble to Regulation (EEC) No 1125/74 disclose that those responsible for the regulation were in possession of information, which is not available to the court, to the effect that quellmehl as a substitute product in fact was not or was only to an economically insignificant extent in competition in the territory of the EEC with products containing starch. Since the plaintiff contests this, with supporting evidence, the question arises whether Regulation (EEC) No 1125/74 is valid in so far as it relates to the abolition of the production refund on quellmehl, since it may infringe Article 40 (3) of the EEC Treaty. The adjudicating Senate therefore considers that a ruling by the European Court of Justice is necessary in the interest of a uniform application of Community law.

If the Court of Justice should come to the conclusion that the abolition of the production refund on quellmehl is invalid, then there remain doubts as to the legal basis upon which the plaintiff can satisfy its claim and as to the formal conditions which have to be fulfilled. For this reason it has been necessary to refer Question 2.'

6. The orders making the references were registered at the Court Registry on 10 December 1976 and 31 January 1977 respectively.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted by the plaintiffs in the main actions, the plaintiff in Case 117/76

being represented by the Chambers of Fritz Modest, Hamburg, the plaintiff in Case 16/77 being represented by E. Eckelt, A. Kallenbach and K.-D. Rathke, Advocates, of Augsburg, and by the Council, represented by Daniel Bignes, Director of its Legal Service, assisted, in Case 16/77, by Felix Van Craeyenest, Principal Administrator of the said service and by the Commission, represented by its Legal Advisers Peter Kalbe and Götz zur Hausen, acting as Agents.

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

After hearing the report of the Judge-Rapporteur and the views of the Advocate-General the Court decided to open the oral procedure without any preparatory inquiry.

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

II — Written observations submitted to the Court

The first question

1. (a) The *plaintiffs in the main actions* point out first of all that quellmehl does not have the same importance in the other Member States as in Germany. On the other hand it is not correct to claim, as the defendants in the main actions have done, that quellmehl is of importance only in Germany.

(b) From the technical point of view quellmehl and pre-gelatinized starch are interchangeable and equal from the point of view of their use as aids to the baking of products made from rye flour.

(c) Where there is free competition as regards prices, quellmehl has a slight advantage over pre-gelatinized starch. This advantage amounts to less than the production refund paid in respect of maize starch. On the other hand the advantage is so marked that in the first place, the baking industry and bakers prefer quellmehl-based aids to baking and, secondly, the starch industry no longer disputes that advantage because it has other ways of selling its starch. The grant of a production refund of the same amount as for maize and rice processed into quellmehl or starch has enabled quellmehl to retain intact its competitive advantage over pre-gelatinized starch.

(d) The reasons advanced to justify the abolition of the production refund granted for the manufacture of quellmehl and the retention of the refund for starch are untrue.

(e) It is only because the allocation of a production refund of an equivalent amount enables the natural competitive situation between pre-gelatinized starch and quellmehl to be maintained that pre-gelatinized starch has not ousted quellmehl from the market in baking aids for rye-flour-based products.

(f) The abolition of the production refund for quellmehl created a fundamental change in the competitive situation which naturally exists between quellmehl and pre-gelatinized starch; after it was abolished pre-gelatinized starch could be offered on the market at a lower price than quellmehl.

According to the plaintiff in the main action in Case 117/76 it is because the manufacturers of quellmehl and of ingredients of quellmehl-based baking products paid the production refund out of their own pockets that they have been able, in the main, to maintain their position on the market.

The plaintiff in the main action in Case 16/77 considers that the level of prices subsequent to the abolition of the

production refund led to a reducation of more than 70 % in the turnover in quellmehl-based products. It adds that the selling price of quellmehl cannot, on the most conservative estimate, be less than DM 100 per 100 kg. On the other hand pre-gelatinized starch made from maize or wheat is at present already being offered at from DM 85 per 100 kg free at destination. The two biggest manufacturers of quellmehl-based ingredients of baking products have suffered a reduction in their turnover in one case of 7·5 % in 1975, compared with 1974, in the other case of 40 % in 1976, compared with 1974. In the case of the two undertakings referred to this reduction in sales has, apart from the abolition of the production refund, resulted in a substantial reduction in the cover for overheads (Deckungsbeiträgen). The plaintiff in the main action in Case 16/77 points out that, until the spring of 1975, the two manufacturers still held their stocks of maize for which production refunds had been granted before entry into force of the contested regulation. The result is that the reduction in the cover for overheads (Deckungsbeiträgen) has become more marked. The manufacturers of quellmehl are suffering losses or, according to circumstances, a considerable reduction in their income and the sole reason for this is to be found in the fact that a production refund is paid for the manufacture of pre-gelatinized starch, whereas, in contrast to this, none is paid for the manufacture of quellmehl.

(g) According to the official statement of the grounds, a production refund for maize, rye and potato starch appears to be required only to enable the starch industry to compete with chemical substitute products. This is an admisssion that it is not necessary in so far as starch is sold for use in connexion with food for human consumption. Despite this, the production refund is granted for products used in the manufacture of starch without regard to the sector in which the starch is sold.

According to the plaintiffs in the main actions it is possible to restrict the allocation of a production refund for the processing of maize, rice and potatoes used in the manufacture of starch inasmuch as this starch is intended for the industrial sector and is in competition with chemical substitute products.

(h) There is also an unofficial reason for the abolition of the production refund for quellmehl: that a great deal of quellmehl based on maize and rice is sold for animal feed and its use for this purpose is an abuse which must be redressed by abolishing the production refund.

The plaintiffs in the main actions dispute this statement. The association of manufacturers of ingredients for baking products has declared that its members have never sold quellmehl for animal feed. There still exist in the Federal Republic of Germany one or two small undertakings which do not belong to the association of manufacturers of ingredients for baking products but their output is not very great. Outside Germany, there is an undertaking manufacturing quellmehl in Denmark and there are one or two in the Netherlands, but their output is insignificant. But even if these undertakings were to have sold quellmehl for use as animal feed such sales would still have been of comparatively little importance.

They go on to say that the Community regulations on production refunds for the two products in question did not prohibit sale of those products for animal feed. Nor is the production refund restricted to quellmehl or starch used for human consumption or for chemical products.

Unlike quellmehl, large quantities of maize starch are in fact sold for animal feed. But a production refund continues to be granted even for starch used in the animal feed industry.

(i) In the same way as the production refund can be restricted to starch used in industry for chemical purposes, it can, in the case of quellmehl or starch, be restricted exclusively to cases where these products are used for human consumption.

It is not difficult for control to be effectively exercised. The unofficial reason for the abolition of the production refund does not therefore stand up to scrutiny on any count.

(j) The plaintiff in the main action in Case 16/77 refers furthermore to the fact that the need to reduce the budget of the Community was also used as an excuse to justify the abolition of the production refund for quellmehl. It finds this argument unconvincing: in the first place the production refund granted hitherto for the manufacture of quellmehl is of little importance compared with the total volume of production refunds and also with the production refund for the manufacture of starch. Secondly, there is no doubt that it is perfectly possible to abolish the production refunds. Nevertheless, when account is taken of the principle of non-discrimination, this could only lead to the abolition of the production refund both for the manufacture of quellmehl and for the manufacture of pre-gelatinized starch. Finally, it would not be possible to effect any saving in the budget of the Community for the simple reason that, as is shown by the state of the market, after the abolition of the refund for quellmehl, pre-gelatinized starch, for the manufacture of which a production refund is granted, would be used in its place.

(k) Finally the plaintiffs in the main actions contend that there is no substantial ground for abolishing the natural disparity between the competitiveness of the two products in question. Contrary to the contention of the defendant in the main action, it is not true that there is discrimination only if quellmehl is of economic importance in the food industry throughout the Common Market. There are in the Community production refunds which benefit only the undertakings in certain Member States such as the aid to durum wheat, colza and olive oil.

(l) Moreover, in the case of the quellmehl manufacturers concerned, discrimination is appreciable and substantial and even if discrimination were minimal the *de facto* situation would not justify it.

The plaintiffs in the main actions accordingly request the Court to answer the first question of the Finanzgericht to the effect that the provisions mentioned therein are contrary to the prohibition of discrimination laid down in Article 40 (3) of the Treaty and are null and void in so far as they make no provision for a production refund for maize used in the manufacture of quellmehl up to the same amount as that of the refund granted for the processing of this product into starch.

2. (a) The *Council and the Commission* point out in the first place that, in Case 117/76, the plaintiff in the main action lodged its application on 22 July 1975, that is to say, during the 1974/75 marketing year, while in Case 16/77 the application was lodged on 15 August 1975 and therefore during the 1975/76 marketing year.

In consequence, any entitlement to the refunds and the amounts of the refunds depend, in Case 117/76, on Regulations (EEC) Nos 1125/74, 1132/74 and 3113/74 of the Council and on Regulation (EEC) No 2518/74 of the Commission of 4 October 1974 (OJ L 270, p. 1) and, in Case 16/77, on Regulations (EEC) Nos 1125/74, 665/75 and 1955/75 of the Council.

(b) According to the *Council*, quellmehl and pre-gelatinized starch are to some extent interchangeable in particular when used as baking materials in the manufacture of rye bread. However

because of its different properties quellmehl is more useful than pre-gelatinized starch. It has a greater capacity to absorb water; apart from starch it contains other raw material constituents which are of nutritional value; the process enabling it to be extracted from the raw material is a relatively simple physical operation whereas the manufacture of starch employs a technique which involves relatively more work; and the raw material extraction level is higher. The effect of these advantages is to make quellmehl from 15 to 20 % cheaper than pre-gelatinized starch, which is far more than the amount of the refund which pre-gelatinized starch continued to receive until the 1975/76 marketing year.

Thus the abolition of the subsidy would not have abolished the advantages as regards price and quality which quellmehl enjoys in terms of the manufacture of cooking agents.

(c) As the result of the oil crisis, prices of products competing with starch went up and in consequence did not compete so strongly against starch which, in turn, became a weaker competitor against quellmehl. The competitive pressure of imported processed products was also weaker. Moreover the maize market itself felt the repercussions of the world increase in the prices of cereals and there was less need to protect the processing industries of the Community. Again, the fact that the manufacture of starch is much more costly and complex than that of quellmehl also resulted in making the production costs of starch markedly more sensitive to the increase in investment costs and in labour costs. Finally, the Community realized that quellmehl was no longer put solely to its traditional use, baking, but that, owing to the refund, it was used as a constituent of animal feed. But these developments, which arose from the refund, do not fall within the objectives of the common agricultural policy for the purposes of which the refund was introduced.

It was because it was aware of this state of affairs that the Council reduced the refund for starch (in Regulations (EEC) Nos 1132/74, 3113/74 and 1955/75), made it discretionary (in Regulation (EEC) No 665/75) and abolished it for quellmehl (in Regulations (EEC) Nos 1125/74 and 1132/74).

(d) To grant a refund for starch is consistent with the provisions of Article 39 (1) (c) and (d) of the Treaty. Conversely, because of the use of quellmehl as animal feed, the abolition of the refund for this product furthers the objective designed to limiting the common agricultural policy 'to pursuit of the objectives set out in Article 39' (second subparagraph of Article 40 (3) of the Treaty).

(e) With regard to the alleged infringement of the rule against discrimination, the Council contends that to treat dissimilar situations differently does not amount to discrimination. The grant of a production refund for starch is justified by the state of the market in this product and by its key position between the common agricultural market and the common industrial market. Quellmehl, however, is in a different position. The grant of a refund for quellmehl is in the first place unnecessary as protection for its traditional outlets since the refund granted for pre-gelatinized starch has on several occasions been considerably reduced and, secondly, unjustified inasmuch as it helps to create an unintended outlet by way of animal feed. This different position justifies different treatment despite the fact that the two products concerned are to some extent in competition.

(f) The Council also states that even if, in the past, quellmehl and starch have in general received the same treatment this does not constitute a right to the same treatment, as claimed by the plaintiffs in the main actions. In this connexion the Council refers to the various grounds

which it has already given and which, it declares, have now ceased to exist, however much they may have justified this identity of treatment in the past.

This is clear from the fourth recital in the preamble to Regulation (EEC) No 1125/74 which gives grounds for the abolition of the payment of a refund for quellmehl and begins to reduce it for starch. The reduction to 10 u.a. per tonne of the refund for starch restored the natural superiority of quellmehl as a cooking agent.

(g) In terms of law, the Council refers to the decisions of the Court since its judgment of 17 July 1963 in Case 13/63 *Italy* v *Commission* [1963] ECR 165 which laid down that it is not discriminatory to treat dissimilar situations differently. The Council also refers to paragraph 22 of the judgment of the Court of 11 July 1974 in Case 11/74, *Union des Minotiers de la Champagne* v *France* [1974] ECR 877, according to which difference in treatment cannot be regarded as constituting discrimination which is prohibited unless it appears arbitrary.

In the Council's view it appears to be clear from the facts which it has set out, especially from those relating to the natural superiority of quellmehl from the competitive point of view and its use in the manufacture of animal feed, which is contrary to the original object of the subsidy, that it was not guilty of arbitrary discrimination in Regulation (EEC) No 1125/74 (1974/75 marketing year, Case 117/76) or in Regulations (EEC) Nos 665/75 and 1955/75 (1975/76 marketing year, Case 16/77). The same applies to Regulation (EEC) No 2727/75, which was effective only from 1 November 1975.

3. (a) The *Commission* states that the abolition of the production refund for quellmehl is only one aspect of the comprehensive change in the Community's subsidies policy in the case of products processed from cereals, one of the consequences of which is the reduction of refunds for starch. A charge of discrimination cannot therefore be based on the abolition *per se* of refunds in the case of quellmehl but at most on the fact that the refund granted for pre-gelatinized starch was not abolished in its entirety.

(b) From the legal standpoint Commission contends that an economic decision of the same kind as the contested measure cannot be discriminatory unless it was based on considerations which are manifestly erroneous; judgment of the Court of 24 October 1973 in Case 43/72, *Merkur* v *Commission* [1973] ECR 1055.

(c) The Commission accordingly sets forth the considerations on which the contested measures were based: the financial burdens of the common agricultural policy had to be reduced; price arrangements under the system of production refunds had to be adjusted to economic realities: the supply price (the basis of calculation of the production refund, which represents the difference between this price and the Community threshold price) had not followed the trend of market and threshold prices, which was steadily rising and the refunds were, in consequence, pratically doubled; and, because of the increase in the price of synthetic products which are in competition with cereal-based starch as the 'result of the rise in price of oil products, consideration was being given to the need for a fundamental reappraisal of the policy of granting refunds.

(d) Because starch was in competition with synthetic substitute products, the Council did not abolish production refunds for starch but merely reduced the relevant amounts.

(e) In consequence the question arose whether the timing of the reduction in the production refund for quellmehl should be the same as in the case of starch.

An analysis of the competitive position of these two products disclosed vital differences which made it unnecessary to keep the regulations governing the refund so completely in parallel as they had been hitherto. The explanation why quellmehl and starch are treated alike in Article 11 of Regulation No 120/67/EEC lies in the political argument of the 'preservation of the acquired rights' of quellmehl manufacturers rather than in economic necessity and the similarity of economic conditions. In this connexion it must be borne in mind that the manufacture of quellmehl has benefited from a German internal subsidy since 1930.

(f) The amount of the refunds is based on the overall assumption that 161 kg of maize are required for the manufacture of 100 kg of starch. On the other hand the extraction rate for quellmehl is, at most, between 102 and 110 kg and the manufacture of quellmehl involves much less work and requires much less technical knowhow than the manufacture of starch.

Furthermore, cereals themselves need not necessarily serve as raw material for quellmehl. All the other cheaper starch-producing products of the milling industry can be used.

(g) The interchangeability of the two products in question has, in practice, been hitherto of little importance.

On this point the Commission quotes the plaintiff in the main action in Case 16/77 as follows:

'... quellmehl has better technical qualities. The capacity to absorb water in particular ... is higher in the case of quellmehl; ... quellmehl has better qualities from the nutritional point of view . . .;'

'... In the end, however, the choice between the two products is only a matter of price since the use of a greater quantity of pre-gelatinized starch makes it possible to obtain absolutely the same capacity to absorb water ...'

Given that the cost price of the raw material is the same, the refund, adapted to the needs of starch manufacture, has over-subsidized the already cheaper production of quellmehl. This difference in price, together with the ability to use cheaper low grade flour, makes it possible for the quellmehl industry to invade the market in animal feed.

It is for this reason that the Community institutions reached the conclusion that there was no compelling reason to adhere to the principle of strict equality of treatment between the manufacturers of quellmehl and manufacturers of starch.

In view of the substantial reductions which took place in the production refunds for starch simultaneously with the abolition of the refund for quellmehl, there is no reason to suppose that great and irreparable harm would be done to the competition with pre-gelatinized starch.

In the animal feed industry, the higher prices of maize as a raw material could have been easily offset by the use of lower-grade flours which are cheaper.

Similarly, there is little reason to suppose that pre-gelatinized starch is forcing rye-flour cooking agents out of the traditional market. Pre-gelatinized starch is certainly coming to supersede quellmehl but not specific cooking agents because it does not possess their qualities.

(h) Nor is there any reason to fear that the natural advantage possessed by quellmehl-based products in terms of competition will be reversed as a result of the undue advantage granted to pre-gelatinized starch in terms of price.

The increase in the price of raw material caused by the abolition of the refund is

not reflected fully but only in part in the price of quellmehl, which is also considerably influenced by other factors. The effect of this increase on the price of cooking agents ready to be marketed, like those manufactured by the plaintiffs in the main actions, is even less significant.

Similarly the reduction, owing to the maintenance of refunds, in the price of maize as a raw material compared with the cost price of quellmehl has only a partly favourable effect on the price of pre-gelatinized starch as the finished product.

Price fluctuations due to changes in the amount of the refunds amount to discrimination only if they cause the price of quellmehl to rise appreciably above that of starch.

Like quellmehl producers, the starch manufacturing industry had to bear substantial price increases for maize as its raw material. The advantage which that industry enjoyed in terms of price compared with quellmehl manufacturers lay only in the maintenance of a lower production refund. The amount of the refund which, in the beginning, was as much as 20·40 units of account per tonne fell to 18·45 units of account per tonne in July 1975 and, after August 1975, to 10 units of account per tonne. This was not enough even to come within reach of the advantage of at least DM 100 which quellmehl previously enjoyed as a finished product.

Nor has experience gained in the meantime supplied any evidence of competition which makes it possible for pre-gelatinized starch to replace quellmehl because of the refunds it receives.

Second question

1. The *plaintiff in the main action* in Case 117/76 states that, in the present case, discrimination can be eliminated retroactively by granting, with retroactive effect, the production refund for the manufacture of quellmehl from maize and rice up to an amount equal to that granted for the manufacture of starch from maize and rice during the same period.

The plaintiff in the main action in Case 16/77 adds that if Regulation (EEC) No 1125/74 is annulled it will mean that Article 11 of Regulation No 120/67/EEC, as it was worded before the entry into force of Regulation (EEC) No 1125/74, is again valid in so far as it governs the production refund for maize used in the manufacture of quellmehl.

The second paragraph of Article 215 of the Treaty has the same legal effect. The principle that the person responsible for the damage should, in the first place, restore the situation to what it would have been if the event causing the damage had not taken place is one of the general principles relating to the liability of the Community for damage caused by its institutions. The same principle is illustrated by the right to have the consequences made good, which is recognized in administrative law and is also common to the legal systems of the Member States.

The plaintiffs in the main actions accordingly request the Court to give an affirmative answer to the second question.

2. The *Council* contends that, even if the Court finds that a set of regulations is legally invalid, it may not put itself in the place of the Community legislature in the exercise of the powers of discretion conferred upon the latter and promulgate a positive rule since a whole range of alternative courses is open to the legislature.

Moreover, the aim of the second question is to have an issue concerning the application of the law settled by the Court, and this is not possible.

3. The *Commission* points out that, even if quellmehl were reentered on the list in Article 11 of Regulation No 120/67/EEC of the products entitled to a refund, the Council is not bound to grant a refund for quellmehl. Regulation (EEC) No 665/75 abolished the compulsory refund which existed previously and left the decision whether a refund should be granted for one of the listed products to the discretion of the Council.

A finding that there had been a misuse of powers would mean that the measures taken were invalid and would oblige the Council to replace them with a non-discriminatory measure coming within the scope of its discretionary power.

There could be an exception only if the Council's margin of discretion was confined to one decision only: that of restoring unchanged and with retroactive effect the right to the refund. In this case, there is, in any event, a choice of several possible solutions.

III — The written reply to a question put by the Court

In response to the Court's request for evidence to prove that quellmehl has been used for animal feed, the Commission produced a telex from the Federal Ministry of Food.

According to this telex the trade association for the animal feed production industry ('Fachverband der Futtermittelindustrie') is one of the groups which has got into touch with the Ministry concerning the abolition of the production refund for quellmehl because its abolition placed quellmehl at a disadvantage compared with pre-gelatinized starch in the production of milk substitute foods for calves and pigs. It also appears from the telex that the Ministry of Food is in possession of a report which shows that, at that time, quellmehl was being offered on the market in animal feed components at a price of from DM 65 to DM 70 per 100 kg compared with starch products fetching from DM 80 to DM 85 per 100 kg and was thus selling at from about 80 % to 82 % of the price of starch-based and glucose-based products.

The Commission has not been able to see the original documents or to place them at the disposal of the Court because they contained certain confidential matter.

IV — Oral procedure

At the hearing on 21 June 1977, oral observations were made by the plaintiff in the main action in Case 117/76, represented by Fritz Modest, the plaintiff in the main action in Case 16/77, represented by K.-D. Rathke, the Council, represented by the Director of its Legal Service, Daniel Vignes, acting as Agent, and the Commission, represented by its Legal Adviser, Götz zur Hausen, acting as Agent.

The *plaintiff in the main action in Case 117/76* states that, according to information which it is unable to prove beyond doubt, only one undertaking in the Federal Republic of Germany, Interquell, has processed some 5 000 tonnes of maize into quellmehl, half of its output, or 2 500 tonnes, being sent to the animal feed industry, while the quellmehl industry as a whole processes from about 40 000 to 50 000 tonnes of maize into quellmehl.

It does not understand how pre-gelatinized starch can replace quellmehl but not the particular baking aids which have different properties; like quellmehl, pre-gelatinized starch can be used as the basic ingredient of an aid for bakery products.

The cost price of quellmehl is DM 98·79 per 100 kg while starch was, owing to the refund, on offer at DM 98 per 100 kg.

The *plaintiff in the main action in Case 16/77* states that, while quellmehl, like starch, is largely used as a component of food products other than cooking agents, the ways in which the two products can be used are much the same. The production costs of pre-gelatinized starch and of quellmehl are the same.

It is not true that quellmehl is from 15 to 20 % cheaper to produce than starch. In the foodstuffs industry the price relationship is the opposite: prices are from 20 % higher in the case of quellmehl than in the case of pre-gelatinized starch. Prices mentioned in the telex of the German Federal Ministry of Food referred only to animal feed.

Referring to the statement of the plaintiff in the main action that pre-gelatinized starch was on sale at DM 98 per 100 kg, the *Commission* states that this figure relates to the present position whereas the comparison of prices made by the Commission refers to the time when the abolition of the refund was being discussed.

The fact that quellmehl was used in the animal feed industry was not merely an unofficial ground: there was a reference, though rather vague, to this effect in the third recital in the preamble to the regulation.

The Court invited the Commission to develop its arguments at the hearing on the following point:

'The difference between Cases 117/76 and 16/77 arising from the fact that the application for grant of a refund in the first case was submitted on the date when Article 11, as amended, of Regulation No 120/67/EEC made the grant of a refund for the products covered by the article compulsory (refund shall be granted), whereas the application in the second case was submitted on a date when the wording in force of Article 11 provided for the refund in respect of the products covered to be discretionary (refund may be granted).'

The Commission's reply was that, in neither case, was quellmehl any longer mentioned by the aforesaid provision. This is therefore a question which would arise only if the abolition of the refund for quellmehl were to be declared invalid by the Court. If that occurred, quellmehl would, as a finished product, once more come under the regulation concerning the basic product in respect of which a production refund is granted in the first case and may be granted in the second case.

Even if a basic regulation lays down that a refund shall be granted this does not confer any right to it on the party concerned. A right would be conferred on the party concerned only by the fixing of the amount of the refund. Nor, against this, could it be objected that the amount of the refund had already been fixed for pre-gelatinized starch and that a now legislative measure was not therefore necessary to introduce the refund; this would amount to saying that the Council had exercised its discretion irrevocably, once and for all, because it had fixed the refund at a specific sum for starch. In the Commission's view such a contention would be difficult to justify: the act of simply transferring to quellmehl the refund which had originally been fixed for starch is not the only way to achieve this equality of treatment. It is equally possible to confine the refunds to food for human consumption or to restrict the level of the refund for the two products. That, too, can ensure equality of treatment. In the case of the 1975/76 marketing year, equality is a matter for decision by the legislature and could even consist of the total abolition of the refund for pre-gelatinized starch because at the material time the refund was not compulsory.

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

Decision

1 By two orders dated respectively 8 November 1976 and 18 January 1977, which reached the Court on 10 December 1976 and 31 January 1977, the Finanzgericht Hamburg has referred to the Court under Article 177 of the EEC Treaty two questions concerning the validity of certain provisions of Community regulations on the subject of refunds for the manufacture of products derived from maize.

2 Since the questions referred in both cases are identical and have essentially the same object, it is proper to join the cases for the purposes of judgment.

3 The substance of the first question is whether the provisions of Article 11 of Regulation No 120/67/EEC of the Council on the common organization of the market in cereals, as subsequently amended, are invalid in so far as they do not grant a production refund of the same amount on maize for the manufacture of quellmehl as they do for the processing of this product into starch.

The second question is whether, in the event of the reply being in the affirmative, manufacturers of quellmehl can lay direct claim to the same production refund as that granted to manufacturers of pre-gelatinized starch or whether a legal measure adopted by the Council is required for this.

4 These questions were referred in connexion with proceedings for the payment of a production refund for quellmehl brought against the competent national authorities by the manufacturers of this product, who claim that the provisions which abolished this refund while maintaining it for starch constitute discrimination contrary to the second subparagraph of Article 40 (3) of the Treaty.

5 The production refund for quellmehl extracted from maize, which has been granted in Germany since 1930, was introduced into the common organization of the market in cereals, first as discretionary by Regulation No 142/64/EEC of the Council of 21 October 1964 (JO of 27. 10. 1964, p. 2673) and subsequently as compulsory by Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967 (JO English Special Edition 1967, p. 33).

These arrangements were identical with those established by the same regulations for the grant of production refunds for starch and the amount of the refunds was also the same for the two products.

Although the reason for the grant of production refunds for starch was the need to keep prices competitive compared with the prices of substitute products derived principally from oil, the reason for the grant of production refunds for quellmehl was, as is made clear in particular by the tenth recital in the preamble to Regulation No 120/67/EEC, the interchangeability of starch and quellmehl.

6 The situation remained the same until 1 August 1974, the date of the entry into force of Regulation (EEC) No 1125/74 of the Council of 29 April 1974 (OJ L 128 of 10. 5. 1974, p. 12), whereby Article 11 of Regulation No 120/67/EEC was superseded by a new text providing for the grant of production refunds for starch but not for quellmehl.

The recitals in the preamble to Regulation (EEC) No 1125/74 stated that the reason for abolishing the production refund for quellmehl was that experience had shown that the opportunity for substituting quellmehl for starch for certain specific uses as food for human consumption was 'economically slight, if not non-existent'.

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

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

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

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

8 It must therefore be ascertained whether quellmehl and starch are in a comparable situation, in particular in the sense that starch can be substituted for quellmehl in the specific use to which the latter product is traditionally put.

In this connexion it must first be noted that the Community regulations were, until 1974, based on the assertion that such substitution was possible.

However, the plaintiffs in the main actions on the one hand, and the Council and the Commission on the other are not in agreement concerning the continued existence of that situation.

The plaintiffs in the main actions contend that the opportunities for substitution are the same as previously, with the result that, since the abolition of the refund for quellmehl, trade in the latter has fallen off in favour of starch.

While the Council and the Commission have given detailed information on the manufacture and sale of the products in question, they have produced no new technical or economic data which appreciably change the previous assessment of the position.

It has not therefore been established that, so far as the Community system of production refunds is concerned, quellmehl and starch are no longer in comparable situations.

Consequently, these products must be treated in the same manner unless differentiation is objectively justified.

9 With regard to this latter aspect, the Council and the Commission contend that the abolition of the refund for quellmehl is justified by the fact that quellmehl has been to a great extent diverted from its specific use in food for human consumption in order to be sold as animal feed.

Although this ground, the correctness of which is moreover disputed by the plaintiffs in the main actions, is referred to in the statement which accompanied the proposal submitted by the Commission to the Council and later adopted as Regulation (EEC) No 1125/74, it does not appear in the recitals to that regulation.

During the proceedings, the Commission was requested by the Court to produce evidence to show that quellmehl had been used for animal feed but it was unable to comply with this request.

Even if adequate proof had been forthcoming that it was put to such use and that subsidized starch had not been put to similar use this could have justified the abolition of the refund only in respect of the quantities put to such use and not in respect of the quantities of the products used in food for human consumption.

10 In view in particular of the length of time during which the two products were given equality of treatment with regard to production refunds, it has not been established that there are objective circumstances which could have justified altering the previous system as was done by Regulation (EEC) No 1125/74, which put an end to this equality of treatment.

It is clear from the foregoing that the abolition, as a result of Regulation (EEC) No 1125/74, of the refund for quellmehl, while the refund was maintained for maize-based starch, amounts to a disregard of the principle of equality.

11 In the particular circumstances of the case, however, this finding of illegality does not inevitably involve a declaration that a provision of Regulation (EEC) No 1125/74 is invalid.

12 It must first of all be borne in mind that the amendment of Article 11 of Regulation No 120/67/EEC effected by Article 5 of Regulation (EEC) No 1125/74 took the form not of the deletion of that part of the text which relates to quellmehl but of the replacement of the previous wording by a new wording in which there is no mention of that product.

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

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

On the other hand the conclusion must be drawn that, in law, the situation created by Article 5 of Regulation (EEC) No 1125/74, whereby the previous text was replaced by a new wording of Article 11 of Regulation No 120/67/EEC, is incompatible with the principle of equality and that it is for the competent institutions of the Community to adopt the measures necessary to correct this incompatibility.

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

Costs

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

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

On those grounds,

THE COURT

in answer to the questions referred to it by the Finanzgericht Hamburg by orders of 8 November 1976 and 18 January 1977, hereby rules:

1. **The provisions of Article 11 of Regulation No 120/67/EEC of the Council of 13 June 1967, as worded with effect from 1 August 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 pre-gelatinized 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.

Kutscher Sørensen Bosco Donner Pescatore

Mertens de Wilmars Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 19 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President

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

Mr President,
Members of the Court,

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

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

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

1 — Translated from the Italian.