JUDGMENT OF THE COURT (FIFTH CHAMBER)
13 NOVEMBER 1984 [1]

Birra Wührer SpA and Others v Council and Commission of the European Communities

(Maize gritz — non-contractual liability)

Joined Cases 256, 257, 265, 267/80, 5 and 51/81 and 282/82

1. *Community law — Principles — Assignment of rights — Whether possible — Consequences*

2. *Non-contractual liability — Damage — Compensation — Claim for interest — Admissibility*
(EEC Treaty, Art. 215, second para).

1. The assignment of rights is in principle possible under the laws of the Member States and should therefore also be possible under Community law. The assignee of a right is subrogated to the right of action in the event of an infringement of that right.

2. A claim for interest made in connection with the non-contractual liability of the Community under the second paragraph of Article 215 must be considered in the light of the principles common to the laws of the Member States, to which that provision refers. It follows from those principles that a claim for interest is in general admissible.

In Joined Cases 256, 257, 265 and 267/80, 5 and 51/81 and 282/82,

BIRRA WÜHRER SPA, whose registered office is at 62 Viale Bornata, Brescia, acting through its Chairman and legal representative, Francesco Wührer,

MANGIMI NICCOLAI SPA, whose registered office is at 196 Corso Garibaldi, Naples, acting through its Managing Director, Giovanni Niccolai,

DE FRANCESCHI MARINO & FIGLI SPA, whose registered office is at 72A Viale Grigoletti, Pordenone, acting through its Managing Director, Dino De Franceschi,

1 — Language of the Case: Italian.

RISERIA MODENESE SRL, whose registered office is at 5 Via Minalo, Carpi (province of Modena), acting through its legal representative, Natalino Baetta,

DITTA RISERIE ANGELO E GIACOMO RONCAIA, whose registered office is at Castelforte (Mantua), acting through its proprietors Angelo and Giacomo Roncaia,

represented and assisted by Nicola Catalano of the Rome Bar, with an address for service in Luxembourg at the Chambers of Ernest Arendt, Centre Louvigny, 34 B IV Rue Philippe-II, Luxembourg,

DE FRANCESCHI SPA MONFALCONE, whose registered office is at Monfalcone, acting through its legal representative *pro tempore*, Coclite De Franceschi, and represented and assisted by Giovanni Mario Ubertazzi and Fausto Capelli of the Milan Bar, with an address for service in Luxembourg at the Chambers of Louis Schiltz, 83 Boulevard Grande-Duchesse-Charlotte,

BIRRA PERONI SPA, whose registered office is at 6 A Via Guattani, Rome, acting through its Chairman and legal representative, Giorgio Natali, and represented by Raimondo Marini-Clarelli of the Rome Bar, with an address for service in Luxembourg at the Chambers of Jean Hoss, Avocat, 15 Côte d'Eich,

applicants,

v

COUNCIL AND COMMISSION OF THE EUROPEAN COMMUNITIES, represented, in the case of the Council, by Daniel Vignes, the Director of its Legal Department, assisted by Arthur Brautigam, an Administrator in the Legal Department, with an address for service in Luxembourg at the office of H. J. Pabbruwe, the Head of the Legal Affairs Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer, and, in the case of the Commission, by Richard Wainwright, its Legal Adviser, and Guido Berardis, a member of its Legal Department, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION for damages under Article 178 and the second paragraph of Article 215 of the EEC Treaty,

THE COURT (Fifth Chamber)

composed of: O. Due, President of Chamber, C. Kakouris, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: P. VerLoren van Themaat

Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and written procedure

1. By Regulations Nos 665 and 668 of 4 March 1975 (Official Journal L 72, pp. 14 and 18), the Council abolished, with effect from 1 August 1975 and 1 September 1975 respectively, the refunds granted to producers of maize gritz and broken rice used in the brewing industry.

By its preliminary ruling of 19 October 1977 in Joined Cases 124/76 and 20/77 (*SA Moulins et Huileries de Pont-à-Mousson* v *Office Interprofessionnel de Céréales; Société Coopérative "Providence Agricole de la Champagne"* v *Office Interprofessionnel des Céréales* [1977] ECR 1795) the Court held Regulation No 665/75 to be invalid in so far as the Council had infringed the principle of equal treatment to the detriment of maize-gritz producers by abolishing the refunds for maize gritz while retaining refunds for the competing product, maize starch.

Following that judgment, the refunds in question were restored for both maize gritz and broken rice by Council Regulations Nos 1125, 1126 and 1127/78 of 22 May 1978 (Official Journal L 142, 30. 5. 1978) with effect from the date of the judgment of the Court, that is to say from 19 October 1977. As a result, no refunds were granted for the period between 1 August 1975 and 1 September 1975, the dates on which they were abolished, and 19 October 1977, when they were restored.

A number of the producers concerned brought actions for compensation for the damage caused by the non-payment of the refunds, and, by judgments of 4 October 1979 in Case 238/78 (*Ireks-Arkady GmbH* v *Council and Commission of the European Communities* [1979] ECR 2955), in Joined Cases 241, 242 and 245 to 250/78 (*DGV, Deutsche Getreideverwertung und Rheinische Kraftfutterwerke GmbH and Others* v *Council and Commission of the European Communities* [1979] ECR 3017), in Joined Cases 261 and 262/78 (*Interquell Stärke-Chemie GmbH & Co. KG and Diamalt AG* v *Council and Commission of the European Communities* [1979] ECR 3045) and in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 (*P. Dumortier Frères SA and Others* v *Council of the European Communities* [1979] ECR 3091), the Court held that the Community was liable and ordered it to pay the applicants in the above cases amounts equivalent to the production refunds which they would have been entitled to receive if, during the period from 1 August 1975 to 18 October 1977, the production of maize gritz for use in the brewing industry had qualified for the same refunds as the manufacture of starch.

2. Between those dates the applicant undertakings produced or used maize

gritz and/or broken rice intended for use in the brewing industry.

A — In Case 256/80, the applicant, Birra Wührer SpA, used maize gritz and broken rice for brewing beer between 1 August 1975 and 18 October 1977. It purchased the maize gritz and broken rice directly from the producers, who assigned to it their right to the payment of the production refunds.

As a result of Article 3 of Council Regulation No 665/75 and Article 1 of Council Regulation No 668/75, the refunds provided for by the earlier measures were not paid to Birra Wührer until 19 October 1977. Following the above-mentioned judgments of the Court of Justice of 19 October 1977 and 4 October 1979, Birra Wührer requested the Commission, by telex message of 18 August 1980, to pay the refunds which would normally have been due to the producers of maize gritz and broken rice who had assigned their rights thereto to Birra Wührer.

By letter of 3 September 1980 to the Permanent Representation of the Italian Republic to the European Community, the Commission stated, as in other similar cases, that it could not comply with the request because it had been received after the expiry of the five-year period of limitation laid down in Article 43 of the Protocol on the Statute of the Court of Justice for actions against the Community based on non-contractual liability. In the Commission's view time had begun to run on 20 March 1975, the date on which Regulations Nos 665 and 668/75 were published.

B — In Case 257/80, the applicant, Mangimi Niccolai SpA, a producer of maize gritz intended for other uses, began to produce maize gritz for the brewing industry as from 16 March 1976. As a result of Article 3 of Regulation No 665/75 it received no production refund until 18 October 1977.

Following the judgments of the Court of Justice of 19 October 1977 and 4 October 1979, Mangimi Niccolai SpA sought payment of the refunds from the Italian Finance and Agriculture Ministeries on 19 November 1979 and, by telex message of 25 March 1980, it made the same request to the Commission of the European Communities. It asked the Italian Ministries and the Commission for payment of a total of LIT 208 551 246, the calculation of which was to be corrected in accordance with a document which it has annexed to its application.

By letter of 3 September 1980 the Commission refused to comply with the request on the grond that it had been received after the expiry of the five-year limitation period laid down in Article 43 of the Statute of the Court of Justice.

C — In Case 265/80, the applicant, De Franceschi Marino & Figli SpA, produced maize gritz for the brewing industry between 1 August 1975 and 18 October 1977. As a result of Article 3 of Regulation (EEC) No 665/75 it received no production refunds until 18 October 1977. Following the judgments of the Court of Justice of 19 October 1977 and 4 October 1979, it applied on 8 November 1979 to the Italian Finance and Agriculture Ministries for payment of a total of LIT 131 466 576 and, by registered letter of 8 May 1980, it submitted a similar request to the Com-

mission of the European Communities, in which, whilst not specifying a figure, it requested payment of a sum equivalent to the refunds and set out the quantities produced between 1 August 1975 and 18 October 1977.

In a letter of 30 September 1980 the Commission replied that it could not comply with the request, since the direct request had reached it after the expiry of the five-year limitation period laid down in Article 43 of the Statute of the Court of Justice.

D — In Case 267/80, the applicant, Riseria Modenese Srl, produced and sold, between 1 September 1975 and 18 October 1977, broken rice for beer production to various breweries.

Following the judgments of the Court of Justice of 19 October 1977 and 4 October 1979, it applied to the Commission, by telex message of 8 August 1980, for payment of the unpaid refunds. Receiving no reply, the applicant concluded on the basis of the Commission's answers to similar requests that the application had been turned down because it had been received after the expiry of the five-year period laid down in Article 43 of the Statute of the Court of Justice.

E — In Case 5/81, the applicant, Riserie Angelo e Giacomo Roncaia, produced broken rice for the brewing industry between 1 September and 18 October 1977. On the basis of Article 1 of Regulation (EEC) No 668/75 it was refused production refunds until 18 October 1977.

Following the judgments of the Court of Justice of 19 October 1977 and 4 October 1979, it applied to the Commission of the European Communities, by letter of 2 September 1980, for the payment of the said refunds.

Receiving no reply, the applicant concluded on the basis of the Commission's answers rejecting similar requests that it had been rejected on the ground of the expiry of the five-year period laid down in Article 43 of the Protocol on the Statute of the Court of Justice.

F — In Case 51/81, the applicant, De Franceschi SpA Monfalcone, requested payment of production refunds in respect of maize gritz used in the brewing industry for the periods from 4 April 1977 to 18 October 1977. On 23 November 1978 it submitted a request to that effect to the Italian finance authorities, which was rejected on 22 January 1979 on the ground that there was no provision for the payment of a Community refund for the period in question. On 19 December 1979 it asked the Italian Ministry of Finance, the Ministry of Agriculture and the finance authorities to pay it compensation of LIT 54 327 278 plus interest for the loss of the production refunds.

Subsequently, on 15 April 1980 it submitted a similar request to the Commission, which, by telex message of 25 September 1980 transmitted to the applicant via the Monfalcone customs office, dismissed the request on the ground that the five-year period of limitation laid down in Article 43 of the Protocol on the Statute of the Court of Justice had expired.

3. After their requests had been rejected — expressly or by implication — the six applicants brought actions before the Court on the basis of Article 215 of the EEC Treaty seeking to establish the Community's non-contractual liability.

Birra Wührer (Case 256/80) and Mangimi Niccolai (Case 257/80) brought their actions on 24 November 1980. De Franceschi Marino & Figli (Case 265/80) brought its action on 28 November 1980. Riseria Modenese (Case 267/80) on 1 December 1980, Riserie Roncaia (Case 5/81) on 12 February 1981 and De Franceschi Monfalcone (Case 51/81) on 9 March 1981.

The Council, by documents lodged on 29 December 1980 (Cases 256, 257, 265 and 267/80), on 16 February 1981 (Case 5/81) and on 15 April 1981 (Case 51/81), and the Commission, by documents lodged on 30 January 1981 (Cases 256, 257, 265 and 267/80), on 17 February 1981 (Case 5/81) and on 15 April 1981 (Case 51/81), raised an objection of inadmissibility under Article 91 of the Rules of Procedure on the basis of the five-year limitation period laid down under Article 43 of the Statute of the Court and requested the Court to declare that the actions were inadmissible without considering the substance of the case.

By judgment of 27 January 1982 in Cases 256, 257, 265 and 267/80 and 5/81, which were joined by order of 11 January 1981 for the purposes of the oral procedure and the judgment, and by its judgment of the same date in Case 51/81 the Court dismissed the above-mentioned objections.

Since the written procedure was thus resumed as regards the substance of the case, the Court decided, by order of 17 February 1982, to join Case 51/81 to Joined Cases 256, 257, 265 and 267/80 and 5/81 for the purposes of the oral procedure and the judgment.

4. In Case 282/82, the applicant, Birra Peroni SpA, between 1 August 1975 and 18 October 1977 used broken rice purchased directly from the producers, who assigned their rights to the payment of the refunds to Birra Peroni. The producers included the aforementioned applicants, Riseria Modenese Srl (Case 267/80) and Riserie Roncaia (Case 5/81). By telex message of 19 February 1982 Birra Peroni advised the Commission against paying to those applicants any sum by way of compensation for the non-payment of the refunds at issue in the present proceedings and made an application to intervene under Article 43 (1) of the Rules of Procedure of the Court of Justice. That application was dismissed on 18 August 1982 on the ground that it was submitted out of time, the time-limit having expired on 11 July 1981 since, pursuant to Article 16 (6) of the Rules of Procedure, notice of the last of the joined cases (Case 51/81) had been published in the *Official Journal of the European Communities* (C 71) of 1 April 1981.

On 23 June 1982 Birra Peroni sent a telex message to the Commission of the European Communities requesting payment of the refunds (amounting to LIT 56 921 741) which otherwise would have been due to the suppliers who had assigned their rights to it. The Commission did not reply to that request.

On 25 October 1982 Birra Peroni brought an action before the Court on the basis of Article 215 of the EEC Treaty. By order of 9 March 1982 the Court decided to join that case to the above-mentioned joined cases for the purposes of the oral procedure and the judgment.

5. The written procedure followed its normal course, although, by letter of

25 March 1982, the Council stated that it would not lodge a rejoinder in Case 282/82.

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

However, the Court asked the applicants and the Commission to answer a number of questions and provide certain information, which they did within the period laid down.

II — Conclusions of the parties

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

Order the European Economic Community to pay compensation for the damage suffered by the applicants as a result of the abolition, by Regulations (EEC) Nos 665 and 668/75 of 4 March 1975, of the production refunds for maize groats and meal (gritz) and/or broken rice and as a result of the failure to restore such refunds until 19 October 1977; order the adoption of the calculation criteria set out in the applications or such criteria as the Court considers just and appropriate;

Order the European Economic Community to pay interest as from the dates on which each individual refund should have been paid;

Order the European Economic Community to pay the costs.

2. A — The *Council* contends that the Court should:

(a) *In Cases 256, 257, 265 and 267/80 and 5 and 51/81*

Instruct the applicants to prove by any appropriate means the actual damage which they claim to have suffered and the causal relationship between that damage and the unlawful act of the Community institutions and, in the absence of satisfactory proof, dismiss the applicants' claims as unfounded;

In the latter event order the applicants to pay the costs;

In the alternative, should the Court decide that the applications are wholly or partly well-founded, reduce the applicants' claims by the sum passed on to another marketing stage and fix the applicants' claims in national currency by applying the "green" exchange rate for the Italian lira which was applicable at the time of the transaction conferring entitlement to the refund at issue.

(b) *In Case 282/82,*

Declare the applicant's claim to be inadmissible in so far as it relates to transactions which took place before 23 June 1977, on the ground that the right to compensation pertaining thereto is time-barred;

Instruct the applicant to prove by any appropriate means the actual damage which it claims to have suffered and the causal relationship between that damage and the unlawful act on the part of the Community institutions and, in the absence of satisfactory proof, dismiss the applicant's request as unfounded;

In the latter event, order the applicant to pay the costs.

B — The *Commission* contends that the Court should:

(a) *In Cases 256, 257, 265 and 267/80 and 5 and 51/81*

Dismiss all the applications;

Order the applicants to pay the costs.

(b) *In Case 282/82*

Dismiss the application as inadmissible in so far as the applicant seeks compensation for damage which occurred before 23 June 1977 and which concerns invoices prior to that date;

Dismiss the remainder of the application;

Order the applicant to pay the costs.

III — Submissions and arguments of the parties

Admissibility

1. As a result of the judgments delivered on 27 January 1982 in the first six cases, the *Council* concedes that the applications are admissible and that the applicants' claims are not time-barred for the periods terminating on 18 October 1977 and commencing on dates which may be determined as follows for each of the applicants:

A — Case 256/80 (Birra Wührer): An application was made to the relevant Community institution (Commission) on 18 August 1980; according to the applicant no direct reply was received from the Commission; the action was brought within four months (Article 43 of the Statute of the Court of Justice, read in conjunction with the second paragraph of Article 175 of the EEC Treaty), namely on 24 November 1980; hence the application is admissible as from 18 August 1975 (18 August 1980 minus five years).

B — Case 257/80 (Mangimi Niccolai): an application was made to the Commission on 25 March 1980; the Commission replied on 3 September 1980; the action brought on 24 November 1980 was out of time since, in order to preserve the interruption of the period of limitation caused by the submission of an application to the relevant Community institution, the action should have been brought no later than four months (period laid down in Article 43 of the Statute and the second paragraph of Article 175 of the EEC Treaty) and ten days (extension of time-limit on account of distance) after the date of the application to the Community institution (25 March 1980). Since the action was brought later, namely on 24 November 1980, it is admissible as from 24 November 1975 only, that is to say 24 November 1980 minus five years.

C — Case 265/80 (De Franceschi & Figli): an application was made to the Commission on 8 May 1980; the Commission replied on 3 September 1980; the action was brought out of time on 28 November 1980 and hence the application is admissible as from 28 November 1975 (as in Case 257/80).

D — Case 267/80 (Riseria Modenese): an application was made to the Commission on 8 August 1980; according to the applicant there was no reply; the action was brought within the prescribed period of four months on 1 De-

cember 1980; hence the application is admissible for the whole period, in so far as broken rice alone is involved (the abolition of the subsidy was effective from 1. 9. 1975), or, if maize is also involved, only from 8 August 1975.

E — Case 5/81 (Riserie Roncaia): the application to the Commission was made on 2 September 1980; according to the applicant there was no reply; the action was brought out of time on 12 February 1981; hence the application is admissible as from 12 February 1976 (12. 2. 1981 minus five years).

F — Case 51/81 (De Franceschi Monfalcone): the application to the Commission was made on 15 April 1980; according to the applicant no direct reply was received; the action was brought out of time on 9 March 1981; hence the application is admissible as from 9 March 1976 (9. 3. 1981 minus five years).

G — Case 282/82 (Birra Peroni): the application to the Commission was made on 23 June 1982; according to the applicant no reply was received; the action was brought within the prescribed period (the two months stipulated in Article 43 of the Statute of the Court plus two additional months as provided for in the second paragraph of Article 175 of the EEC Treaty plus the extension on account of distance); hence the application is admissible as from 23 June 1977 (23. 6. 1982 minus five years).

2. The *Commission* likewise concedes that the applications are admissible for the above periods. However, as far as the application by Birra Peroni (Case 282/82) is concerned, the Commission contends that it is time-barred as regards damage which occurred prior to 23 June 1977, that is to say, more than five years before 23 June 1982, the date of the "prior application" to the Commission. It contends that the application should be admitted only with respect to the amounts claimed on the basis of invoices dated after 23 June 1977 and before 19 October 1977 and that, for the rest, it should be dismissed as inadmissible.

3. The *applicant, Birra Peroni,* (Case 282/82) contends that the period of limitation, and hence the period for bringing its claim for damages for the period preceding 23 June 1977, should begin to run from the date of publication of Council Regulations Nos 1125 and 1127 of 23 May 1978, which reintroduced the refunds in question. The said regulations were published in Official Journal L 142 of 30 May 1978.

Substance

1. The *applicants* rely on the following submissions and arguments in their applications.

A — *Birra Wührer,* the applicant in Case 256/80, claims that between 1 August 1975 and 18 October 1977 it used for the manufacture of beer maize gritz and broken rice which it purchased directly from the producers and that the latter expressly assigned to it their rights to the production refunds.

In support of the above contentions it provides:

(a) a list of the deliveries of broken rice used in 1975, 1976 and 1977 for beer production at its Brescia plant and, appended thereto, copies of the invoices and of the assignments of the rights to refunds;

(b) a list of the deliveries of broken rice used in 1977 for beer production at its S. Cipriano plant and, appended thereto, copies of the invoices and of

the assignments of the rights to refunds;

(c) a list of deliveries of maize gritz used in 1977 at its Brescia and S. Cipriano plants and, appended thereto, copies of the invoices and of the assignments of the rights to refunds.

As far as the Community's liability and the applicant's right to compensation for the damage sustained by it are concerned, the applicant considers that it is sufficient to refer to the above-mentioned judgments of the Court of 4 October 1979.

As regards the extent of the damage sustained, the applicant considers that the damages should correspond to the amount of the refunds which ought to have been paid but were, not, plus interest from the date when each refund was due to be paid.

Finally, as regards the calculation of the sums which the Community should be ordered to pay, Birra Wührer states that, in the event of the documents produced by it being considered to be insufficient, it is prepared to comply with any reasonable requests of the defendants and with any order which the Court may make.

As regards the calculation, the applicant points out, however, that it has appended to its application a list of the deliveries of rice and maize used for beer production and that the refunds have been calculated with reference to the quantities used and the rates in units of account (or ECU) applying during the periods in question (4. 9. 1975 to 31. 7. 1976; 1. 8. 1976 to 31. 7. 1977; 1. 8. 1977 to 18. 10. 1977). The total for each period has been converted into Italian lira at the rates ruling during the periods in question.

However, the applicant stresses that the Italian lira has undergone a massive devaluation, one so large that Italian case-law now recognizes the right to compensation for damage sustained as a result of currency devaluation. In that connection, the applicant also emphasizes that, in order to guarantee the utmost equality of treatment throughout the common market, levies and refunds are set in an artificial currency, which is converted into the various national currencies at constantly updated rates at the time of their implementation. It therefore maintains that, once the calculation has been carried out in units of account (or ECU), the resulting amounts should be converted into Italian lira at the rate applying at the time of payment.

B — Mangimi Niccolai, the applicant in Case 257/80, states that it did not begin to produce maize gritz for the brewing industry until 16 March 1976. Before that it produced gritz for other uses. It sets out its production process in detail in tables appended to its application.

It explains that it was not aware of its entitlement to the refunds until the subsequent judgments of the Court of Justice belatedly came to its notice. In fact it had never received refunds before; it had not even been aware of the new rules abolishing the refunds.

Mangimi Niccolai therefore considers that it must contest, within the prescribed time-limits, the Commission's refusal to grant it compensation and ask the Court of Justice to order the Community to compensate it for the damage which it has sustained.

According to the applicant, the refunds to which it is entitled amount to LIT 208 551 246. That sum should, however,

be corrected in accordance with a document annexed to its application, in which the refunds are calculated with reference to the quota and exchange rates applying on the date when the refunds should have been paid.

In addition, it produces the following: a list of deliveries made to various breweries in the period from 16 March 1976 to 31 July 1976 together with photocopies of the relevant invoices; a list of deliveries to various breweries in the period from 1 August 1976 to 31 July 1977 together with photocopies of the relevant invoices; and a list of deliveries made to various breweries in the period from 1 August 1977 to 18 October 1977 together with photocopies of the relevant invoices.

As regards the Community's liability, the applicant's right to compensation for the damage sustained as a result of the non-payment of the refunds and the calculation of the amount of the damages, Mangimi Niccolai puts forward submissions and arguments identical to those of the preceding applicant.

C — *De Franceschi Marino & Figli,* the applicant in Case 265/80, states that it produced maize gritz for the brewing industry between 1 August 1975 and 18 October 1977.

As evidence it produces photocopies of invoices, the originals of which were appended to the letter sent to the Commission on 8 May 1980 in which the applicant asked to be paid a sum equal to the refunds and stated the quantities produced between 1 August 1975 and 19 October 1977.

As regards the Community's liability, the applicant's right to compensation for the damage sustained as a result of the non-payment of the refunds and the calculation of the amount of the damages, De Francescho Marino & Figli puts forward submissions and arguments identical to those of the preceding applicants.

D — *Riseria Modenese,* the applicant in Case 267/80; states that between 1 September 1975 and 18 October 1977 it produced and sold broken rice for use in beer-making to various breweries.

As evidence of the above operations, it produces invoices for direct deliveries made to the various breweries. However, it points out that by its action it is not seeking payment of the refunds in respect of the 30 000 kilogrammes of broken rice sold to Birra Wührer (the applicant in Case 265/80) in 1975 or in respect of the 414 760 kilogrammes sold to that company in 1977, since it assigned all rights to those refunds to Birra Wührer. Those refunds are the subject of the separate action brought by Birra Wührer itself.

As regards the Community's liability, the applicant's right to compensation for the damage sustained as a result of the non-payment of the refunds and the calculation of the amount of the damages, Riseria Modenese puts forward submissions and arguments identical to those of the preceding applicants.

E — The firm *Riserie Angelo e Giacomo Roncaia,* the applicant in Case 5/81, states that it produced broken rice for the brewing industry between 1 September and 18 October 1977.

As evidence thereof it pruduces invoices in respect of deliveries dated 27 January and 18 March 1977.

As regards the Community's liability, the applicant's right to compensation for the damage sustained as a result of the non-payment of the refunds and the calculation of the amount of the damages, Riserie Angelo e Giacomo Roncaia puts

forward submissions and arguments identical to those of the preceding applicants.

F — *De Franceschi Monfalcone,* the applicant in Case 51/81, states that it produced maize gritz for the brewing industry, entitling it to receive refunds for the period from 4 April 1977 to 18 October 1977 or, in place of the refunds, compensation of LIT 54 327 278 plus interest to the date of payment. The applicant claims that the said sum is arrived at on the basis of the invoices which it produces as evidence of the transactions in question.

As for the remaining questions, it submits the same legal arguments as the precedings applicants.

G — *Birra Peroni,* the applicant in Case 282/82, states that during the period from 1 September 1975 to 19 October 1977 it purchased broken rice for beer production by its various branches, and that its suppliers expressly assigned their rights to refunds to it.

It submits a number of invoices showing that the amount of the refunds payable for the period in question, and hence the compensation for their non-payment, comes to LIT 56 921 741.

However, in the light of the Court's judgments of 27 January 1982 in the first six of the present cases, according to which the five-year period of limitation in relation to matters arising from the non-contractual liability of the Community cannot begin to run before the applicant has suffered damage which is certain in character, the applicant acknowledges that it might be entitled to demage only for those transactions evidenced by invoices issued after 23 June 1977, the date of its application to the Commission.

In the latter eventuality, the amount of damages requested would amount to LIT 2 168 373 plus interest at the commercial rate from the dates on which each refund should have been paid until the time of actual payment.

As regards the Community's liability, the applicant raises submissions and arguments identical to those of the preceding applicants, while referring in particular to the aforementioned judgments of the Court of 19 October 1977 and 4 October 1979.

As regards the admissibility of its action as an assignee of rights to refunds, the applicant points out that, in a case involving the assignment of a right to compensation, the Court of Justice held to be admissible an action brought by the assignee (judgment of 4 October 1979 in Case 238/78, *Ireks-Arkady GmbH* v *Council and Commission of the European Communites,* cited above).

2. The *defendant institutions* set forth the following submissions and arguments in their defences.

A — The *Council* acknowledges that the Community has, in principle, incurred non-contractual liability owing to the illegality of Regulations Nos 665 and 668/75.

(a) The Council considers, however, that the applicants have failed to establish actual damage or a causal relationship between the unlawful measure adopted by the Community institutions and the damage which the applicants claim to have suffered.

In the Council's view, it follows that the conditions on which the right to demand

actual compensation depend — as reaffirmed by the Court in paragraph 9 of its judgment of 27 January 1982 in the first six of the present cases — are not satisfied.

The Council therefore asks the Court to instruct the applicants to prove, by any appropriate means, that those two conditions are met and, in the absence of satisfactory proof, to dismiss the applicants' claims as unfounded.

In the Council's view, the principle that such proof is necessary follows from the judgments of 4 October 1979 (cited above) and, particularly, from the judgment in Case 238/78 *Ireks-Arkady* (paragraphs 14 to 17), where the Court, faced with the same submission raised by the defendant institutions, held that "in principle, in the context of an action for damages, such an objection may not be dismissed as unfounded" and that "it must be admitted that if the loss from the abolition of the refunds has actually been passed on, or could have been passed on, in the prices the damage may not be measured by reference to the refunds not paid", since "the price increase would take the place of the refunds, thus compensating the producer".

As regards Birra Wührer (Case 256/80), which states that the producers assigned to it their rights to the refunds, the Council contends that, in the first place, it should show that it has suffered actual damage by submitting to the Court evidence that it compensated its suppliers for the loss of their refunds or, in other words, demonstrate that, following the abolition of the refunds, it paid the producers a price which had been increased by the amount of the refund.

Otherwise, the Council considers, the company suffered no damage as a result of the non-payment of the refunds, since the price of its raw material remained unchanged following the abolition of the refunds.

The Council puts forward the same arguments against the claim made by Birra Peroni, adding, however, that the latter should prove, first, that it did not incorporate the loss resulting from the non-payment of the refunds in its subsequent selling prices and, secondly, that its suppliers actually and properly assigned to it the right to the refunds and to the resulting compensation.

The Council points out that on 19 February 1982 the applicant sent a telex message to the institutions warning them against making any payment to the applicant in Case 267/80, Riseria Modenese, or to the applicant in Case 5/81, Riserie Roncaia; nevertheless those applicants have yet to renounce their claims in favour of Birra Peroni.

As far as the producer applicants are concerned, the Council contends that, if they were already producing before the refunds were abolished, they should prove that they did not, or could not, pass on in their selling prices the amount lost as a result of the non-payment of the refunds.

The Council maintains that if the applicants passed on the loss in their selling prices they suffered no actual damage, since the disadvantage would pass to another stage in the marketing chain and, ultimately, to the consumer.

The Council further considers that, if those applicants which were already

producing before the abolition of the refunds did not pass on the difference wholly or in part in their selling prices, they must prove that they were unable, for objective reasons, to increase their selling prices and did not, of their own free choice, forgo raising their selling prices in order to increase their outlets.

As for those applicants which did not commence production until after the abolition of the refunds (Mangimi Niccolai and Riserie Roncaia), the Council considers that they must demonstrate that they set their selling prices at an unprofitable level and that the difference between a profitable and an unprofitable price level is equivalent to the value of the unpaid refunds.

In the Council's view, an undertaking which did not commence production of maize gritz or broken rice for the brewing industry until after the abolition of the subsidy and was therefore free to fix its selling would normally have set them at a profitable level without, for instance, having to justify to its customers the price increase caused by the non-payment of the refund. The Council considers that the applicants in that position should be required to prove the causal link.

(b) As regards the burden of proof, the Council points out that in previous cases involving action for demages (in particular Case 238/78, [1979] ECR 2955, paragraphs 14 to 17) it insisted that, where an undertaking which considered that it had suffered loss as a result of a Community measure had incorporated the loss in its selling prices and therefore had passed it on to a later stage in the marketing chain, it could not be compensated twice, that is to say, once at the expense of the ultimate consumer and once out of public funds. Such a situation would without reason enrich the undertakings involved.

The Council maintains that the Court accepted the validity of that line of argument; however, in the previous quellmehl and gritz cases the Court considered that, since there was insufficient evidence for it to make a finding on that point, it should give the applicants the benefit of the doubt.

The Council therefore asks the Court to reconsider its decisions on this matter, on the ground that, in most cases, it will be impossible for the institutions to provide the Court with cogent evidence, in view of the fact that generally the institutions only have at their disposal the information which the applicants think fit to provide during the written procedure.

Lastly, as regards the "green" rates for converting the applicant's claims into national currency, the Council considers that in the light of the Court's previous judgments and with a view to ensuring equal treatment for all undertakings in the Community which have suffered loss as a result of the non-payment of the refunds, the applicants' claims calculated in units of account and/or ECU on the basis of the quantities used should be converted into national currency by means of the "green" rate which was applicable at the time of the operation which qualified for the refund.

B — The *Commission* also acknowledges that the Community has incurred non-contractual liability, since this was established definitively by the Court in

its aforementioned judgments of 4 October 1979.

However, it considers that recognition of the applicants' right to actual compensation still depends on certain conditions.

(a) First, the Commission considers that all the applicants must indicate the total amount of compensation claimed and prove that they were unable to pass on to their customers the increased costs resulting from the abolition of the refunds.

In common with the Council, the Commission refers to the aforementioned judgments of the Court of 4 October 1979 where, after holding that the Community was liable, the Court was careful to point out that it was appropriate to check, before paying the damages, whether the applicants' loss due to the non-payment of the refunds was actually passed on, or could have been passed on, to their customers by means of price increases.

(b) Secondly, the Commission contends that that obligation is particularly obvious in the case of Mangimi Niccolai.

The Commission points out that, in its own words (pages 2 and 3 of the application), Mangimi Niccolai

"did not commence production of maize meal for the brewing industry until 16 March 1976", that "previously, it had produced maize meal for other uses only" and that it "did not become aware of the fact that it was entitled to the refunds ... until the subsequent judgments of the Court of Justice belatedly came to its notice. In fact, the applicant, which had never before received any refund, was not even aware of the new measure abolishing the refund."

The Commission draws two conclusions from those statements:

(i) Since the applicant was ignorant both of the existence of the refunds and of their abolition, there can have been no causal connection between the unlawful measure which allegedly caused the damage and the alleged damage. In the Commission's view, the origin of the damage may lie in the change which the applicant made in its production for reasons of its own having nothing to do with the unlawful Community measure, of which the applicant itself was not even aware. The Commission maintains that in a more or less analogous case, Case 245/78 *(SA Maïseries Benelux NV,* [1979] ECR 3017), the Court found that there was no causal connection between the unlawful act and the damage and therefore held that there wa no right to compensation.

(ii) The Commission considers that the applicant's ignorance proves that Mangimi Niccolai sold its gritz without making any particular economic calculation and simply adjusted its prices to conditions on the market. The Commission also concludes from the applicant's ignorance that there can therefore have been no question of a genuine passing on of the loss to purchasers; however, the result is the same since, even if the existence of a causal connection were accepted, the damage would still be lacking.

(c) Thirdly, the Commission points out that Birra Wührer states that the producers which supplied it assigned their rights to it. Therefore, Birra Wührer should, it contends, prove that the said assignment was effected by means of a proper contract of assignment.

Similarly, as regards Birra Peroni, which also purports to be the assignee of its suppliers' rights to the refunds, the Commission observes that the "assignment" does not in fact consist of a contract of assignment properly so-called, but of the application of a special procedure for the payment of refunds which is laid down in a circular of the Italian Ministry of Finance of 1970, whereby a brewer may submit a claim for refunds in the place of the supplier of the raw material with the latter's consent.

The Commission draws attention to the difficulties which that circular might create, in particular as regards compatibility whith Community legislation. In addition, it states that it has observed from examination of the invoices annexed to Birra Peroni's application that, contrary to the provisions of the circular, Article 4 of which stipulates that "the deadline for the submission of the application for a refund is two years from the date of the record of processing", it appears from some of the invoices that the "assignment" is dated a long time after the expiry of that deadline. It emphasizes that on examination of the various invoices produced by the applicant it is not uncommon to find that the alleged "assignment" is dated a long time after the expiry of the time-limit. It mentions by way of example a number of invoices (Nos 118.917, 119.681 and 120.426 of the Italian firm Oli e Risi and Nos 152 and 172 of Riseria F. Spezia) which date from just after 23 June 1977 and points out that the "assignments" are dated, respectively, 11 June 1980 and 15 May 1980.

In the Commission's view, quite apart from that line of argument and even on the assumption that a genuine "assignment" is involved, what was assigned to the applicant in question was the right to ask the competent national authority to pay the refunds and not the right to seek damages, which is a separate matter, even if the Court decides that the amount of the damages must be equivalent to the amount of the unpaid refunds.

Furthermore, the Commission questions what sense there might be in assigning in 1980 a right to the payment of refunds for 1977 when no refund was ever provided for in respect of that period. It is perhaps conceivable that the Court's judgments of 1979 mentioned above may have led to the assignment of a right to compensation; however, the producer had nothing to assign in so far as he had passed on his loss in the prices charged to the brewers.

Lastly, as regards Birra Peroni's statement in its application that in its judgment of 4 October 1979 in Case 238/78, *Ireks-Arkady*, the Court held to be admissible an action brought by an assignee in the case of an assignment of a right to damages, the Commission states that the case in question concerned two companies which were members of the same group and that the assignment took place in connection with the reorganization of the group. It follows, in the Commission's view, that the factors which induced the Court to hold that that action was admissible do not seem to be capable of being transposed *sic et simpliciter* to cover the particular circumstances of the present case.

(d) Fourthly, the Commission calls on the applicants in Cases 51/81 (De Franceschi), 267/80 (Riseria Modenese) and 5/81 (Riserie Roncaia) to furnish explanations.

It points out that Riserie Roncaia states (page 1 of the application) that it "produced between 1 September 1975 and 18 October 1977 broken rice for the production of beer". In addition, it states (page 2) that

"proof of the production of broken rice for the brewing industry is provided by the invoices produced, evidencing direct deliveries made between 27 January and 18 March 1977 to a well-known brewery".

The Commission asks why it is that Riserie Roncaia produces invoices for a short period which occurred a considerable time after the abolition of the refunds.

The same comment applies to De Franceschi SpA, which refers to production for a period between 4 April 1977 and 18 October 1977.

As for Riseria Modenese, the Commission points out that it states (pages 2 and 3 of the application) that it is not seeking the payment of refunds in respect of a particular quantity because it assigned its rights in respect of that quantity to Birra Wührer, the applicant in Case 256/80.

The Commission points out that it received a telex message from Birra Peroni warning it against paying any sum whatsoever to Riseria Modenese or to Riserie Roncaia, on the ground that both firms "have renounced in its favour the refunds granted in respect of broken rice".

The Commission therefore considers that, quite apart from Birra Peroni's stated intention to intervene in the proceedings, Riseria Modenese and Riserie Roncaia should provide the Court with some explanation on that point. In the Commission's view, if the statements made by Birra Peroni are correct, it would appear that the general problem of the passing on of losses to subsequent purchasers is manifest and serious. The intervention of the breweries shows that passing on was widespread; hence there is all the more reason why the producer applicants must prove the contrary.

(e) Finally, the Commission states that, in the event of its being obliged to pay the sums claimed, payment should be made on the conditions laid down in the Court's previous judgments, namely:

(i) preliminary checks by the national authorities;

(ii) unpaid refunds to be calculated at the conversion rate applicable at the time when they were due;

(iii) interest to be paid, at the rate laid down by the Court, as from the date of the judgment in the present cases.

3. In their replies the *applicants* state as follows:

A — *The applicants in Cases 256, 257, 265, 267/80 and 5/81*

(a) The above applicants begin by answering the argument of the Commission and the Council that they should prove the existence of the damage which they claim to have suffered by showing that they could not pass on the loss to their customers.

The applicants deny that they are subject to such an obligation.

In the applicant's view, there can be no such obligation, first of all, for procedural reasons. They contend that, whilst they, as the applicants, are obliged to prove the non-receipt of the refunds, being the cause of the damage in question and hence the basis of the application, the validity of the objection that the losses were passed on in the applicants' prices should be proved by the defendant institutions, since the burden of proving the validity of an objection always falls on the party raising it. That is in accordance both with the national laws of the Member States and with the Opinion of Mr Advocate General Capotorti in Case 238/78, *Ireks-Arkady* [1979] ECR 2955, at p. 3006).

The applicants in question further contend that the extremely difficult task of providing such proof could be assigned to them only by means of a reversal of the burden of proof, which the Council and the Commission are only seeking because of the difficulties which they are encountering in finding appropriate arguments in their defence.

What is more, the applicants claim that, contrary to the arguments adopted by the Council and the Commission, the Court's decisions by no means indicate that those who have suffered damage as a result of the abolition of refunds are subject to such an obligation.

They refer in particular to one of the judgments of 4 October 1979, delivered in *P. Dumortier Frères SA and Others* v *Council* (Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79, [1979] ECR 3091), the facts of which approximate closest to those of the present cases. Although the Court acknowledged in the abstract the relevance of an identical objection raised by the same defendants, it went on to dismiss the objection in that particular case. The applicants argue that, since the facts in the various cases and particularly in the case of *Dumortier Frères* were analogous if not identical, the defendants' objection that the applicants must furnish proof that the loss of the refunds was not passed on in their selling prices should be dismissed in the present case as well.

In the applicants' view, although there can be no question of *res judicata* in the strict sense since the parties to the cases were different, it would — quite apart from the fact that the same line of argument was put forward by the same defendants in a previous case and was dismissed by the Court — be inconceivable for the Court to come to a different decision on a question which is essentially identical, at the risk of treating the various applicants differently.

The applicants stress that the need to deliver consistent decisions, and hence for the decision in the present proceedings to be the same as the decisions taken in similar previous cases, is shown by the fact that the grounds of the judgments of 4 October 1979 are virtually identical. That conclusion should be applied not only with respect to producers of maize gritz, given that the judgments in question concerned that product, but also with respect to broken rice, having regard to the fact that decisions taken in previous cases with respect of quellmehl and gritz producers have been identical.

Finally, the applicants observe that by reinstating the refunds at issue Regulations Nos 1125 and 1127 of 22 May 1978 restored equal treatment, but only from 19 October 1977, However, in its judgments of 4 October 1979 the Court held that the demages were to be determined on the basis of the refunds which should have been paid during the period preceding that date. The applicants therefore contend that, since the regulations of 19 October 1977 do not embody any exception or reservation

with regard to the right to full and retroactive payment of the refunds in the event of the losses being passed on to the successors in title, if the objection raised by the Commission and the Council were accepted, that would lead to further unlawful discrimination between those who did not receive refunds after 19 October 1977 and those who did not receive refunds before that date.

(b) Secondly, the applicants answer the Commission and the Council's argument to the effect that Mangimi Niccolai (and, according to the Council, Riserie Roncaia) commenced production of maize gritz after the abolition of the refunds and fixed their prices at a profitable level taking account of the fact that the refunds had been abolished.

They reiterate the principles governing proof and the burden of proof, contending that the objection raised by the defendant institutions could only be taken into consideration if the latter proved or sought to prove that despite the non-payment of the refunds the selling price actually was "profitable" and, additionally, that Mangimi Niccolai and, possibily, Riserie Roncaia sold at a higher price than those charged by the other maize-gritz and broken-rice producers who, by virtue of the Court's decisions, are entitled to payment of the unpaid refunds in compensation for the damage which they suffered.

The applicants observe that the Commission cites in that connection the Court's judgment in Case 245/78, *Maïseries Benelux*, but omits to mention that the facts there were very different. In that case quantities of the product were diverted from their intended use to the brewing industry as an alternative solution. According to the applicants, the facts in the case under examination are quite different. They explain that Mangimi Niccolai had not found it worthwhile to produce maize gritz for the brewing industry, since the price, in the absence of a subsidy, was not profitable enough. However, at the end of 1975 it decided to produce gritz for use in beer-making following receipt of a circular of 20 November 1975 from the Associazione Nazionale Cerealisti [National Cereal Millers' Association] which stated, on the basis of a communication of 30 October 1975 from the Italian Ministry of Finance, that the refunds for maize gritz and broken rice for the brewing industry had been discontinued, but added that: "As it is not impossible that the discontinued refunds will be reinstated retroactively (and this question is being examined by the competent bodies of the EEC), the Ministry of Finance has decided that the competent authorities (the customs authorities and the Ufficio Tecnico delle Imposte di Fabricazione, UTIF) should continue for the time being at the request of the parties concerned to apply all the previous provisions concerning the grant of the relevant refunds, pending, and without prejudice to, the decisions taken thereon by the Community authorities".

That assurance led Mangimi Niccolai to produce the equipment necessary for the production of maize gritz for the manufacture of beer, thereby creating a new outlet for its products, of which it was in a position to take advantage from March 1976. It follows that the categorical assertion made by the defendants is not only unproven but also baseless.

The applicants observe that they have, in addition, produced invoices which show

their prices. They contend that the defendants are perfectly well aware of the prices in force in the period in question and must have already had the relevant documentation in their possession, since they submitted it to the Court in the course of the proceedings which culminated in the judgment cited by the Commission. The applicants consider that it should therefore be easy for the defendants to prove, for example, that the applicants suffered no injury as a result of the absence of refunds because they sold their products at a higher price than that (charged by other producers who, by contrast, were held to be entitled to the refunds) which they would have obtained as compensation for the damage that they sustained.

The applicants, whilst stating that they do not consider themselves under any obligation to do so, have produced the relevant price lists for the period, from which, they claim, it can be seen that Mangimi Niccolai's prices were not higher than normal prices. They draw particular attention to the fact that the lists in question contain the spot prices for loose crushed and degermed maize (for use as animal feed) franco Milan and that the production cost of maize gritz intended for brewing is markedly higher. What is more, the invoices produced concern deliveries in respect of which the period for payment is 30 or 60 days; consequently not only are Mangimi Niccolai's prices no higher than the market prices, they are, in fact, lower.

The applicants state that, as a result, the production of maize gritz for the brewing industry was not worthwhile unless the selling price was supplemented by refunds.

The applicants conclude that it would be virtually impossible for the defendants to prove that the applicants' selling price was profitable without the refunds.

(c) Thirdly, the applicants refer to the Commission's reservations regarding the existence of a proper assignment to Birra Wührer of the rights to the payment of the refunds.

They observe that the argument has been put forward too late since it relates to the question of Birra Wührer's interest in instituting proceedings; it should have been examined before the issue of limitation and therefore should have been raised during the preceding stage of the proceedings. As far as the admissibility of that defence submission is concerned, the applicants defer to the judgment of the Court.

The applicants point out that the contracts of assignment, bearing the authentic signatures of the assignors, are annexed to the various invoices produced.

They further add that, in a similar case, the Court in any event took account of an assignment of the right to the payment of refunds to brewers and dismissed the objection which is raised again in the present proceedings (paragraph 17 of the decision in the case of *Dumortier Frères).*

The applicants contend that the said assignment to the brewers is linked, in particular, to the procedures laid down for the payment of the refunds for broken rice intended for the brewing industry. The applicants state that, whereas it is possible to monitor the production of maize gritz intended for the brewing industry, production of broken rice (which is only a by-product or, more precisely, a waste product) can be monitored only at the breweres. Accordingly the regulations stipulate that the application for the payment of refunds may be made by the processing undertaking provided that it has ob-

tained the written authorization of the producer of the broken rice.

In the applicants' opinion, the Court's previous decisions on this very subject must constitute an important factor in the dismissal of this objection, which the defendants have again raised despite the fact that it was the subject of a reasoned dismissal by the Court when it was raised in previous cases.

They contend that, precisely because the Court has already rejected that argument, while expressly taking account of the fact that brewers have on occasions taken over the losses caused by the absence of refunds, the Court has refused to recognize the relevance of the passing on of losses to the brewers; the reason for that is that the Court considered that the transfer of the losses to the ultimate purchaser was unproven.

The applicants observe that the refund is payable on the basis of the use to which the product is put (production of beer) and not simply by virtue of the fact that it is produced; consequently it is of no consequence whether the refund is received by the gritz (or broken-rice) producer or by the brewer.

The applicants consider that the assumption by the brewers of the risk attaching to the recovery of the unpaid refunds is, so to speak, an internal matter which does not change the relationship of the parties concerned with the Community and is not in itself enough to eliminate the damage resulting from the discrimination at issue. According to the applicants, it in fact costs more to produce beer using gritz or broken rice than it does using, for example, starch.

They maintain that it does not matter whether the result was a drop in gritz and broken-rice producers' income or increased expenditure on the part of beer producers, since neither was offset by refunds, which should have been paid but were not. What would have to be proved and has not been proved, they claim, is that the increase in costs brought about by the non-payment of the refunds resulted in a corresponding increase in the price of beer which was passed on to the ultimate consumer. They point out that passing on of costs could result equally well from an independent increase in the price of gritz and broken rice as from the assumption of risk resulting from the assignments in question.

However, the applicants stress that no such evidence has been produced or offered. They observe that they cannot prove that the said passing on did not take place since that would be impossible. Neverthless they can provide indirect proof that no such passing on took place or could have taken place, since the only changes that have occurred in the price of beer in Italy have been due, in the main, to increases in duty, wage costs, social security contributions and the cost of containers and electricity.

The applicants stress that it is those items which have the biggest impact on the price of the final product, whereas the price of gritz or broken rice cannot in itself cause a substantial change in the selling price of the final product.

They add that, despite that, the aggregate cost of gritz and broken rice, and hence the absence of refunds for those products, has a significant impact on brewers' overheads. The result is that,

whilst it is practically impossible to pass on the loss sustained to the individual purchaser of a bottle or can of beer, it is undeniable that the industry has suffered, across the whole range of its business, a loss which is considerable in economic terms and which has not yet been made good.

The applicants maintain that it is sufficient to point out that by a Decree-Law of 18 March 1976 the duty levied in Italy on beer was increased from LIT 400 to LIT 600 per hectolitre per saccarimetric degrees. As a result, the duty on a normal beer of 12 saccharimetric degrees increased from LIT 4 800 to 7 200 per hectolitre, the average increase being LIT 2 400 per hectolitre or LIT 24 per litre. That factor alone accounts for a major part of the price increases between the date of the abolition of the refunds and 19 October 1977. The applicants point out that, in addition to higher duty, account must be taken of the increases in all the other production costs which took place over that period as well as the increase in prices generally.

(d) Fourthly, the applicants reply to the Commission's line of argument concerning De Franceschi (Case 51/81), Riseria Modenese (Case 267/80) and Riserie Roncaia (Case 5/81).

The applicants state that, in certain cases, faced with the possible extinction of their rights by limitation, the rice manufacturers concerned considered it wise — both in respect of small deliveries where they had not assigned their rights and certain deliveries where they had assigned their rights to brewers but the brewers had failed to institute proceedings with a view to interrupting the period of limitation — to bring separate actions, even in respect of small quantities. The applicants consider that the foregoing adequately answers the Commission's questions.

As far as maize is concerned, the applicants observe that only one small producer, Molino Lameri, a firm established in the province of Cremona, assigned its rights to Birra Wührer, as can be seen from the documents produced. It is therefore on the basis of a lawful contract that Birra Wührer asks that the damages which it receives should include the refund assigned to it.

The applicants add that, in contrast, Mangimi Niccolai made no assignment of its rights in relation to the refunds at issue. As for De Franceschi Marino & Figli, the applicants claim that they can prove (by means of a photocopy of a document from the Ufficio Tecnico delle Imposte di Fabbricazione) that it also produced maize gritz before 1975 when the refund had not yet been abolished.

As far as the relationship between Riseria Modense and Riserie Roncaia, on the one hand, and Birra Peroni, on the other, is concerned, the applicants maintain that the former instituted proceedings to interrupt the period of limitation in the absence of any action taken to that effect by Birra Peroni. As a result of that initiative a disagreement arose between Riseria Modenese and Birra Peroni, the latter gaining the wrong impression at one point that Riseria Modenese might refuse to recognize the validity of the instruments of assignment. It was that which induced Birra Peroni to send the telex mentioned by the Commission. According to the applicants, that question now seems to have been clarified, as clearly emerges from Birra Peroni's intervention.

(e) Finally, as regards the "green" rate to be applied in calculating the damages, the applicants claim that the Council is mistaken in basing its view on the need to ensure equal treatment for all undertakings in the Community which have suffered damage as a result of the abolition of the refunds at issue. The only effective way of securing equal treatment is to calculate the total amount of the refunds in units of account (or European currency units) and then convert the resulting amounts at the rate applicable at the time of payment for the currency of the country of each applicant.

The applicants observe in that connection that the previous judgments in which the Court held that there was a right to compensation for damage sustained were delivered three years ago. What is more, the applicants in question were from countries whose currencies have depreciated very much less than the Italian lira. In order to secure equality of treatment — for instance between an Italian and a German firm whose applications for compensation were approved at the same time for the same amount of unpaid refunds and in respect of the same date — the Court should require that the calculation be effected in units of account or ECU and the resultant amount converted into national currency at the rate applicable at the time of payment. If, instead, as the Council suggests, the compensation were to be equivalent to the sums which should have been paid in national currency at the time when the refund should have been paid, the Italian firm in the above example would suffer undeniable discrimination compared with the German firm, since it would receive substantially less.

The applicants consider that their application, as it is framed, makes it unnecessary to refer to the complex and difficult question of currency depreciation, which has given rise to a judgment of the Italian Court of Cassation (judgment No 3770 of 4. 7. 1979, Foro it. I, p. 1668). That court, while reaffirming the validity of the nominalist principles sanctioned by Article 1277 of the Italian Civil Code, nevertheless held that a debtor is obliged to make good the loss which is suffered by a creditor who is not paid on time as a result of the depreciation of the currency.

B — *De Franceschi SpA Monfalcone* (Case 51/81) first of all replies to the Commission's arguments based on the fact that it mentions only one period of production, namely 4 April 1977 to 18 October 1977.

It explains that until 30 April 1975 De Franceschi SpA Monfalcone and De Franceschi Marino & Figli, the applicant in Case 265/80, were a single company. On 1 May 1975 De Franceschi SpA, Monfalcone became an independent company, in which form it commenced trading in its own right as from 1976.

The applicant states that, since the director of the single company which, during the period when the refunds were duly paid, comprised both the applicant and De Franceschi Marino & Figli subsequently became the director of the applicant company when it became an independent entity (as is evidenced by Annex 1 of its reply), it is readily apparent that the applicant was aware of the payment of refunds in respect of the production of maize gritz, even though the applicant did not commence trading in its own right until after the abolition of the refunds by Regulation No 665/75.

It is therefore understandable that the applicant, which was therefore aware of the refunds in question, should claim payment thereof.

The applicant contends that, as regards the period of production and the application for the payment of refunds for that period, its views are based on equally irrefutable arguments. Fully convinced of the illegality of Regulation No 665/75 abolishing the production refunds for maize gritz, the above-mentioned director repeatedly made his point of view known both at meetings at the Ministry of Finance in Rome and at meetings held at the competent directorates of the Commission in Brussels. That view, which was shared by various senior officials at the Italian ministries, seemed sufficiently well founded to the Ministry of Finance to convince it that it should oppose the opinion of the Council of Ministers and the Commission and impress upon the Community institutions the need to reinstate the production refunds for maize gritz. The applicant claims that the competent Italian authorities were so convinced of the illegality of the Community regulation abolishing the refunds that on 3 October 1975 the Ministry of Finance issued the above-mentioned circular notifying all the responsible ministries, all the customs authorities and all the relevant producer organizations that it was possible that the production refunds for maize gritz would be reinstated retroactively. The applicant also refers to the circular of 20 November 1975 of the Associazione Nazionale Cerealisti, which has already been cited by Mangimi Niccolai.

In the applicant's opinion, those documents prove that the Italian undertakings which were affected, like itself, not only knew of the existence of the refunds but, what is more, were asked — more or less officially — to take the payment of the said refunds into account, since they would be reinstated retroactively.

As regards the existence of the damage and the applicant's right to compensation, it observes that since it was aware of the refunds payable and was asked to take them into consideration when concluding contracts for the sale of maize gritz it had no reason to recoup any amount whatsoever from the breweries and, in fixing its selling prices, behaved exactly as if the refunds were to be paid in the normal way. It was in its interests to let the breweries benefit from the advantages which the refunds were designed to give them, since this would encourage them through cheap prices to purchase maize gritz and thus free them from having to depend solely on starch producers.

The applicant claims that in order not to lose its customers it was obliged to sell at firm prices without making allowances for the abolished refunds. In other words, it had to sell at prices which were, on average, below those freely formed on the market. It provides invoices showing that its prices were lower than those appearing in the market reports issued by the principal compiler of agricultural commodity price lists in Italy, Associazione Granaria, Milan. The difference corresponded to the amount of the refunds at issue (the average price per 100 kilogrammes of maize meal on the free market was LIT 20 400 as against the applicant's price of LIT

18 000 per 100 kilogrammes, giving a difference of LIT 2 400, which was covered by the refund of LIT 2 946 applicable until August 1977 and the refund of LIT 3 151 applicable until October 1977).

Consequently, the applicant maintains that to recoup the whole of the refund from the brewers it would have been necessary for it to sell its product at at least the free market price. It contends that, since it did in fact sell its product at an average price well below the free market price (the exceptional cases where the prices are virtually the same are due to transport or the delivery time), it has thereby proved that it took account of the refunds when pricing its product. It maintains that it did this in order not to lose its customers, who would otherwise have turned to starch producers, who continued to receive the Community refunds.

Furthermore, the applicant contends that by defining the damage narrowly the Council and the Commission are committing an error of law.

In its view the concept of damage, as it is recognized in the legal systems of all the Member States, covers both a loss in the strict sense of a diminution in a person's assets and a situation where a person is prevented from being able to increase his assets as a result of the harmful act. It refers to the Opinion of Mr Advocate General Capotorti in Case 238/78 ([1979] ECR 2955, at page 2998, Section 9), which the Court followed in its judgment of 4 October 1979 ([1979] ECR 2955, paragraph 13 of the decision, at page 2973) on the ground that the origin of the damage suffered in the case in question lay "in the abolition by the Council of the refunds which would have been paid to the quellmehl producers if equality of treatment with the producers of maize and starch had been observed" and that therefore "the amount of those refunds must provide a yardstick for the assessment of the damage suffered".

In the applicant's view, the reality of the damage which has thus been established is undeniable, since application of the doctrine that the damage is to be regarded as offset by any benefit which arises would not reduce or eliminate the damage in the present case, because that doctrine presupposes that both the damage and the benefit arise as immediate and automatic effects of the unlawful act, which hence must constitute their common origin.

The applicant, referring to the above-mentioned Opinion of Mr Advocate General Capotorti (at page 3005), observes that the abolition of the refunds did not give rise directly to any benefit for the undertakings sustaining damage and that the benefit which was supposedly derived from an increase in the applicants' prices cannot be said to have been caused by the abolition of the production refunds but was the result of an independent decision of the parties concerned.

The applicant also puts forward submissions and arguments similar to those adduced by the preceding applicants regarding proof of actual damage and of the fact that the loss was not passed on in selling prices, the question of which party has the onus of adducing such proof and the rate to be used for converting from units of account (or ECU) into Italian lire.

C — *Birra Peroni*, the applicant in Case 282/82, observes that the Commission and the Council have asked the Court to

place on the applicant the onus of proving that the loss resulting from the non-payment of the refunds did not give rise to higher prices for its product and hence was not passed on to the consumer. It points out that such an increase might have resulted from the rise in the price of broken rice and/or from the loss resulting from the assignment of the rights to the refunds. It contends that it would be impossible for it to prove that the loss was not passed on; on the other hand, it is perfectly able to provide indirect proof that the loss was not passed on and that it was impossible to do so, since beer prices in Italy change only in response to increases in duty, in wage costs, in social security contributions and in the price of packaging, containers and energy.

Birra Peroni also refers in that connection to the above-mentioned Opinion of Mr Advocate General Capotorti (loc. cit.), where he stated that "in this case the benefit which is presumed to be connected with the increase in prices could never be said to have been *caused* by the abolition of the production refunds: it is in truth the result of an independent decision of the producers. In other words: the balancing of the damage against the pain presupposes that both are direct and automatic consequences of the unlawful act, whereas in this case the abolition of the Community aid did not directly give rise to any benefit for the undertakings sustaining damage".

The applicant observes that the Commission and the Council are seeking to base their argument on the principle *compensatio lucri cum damno*. However, that principle cannot be applied here, because it is now well-established in Italy in both legal writings and the decisions of the courts that the damage and the gain must stem from the unlawful act.

In Birra Peroni's opinion, the Commission is wrong to claim that it is for the applicant to prove, on the one hand, that it suffered actual damage and, on the other, the existence of a causal connection between the unlawful act and the right to compensation. For the reasons stated by Mr Advocate General Capotorti in his above-mentioned Opinion (loc. cit), the burden of proof is borne by the defendant institutions, in the sense that they must prove that the applicant passed the loss which it sustained on to the ultimate consumers.

4. In their rejoinders the *defendant institutions* set forth the following arguments and submissions:

A — The *Council* considers that the applicants' reasoning, according to which the defendant institutions must prove that the applicants passed on the loss resulting from the abolition of the refunds in their prices on the ground that that is the normal allocation of the burden of proof, cannot be accepted. On the contrary, it may be inferred from the Court's judgments that the failure to pass on the loss may be a constituent element of the damage which the applicants must establish — at least as regards establishing a *prima facie* case that they suffered actual damage.

The Council contends that, where legal provisions exist which allow losses such as those alleged to be passed on to a subsequent stage in the marketing chain, the existence of such provisions precludes actions for recovery, even if such actions could be successfully brought under

national law. The Council refers in that connection to the Court's judgment of 13 May 1981 in Case 66/80, *SpA International Chemical Corporation* v *Amministrazione delle Finanze*, [1981] ECR 1191, paragraph 24.

The Council contends that the same principle should apply where the factual circumstances permit the loss to be passed on in selling prices.

The Council considers that the actual evidence produced by the applicants, namely the invoices for the period following the abolition of the refunds, suggest that the losses were indeed passed on, since the selling prices mentioned by the gritz producers and the purchase prices quoted by Birra Wührer, the purchaser of the gritz, were all at the same level.

The Council contends that, whilst Birra Wührer claims that its suppliers assigned their rights to the refunds to it, the inference is that, to procure that assignment, Birra Wührer compensated its suppliers for the loss of the refunds, that is to say, it actually paid its suppliers a purchase price which had been increased by the amount of the refund.

It follows that, since the producer applicants' prices were all at the same level, they also received a purchase price increased by the amount of the refund from the other Italian brewers. That being so, the producer applicants suffered no damage.

In the Council's view, the fact that the Italian brewers apparently thought fit simply to compensate the Italian gritz producers for the loss of the refund suggests that they too could readily incorporate the resultant loss in their selling prices.

The Council considers that evidence produced so far suggests that widespread passing on of the losses to subsequent stages in the marketing chain was taking place in Italy at the material time.

The Council claims therefore that, according to the Court's judgment of 4 March 1980 in Case 49/79 *(Richard Pool* v *Council*, [1980] ECR 569, paragraph 11), it is for the applicants to make out at least a *prima facie* case that they suffered actual damage.

For the rest, the Council refers to the rejoinder submitted by the Commission.

B — The *Commission* observes that, as far as the passing on of the damage to subsequent purchasers is concerned, the applicants seem to be contending that the Court, while accepting the principle, rejected it once and for all when it delivered the judgments of 4 October 1979.

The Commission observes first that — unlike the applicants, who criticize it for not doing so — the Commission does not refer to paragraphs 16 and 17 of the judgment of 4 October 1979 in *Dumortier Frères*, simply because they neither add to nor detract from the existence and the substance of the principle concerning the passing on of losses since they are concerned with the application of the principle to that particular case, which has nothing in common with the applicants' cases. In the Commission's view, their similarity to the present cases does not permit the conclusion to be drawn that the principle no longer applies by virtue of the rule of *res judicata*. The Commission considers, on the contrary, that the Court should apply the said principle on a case-by-case basis in order to arrive at the most just solution.

The Commission contends that it is completely incorrect to allege that in its previous judgments the Court held that the principle could not have practical effects. It maintains that it is sufficient to read paragraph 18 of the judgment in *Dumortier Frères* in order to realize that, on the contrary, in some cases the Court has actually refused to grant the application for damages. It quotes the passage in question, where it is stated that:

"It follows that the loss for which the applicants must be compensated has to be calculated on the basis of its being equivalent to the refunds which would have been paid to them if, during the period from 1 August 1975 to 19 October 1977, the use of maize for the manufacture of gritz used by the brewing industry had conferred a right to the same refunds as the use of maize for the manufacture of starch; an exception will have to be made for the quantities of maize used for the manufacture of gritz which was sold at prices increased by the amount of the unpaid refunds under contracts guaranteeing the buyer the benefit of any re-introduction of the refunds."

In the Commission's view, therefore, the principle of passing on exists, has been applied and must be applied to any analogous situation.

It follows that the applicants' contention that the application of the said principle would have the effect of creating "further unlawful discrimination" between those who obtained, by virtue of Regulations Nos 1125 and 1127/78, the reinstatement of the refunds retroactively from 19 October 1977 with no restriction as to the passing on of the loss and those who are claiming the right to refunds (in the form of damages) for the period preceding that date and who are prevented from doing so by the principle of passing on does not stand up to serious examination.

The Commission argues in that connection that the aforementioned regulations retroactively reinstated the refunds by legislative means, whereas the Court's judgments determined the damages to be recovered (albeit for an amount equivalent to the unpaid refunds) by judicial means. The Commission contends that it cannot be denied that an action for damages is subject to its own limits and principles and therefore also to the principle of passing on. Furthermore, the Commission adds, if the applicants' argument were correct, it would necessarily follow that the Court itself had created discrimination by laying down and applying the principle of passing on.

As regards the burden of proof, the Commission observes that the applicants contend that, in any event, it is for the defendants to prove that the loss was passed on or that it was possible to do so, since the question was raised by way of an objection.

The Commission considers that the applicants' argument is wrong, since the question of the passing on of the loss cannot be viewed as an objection in the strict sense of the term. The Commission considers that it forms part of the substance of the case and, more specifically, relates to the establishment of the existence and the extent of the damage, since it would be the existence of the damage which would be ruled out wholly or partly if it were established that the party who allegedly was injured had been able to pass on the loss to his customers.

The Commission therefore contends that it is the injured party who has the onus of proving the existence and the extent of the damage.

As regards the evidence which the applicants, while denying that they bore the burden of proof, furnished in order to show that they did not in fact pass on their losses, the Commission points out that the evidence supplied consists for the most part of market prices quoted at the material time and is intended to show that, since the applicants' prices were not higher than the market prices, their losses clearly could not have been passed on.

The Commission considers that the lists of market prices prove nothing.

They observe, first, that the lists concern different products (loose non-germed broken maize for use in animal feed, on the one hand, and maize flour, on the other) and hence cannot be compared with the prices for the products in question (gritz and broken rice). In the Commission's view, quite apart from that point, the comparison is based on a patent methodological error, since there is no purpose in comparing the applicant's prices with market prices. It observes that the market prices can only reflect the prices charged by the producers, who are all in the same position of not receiving refunds; consequently, their prices will inevitably be more or less the same.

In other words, the Commission considers that, even if there were market prices for gritz and broken rice, they would be of little value since they would inevitably be the same as the prices charges by the producers.

The Commission states that it would have been interesting to have a graph showing the applicants' prices, between say 1974 and 1978, since that would provide a much more accurate picture of their trend and of the passing on of their losses to their customers.

As far as the evidence provided by the applicants is concerned, the Commission states that perusal of the invoices produced by the applicants leads to the conclusion that during the material period the prices shown on the invoices were the same and developed in parallel for all the applicants. According to the recapitulative table annexed to its rejoinder, the prices indicated by the applicants were more or less the same for every month and every quarter.

The Commission maintains that, in view of the fact that the applicant in Case 256/80 (Birra Wührer) considers itself justified in bringing an action for damages on the ground that it is the assignee of the gritz and broken-rice producers' rights, the prices shown on the invoices produced by Birra Wührer must include the amount passed on to it by its suppliers, since otherwise Birra Wührer would have no right to act.

The Commission therefore concludes that the fact that the prices charged by the other applicants which are producers of gritz or broken rice were the same and moved in parallel with Birra Wührer's prices shows that the losses were in fact passed on and that the actions for damages should therefore be dismissed.

In the Commission's view, that conclusion is borne out by the fact that two of the applicants, Riseria Modenese (Case 267/80) and Riserie Roncaia (Case 5/81), which assigned their rights to Birra Peroni (Case 282/82), acknowledge the latter's rights and hence admit by implication that the losses which they sustained as a result of the abolition of the refunds were passed on to that applicant.

The Commission considers that further confirmation that the losses were in fact passed on may be obtained by examining the case of Mangimi Niccolai. The Commission observes that, after stating in its application that it was not aware of its right to refunds until the subsequent judgments of the Court belatedly came to its notice and that it did not even know of the new rules abolishing the refunds, Mangimi Niccolai retracts that statement and claims that it commenced production in view of the high degree of probability that the refunds would be reinstated. The Commission considers that Mangimi Niccolai entered the market completely ignorant of the existence of the refunds and began to charge prices more or less comparable with those of its competitors. As a result, if, as the Commission supposes, Mangimi Niccolai's competitors were already passing on to their customers the loss resulting from the non-payment of the refunds, Mangimi Niccolai will clearly have done the same, notwithstanding the fact that it still had no knowledge of the refunds.

As regards the circular from the Associazione Nazionale Cerealisti to which Mangimi Niccolai and De Franceschi Monfalcone refer, the Commission takes the view that it proves nothing. It conflicts completely with Mangimi Niccolai's earlier statements, and, in any event the Commission considers it unlikely that such a vague and doubtful document could have prompted an undertaking which, according to the applicant, had hitherto specialized in the production of "maize meal intended solely for other uses" to stop producing that product altogether and switch to another, when it had not thought it expedient to do so whilst the Community was actually granting production refunds, that is to say, before their abolition.

Lastly, the Commission observes that the circular in question states that "the Ministry of Finance has decided that the competent authorities (the customs and the UTIF) should continue for the time being, at the request of the parties concerned, to apply all the existing provisions concerning the grant of the relevant refunds . . .". It points out that Mangimi Niccolai makes no reference whatsoever to its having submitted an application or to the requirements mentioned in the circular. That constitutes further confirmation of the defendant institutions' contention that the losses resulting from the non-payment of the refunds were passed on.

The Commission maintains that that contention is further supported by the case of Birra Wührer. The Commission recalls that Birra Wührer claims to be the assignee of its suppliers' rights to refunds and that it, in common with the other applicants, has not provided the requisite proof that it was unable to pass on the increased costs caused by the payment of higher prices to its suppliers. The Commission observes that the applicant makes a vague and inadequate statement to the effect that the price of meal and broken rice accounts for a percentage of the total cost which in itself is insufficient to bring about an appreciable change in the selling price of the final product.

The Commission interprets that statement to mean that, in comparison with other causes of price increases (duty, wage rises, increases in employers' social security contributions, higher prices for containers and electricity, etc.), an increase in the price of raw materials only has a minor impact. In the Commission's view, it does not follow that the passing on of losses is im-

possible, but that it is in fact made easier, since the amount passed on is incorporated in the aggregate price increase.

As far as Birra Peroni is concerned (Case 282/82), the Commission points out that in its reply the applicant merely contests the argument that the undertaking sustaining the damage must show that it was unable to pass on to its customers the increased costs resulting from the non-payment of the refunds.

The Commission states that by so doing the applicant is confining itself essentially to the issue of the burden of proof and hence acknowledges the principle that the action for damages has no foundation if the loss was or could be passed on. As a result, the Commission contends that the issue is reduced solely to determining whether proof of that matter lies with the party that sustained the damage or with the other side.

The Commission considers that this question cannot be described as an objection, since it is a substantive aspect of the action for damages and relates more specifically, to the establishment of the existence and the extent of the damage since the existence of damage is wholly or partly ruled out if the party which incurred the loss was able to pass it on to his customers.

The Commission contends that the reference made by the applicants, and by Birra Peroni in particular, to passages of Mr Advocate General Capotorti's Opinion in Case 238/78, *Ireks-Arkady*, concerning the doctrine of *compensatio lucri cum damno* has nothing to do with the issue of the burden of proof. No argument can be derived therefrom since, as the Court has accepted the principle of passing on and all that it entails, the only remaining question is that of determining who is to bear the burden of proof. The Commission considers that the burden should fall on the applicants.

As regards the validity of the suppliers' assignment to Birra Wührer of their rights to the payment of refunds, the Commission's submissions and arguments are substantially the same as those put forward with regard to Birra Peroni in its defence.

It contends that the purported assignment was not strictly speaking a contract of assignment but the implementation of a special procedure for the payment of refunds which was provided for by a circular of 1970 issued by the Italian Ministry of Finance. The procedure enabled the brewer, with the consent of the supplier of the raw material, to submit the application for a refund in his place.

Similarly, the Commission draws attention once again to the potential problems which might arise in connection with that circular and, in particular, that of compatibility with Community measures. It states that it has observed from an examination of the invoices annexed to the application that, contrary to the provisions of the circular, Article 4 of which stipulates that "the time-limit for the submission of the application for a refund is two years from the date of the record of processing", the "assignment" is dated a long time after the expiry of that limit. It mentions by way of example invoices relating to a supplier of Birra Wührer, Molino Lamerie, which bear dates falling in the period from June to November 1977, whereas the assignment relied on by the applicant is dated 3 November 1980.

Finally, the Commission repeats that, even on the assumption that a genuine

assignment is involved, what was assigned was the right to ask the competent national authority to pay the refunds and not the right to seek damages, which is a separate right, even though the Court has decided that the amount of the damage should be equivalent to the amount of the unpaid refunds.

IV — Oral procedure

At the sitting on 29 May 1984 oral argument was presented by the following; Birra Wührer, Mangimi Niccolai De Franceschi Marino & Figli, Riseria Modenese and Riserie Angelo e Giacomo Roncaia, represented by N. Catalano; De Franceschi SpA Monfalcone, represented by F. Capelli; Birra Peroni, represented by R. Marini-Clarelli; the Council of the European Communities, represented by Mr Gallas, acting as Agent; and the Commission of the European Communities, represented by G. Berardis, acting as Agent.

The Advocate General delivered his opinion at the sitting on 10 July 1984.

Decision

1 By applications lodged at the Court Registry on 24 and 28 November 1980, 1 December 1980, 12 January 1981, 9 March 1981 and 25 October 1982, Birra Wührer and six other undertakings brought actions under the second paragraph of Article 215 of the EEC Treaty for compensation for the damage which they claimed to have suffered on account of the unlawful abolition of the production refunds for maize gritz and broken rice intended for the brewing industry by Council Regulations (EEC) Nos 665 and 668/75 of 4 March 1975, amending Regulation No 120/67/EEC on the common organization of the market in cereals and Regulation No 359/67/EEC on the common organization of the market in rice (Official Journal L 72, 20. 3. 1975, pp. 14 and 18).

2 By orders of 11 March 1981 and 17 February 1982 the first six cases were joined for the purposes of the oral procedure and the judgment. The seventh case was subsequently joined to those cases by order of 9 March 1983.

3 In its preliminary ruling of 19 October 1977 in Joined Cases 124/76 and 20/77, *SA Moulins et Huileries de Pont-à-Mousson* v *Office National Interprofessionnel des Céréales; Société Coopérative "Providence Agricole de la Champagne"* v *Office National Interprofessionnel des Céréales,* ([1977] ECR 1795), the Court held that the provisions of Regulation No 665/75 were unlawful because they were incompatible with the principle of equality in so far as they abolished the production refunds for maize groats and meal (gritz) intended for the brewing industry but retained them for maize starch, a competing product.

4 Following that judgment, the production refunds for maize gritz used by the brewing industry were reinstated by Council Regulation (EEC) No 1125/78 of 22 May 1978 (Official Journal L 142, 30. 5. 1978, p. 21) and those for broken rice intended for the same use were reinstated by Council Regulation (EEC) No 1127/78 of 22 May 1978 (Official Journal L 142, 30. 5. 1978, p. 24). The two regulations entered into force on the third day following their publication in the Official Journal of the European Communities. However, the last paragraph for Article 1 of Regulation No 1125/78 and Article 6 of Regulation No 1127/78 provided that, at the request of the interested party, the production refunds were to be granted with effect from 19 October 1977, that is to say, retroactively with effect from the date of the Court's judgment in Joined Cases 124/76 and 20/77, cited above, and not from the dates on which Regulations Nos 665 and 668/75 took effect.

5 The applicants seek compensation for the damage which they claim to have suffered as a result of the non-payment of refunds for periods commencing on 1 August 1975 or 1 September 1975 — the dates on which Regulations Nos 665 and 668/75, respectively, took effect — and terminating on 19 October 1977. For all the applicants, the damage claimed consists in the loss of income corresponding to the refunds which they would have been paid as producers or assignees of producers' rights if the same refunds had been paid for maize gritz and broken rice as were paid for starch.

The producers' right to institute proceedings

6 The applicants in cases 257, 265 and 267/80 and 5 and 51/81 base their claims on the fact that they are producers of maize gritz or broken rice or both. They therefore have the right to instiute proceedings before the Court.

7 However, the applicant in Case 267/80, Riseria Modenese, although seeking compensation for the damage which it sustained as a result of the non-payment of the refunds for broken rice between 25 November 1975 and 31 August 1977 — amounting, according to calculations given in its answer to a question put by the Court, to 59 954·5598 ECU, formally admits in its reply and in its answer to the Court's question that it assigned its rights for the refunds in question to Birra Peroni, the applicant in case 282/82. Since by means of that assignment it has disposed of its rights to the refunds at issue, it has ceased to be entitled to be compensated for the damage caused by the refusal to pay the refunds. Consequently, its claim for compensation must be dismissed.

The assignees' right to institute proceedings

8 In the case of Birra Wührer and Birra Peroni, which have instituted proceedings as assignees of the producers' rights to the refunds which were unlawfully abolished, the Commission raises a question concerning the validity of the assignments.

9 The Commission maintains that the assignments in question constitute a special procedure for the payment of refunds which was laid down by a circular of the Italian Ministry of Finance and that in some cases claims for the payment of refunds based on such assignments were made in contravention of the circular in question, which prescribes periods within which claims must be made.

10 That argument must be rejected. The assignment of rights is in principle possible under the laws of the Member States and should therefore also be possible under Community law; consequently, the Commission may not object that, in a period in which the refunds were abolished, the applicants failed to comply with the administrative rules laid down by a Member State governing the submission of claims for refunds by an assignee.

11 The Commission also contends that what was assigned was the right to receive payment of the refunds and not the right to be compensated for the refusal to pay them.

12 It should be pointed out, however, that the assignee of a right is subrogated to the right of action in the event of an infringement of that right. Consequently, the Commission's argument must be rejected.

13 Finally, the Commission contends that the assignments in question cannot be effective, because when they took place the assignors, that is to say the producers of gritz and broken rice, were not entitled to the refunds, since they had been abolished and not yet reinstated.

14 In regard to that contention it is sufficient to state that the Commission may not plead the unlawful abolition of the refunds as a defence against the applicants, who have brought their actions specifically to obtain compensation for the damage which they substained as a result of the abolition of the refunds.

Limitation

15 By the judgments which it delivered on 27 January 1982 in the first six of these joined cases, the Court rejected the argument put forward by the Council and the Commission of the European Communities to the effect that the five-year period of limitation laid down in Article 43 of the Statute of the Court started to run on the date on which the unlawful legislative measures were published. In those judgments the Court held that the period of limitation began when all the preconditions for the Community's obligation to provide compensation for damage were satisfied and that, since the liability had its origin in legislative measures, the period of limitation commenced when the injurious effects of those measures had been produced in the form of damage and, consequently, in the circumstances of those cases, from the time when the producers, after completing the transactions entitling them to the refunds, had incurred damage which was certain in character; it could not therefore be claimed that time began to run against the applicants before the date on which the injurious effects of the unlawful measures adopted by the Community were produced.

16 In the light of the foregoing, it must be held that the applicants' rights to compensation for the damage incurred during the five years before the dates on which each of the applicants interrupted the five-year limitation period, in accordance with Article 43 of the Statute of the Court, are not time-barred.

17 Consequently, having regard to the dates on which each of the first five applicants applied to the Commission and to the dates on which they brought their actions before the Court, their applications should be held to be admissible as regards the damage which each of the five applicants claims to have suffered during the periods terminating on 18 October 1977 and commencing on 18 August 1975 in the case of Birra Wührer (Case 256/80), on 24 November 1975 in the case of Mangimi Niccolai (Case 257/80), on 28 November 1975 in the case of De Franceschi Marino & Figli (Case 265/80), on 12 February 1976 in the case of Riserie Roncaia (Case 5/81) and on 9 March 1976 in the case of De Franceschi Monfalcone (Case 51/81).

18 As appears from the conclusions set out in their applications, as clarified by their answers to the Court's written questions, and from the other documents before the Court, Birra Wührer, Mangimi Niccolai, Riserie Roncaia and De Franceschi Monfalcone seek compensation for damage which they claim to have suffered during the periods set out above. Consequently, the objection that those applicant's actions are out of time must be dismissed.

19 As appears from its application to the Commission of 8 May 1980 and its reply to a question put by the Court, De Franceschi Marino & Figli seeks compensation for damage which first became apparent on 1 August 1975, hence before the aforementioned date of 28 November 1975. Consequently, the objection that its action is time-barred must be upheld in part, that is to say as regards the amounts claimed by way of compensation for damage which occurred between 1 August and 28 November 1975, and dismissed as regards the amounts claimed in respect of damage which occurred during the period subsequent to 28 November 1975.

20 As regards Birra Peroni, the defendant institutions claim that its rights are partially time-barred on the ground that it interrupted the five-year period of

limitation laid down by Article 43 of the Statute of the Court by making its application to the Commission on 23 June 1982, whereas its application to the Court for compensation concerns, in part, damage which occurred more than five years earlier than 23 June 1982.

21 In reply the applicant raises a new issue: it contends that one of the preconditions for the harmful effect which had to be fulfilled before the five-year limitation period began to run was the publication of Council Regulations Nos 1125 and 1127 of 28 May 1978 reinstating the unlawfully abolished refunds; the regulations were not published until 30 May 1978.

22 The applicant's argument cannot be upheld. The regulations in question cannot have any causal connection with the damage complained of by the applicant, which occurred as a direct result of the unlawful situation obtaining prior to the publication and the entry into force of those regulations, which were adopted with a view to bringing that situation to an end.

23 It follows that, in the case of Birra Peroni, which claims compensation for damage incurred as from 1 September 1975, the objection that its action is time-barred must be upheld in part, that is to say as regards the damage which occurred between 1 September 1975 and 23 June 1977, and dismissed as regards the damage which occurred after 23 June 1977.

24 It follows from the foregoing that the periods accepted for each of the applicants terminate on 18 October 1977 and commence as follows:

(a) for the applicant in Case 256/80, on 18 August 1975;

(b) for the applicant in Case 257/80, on 24 November 1975;

(c) for the applicant in Case 265/80, on 28 November 1975;

(d) for the applicant in Case 5/81, on 12 January 1975;

(e) for the applicant in Case 51/81, on 9 March 1976; and

(f) for the applicant in Case 282/82, on 23 June 1977.

The Community's liability

25 As the Court held in its judgments of 4 October 1979 in the cases cited above, in its judgment of 18 May 1983 in Case 256/81 *(Pauls Agriculture* v *Council and Commission of the European Communities,* [1983] ECR 1707) and in other judgments in similar cases, the Community has incurred liability because it abolished the refunds for maize gritz by Regulation No 665/75 and those for broken rice by Regulation No 668/75 and yet retained them for maize starch, thus infringing the principle that there should be equal treatment for the various categories of producer concerned.

The damage

26 Against the claims for damages calculated on the basis of the refunds that were not paid during the periods in question, the Council and the Commission have raised the objection that the applicant producers or, where the applicants are assignees, their suppliers eliminated or could have eliminated the damage by passing on in their selling prices the losses caused by the abolition of the refunds. They contend that it is for the applicants to prove the contrary in order for their actions to be considered well founded.

27 For their part, the applicants deny that it was possible to pass on the losses in that way. In the alternative, they contend that in any event the burden of proof would normally be borne by the defendant institutions, since they have raised an objection relating to the actual character of the damage. Nevertheless, the applicants have submitted certain material and statistical data to show that the losses were not passed on for commercial reasons and that any increases which took place in the price of beer in Italy were due to other factors, in particular factors of an economic and fiscal character.

28 Since the defendant institutions have produced no evidence casting doubt upon those data or the conclusions which the applicants draw therefrom, their objection cannot be upheld.

29 It is true that the defendant institutions have put forward the argument that it may be assumed that the producers passed on the damage in their selling prices because the rights to the refunds were assigned and that that assignment must surely have been effected in return for an increase in prices.

They further maintain that the presumed price increase indicates that, even where rights were not assigned to breweries, the losses were largely passed on in producers' selling prices, since the applicant producers' prices were all on the same level.

30 That line of argument must be rejected, It cannot be considered proven that the assignments were effected in return for an increase in selling prices and even less that, even where no assignment took place, there was a generalized price increase.

31 As regards the applicants which have instituted proceedings as assignees, the defendants contend, contrary to the preceding line of argument, that in order to establish actual damage those applicants must prove that they paid the producers who assigned those rights to them a supplementary price corresponding to the unpaid refunds.

32 That argument cannot be accepted either. The assignees do not base their claim on the assignors' having passed on to them amounts corresponding to the refunds at issue. They claim that they suffered damage because they did not receive refunds on the basis of the rights which had been assigned to them. Consequently, the question whether there was a *quid pro quo* for the rights assigned to them and, if so, the form which it took is not relevant.

33 It follows from the foregoing that the damage for which the applicants must be compensated has to be calculated on the basis of its being equivalent to the refunds which would have been paid to them if, during the periods set out above, maize gritz and broken rice used by the brewing industry had qualified for the same refunds as maize starch.

34 As regards the conversion into national currency of the damages to be paid by the defendant institutions to the applicants, as the Court held in its judgments of 19 May 1982 in Joined Cases 64 and 113/76, 167 and 239/78, 27, 28 and 45/79 *(P. Dumortier Frères S A and Others* v *Council of the European Communities,* ([1982] ECR 1733) and of 18 May 1983 in Case 256/81 *(Pauls Agriculture Limited* v *Council and Commission of the European Communities,* cited above), the rate of exchange to be applied is that prevailing at the date of the judgment in which it was held that there was an obligation to make good the damage.

35 As far as the quantum of damages sought by each of the applicants is concerned, the latter have submitted a number of documents to the Court as proof of the quantities of maize gritz and broken rice for which they claim to be entitled to compensation and of the amounts of the refunds not paid in respect of those quantities. The Commission is prepared to accept the accuracy of those quantities only on condition that they are verified by the competent authorities. The Court is not in a position at this stage of the procedure to give a decision on the accuracy of those data. Therefore, it is necessary to lay down by interlocutory judgment the criteria whereby the Court considers that the applicants must be compensated, leaving the amount of the compensation to be determined either by agreement between the parties or by the Court in the absence of such agreement.

The claim for interest

36 The applicants further claim that the Community should be ordered to pay interest at appropriate rates from the dates on which the payment of each refund became due so as to take account of the time which elapsed between those dates and the date on which the damage is actually made good.

37 Since the claim concerns the non-contractual liability of the Community under the second paragraph of Article 215, it must be considered in the light of the principles common to the laws of the Member States, to which that provision refers. It follows from those principles that a claim for interest is in general admissible. Taking into account the criteria laid down by the Court in similar cases, the obligation to pay interest arises on the date of this judgment, inasmuch as it establishes the obligation to make good the damage. The rate of interest which it is proper to apply is 6%.

On those grounds,

THE COURT (Fifth Chamber),

as an interlocutory decision,

hereby:

1. Dismisses the application made by Riseria Modenese in Case 267/80;

2. Orders the European Economic Community to pay the other applicants amounts equivalent to the production refunds for maize gritz and broken rice used by the brewing industry which they would have received if, during the periods commencing on 1 August and 1 September 1975 and terminating on 19 October 1977, the use of maize and rice for that purpose had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch; for each applicant the period in question is as follows:

   (a) Birra Wührer (Case 256/80), 4 September 1975 to 19 October 1977;

   (b) Mangimi Niccolai (Case 257/80), 16 March 1976 to 19 October 1977;

   (c) De Franceschi Marino & Figli (Case 265/80), 28 November 1975 to 19 October 1977;

   (d) Riserie Roncaia (Case 5/81), 26 January to 19 October 1977;

   (e) De Franceschi Monfalcone (Case 51/81), 4 April to 19 October 1977; and

   (f) Birra Peroni (Case 282/82), 23 June to 19 October 1977;

3. Orders that interest at the rate of 6% shall be paid on the above-mentioned amounts as from the date of this judgment, which shall also be the date to be taken into account for the purposes of the conversion of those amounts into national currency;

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

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

6. **Reserves the costs.**

Due Kakouris

Everling Galmot Joliet

Delivered in open court in Luxembourg on 13 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

O. Due

President of the Fifth Chamber

OPINION OF MR ADVOCATE GENERAL VERLOREN VAN THEMAAT DELIVERED ON 10 JULY 1984 [1]

Mr President,
Members of the Court,

1. The facts

For a full statement of the many facts relevant to these joined cases, reference may, as in previous cases, be made to the Report for the Hearing. The content of that report, for which provision is made in the Statute of the Court of Justice of the EEC (fourth paragraph of Article 18), influences quite considerably the length of the Advocate General's Opinion; in view of the Report for the Hearing that has been drawn up in the present instance I can confine myself to a brief summary of the principal facts.

1. — Translated from the Dutch.