

measures taken by the institutions. A specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided such details fall within the general scheme of the measures as a whole.

3. When certain constituent elements of a complex situation are difficult to apprehend with any accuracy the discretion which the Council has when it assesses that complex economic situation is not only exercisable in relation to the nature and scope of the provisions which are to be adopted but also, to a certain extent, to the findings as to the basic facts, especially in this sense that the Council is free to base its assessment, if necessary, on findings of a general nature.
4. The purpose of the premium payable to producers of potato starch, provided for in Council Regulation No 1125/78 amending Regulation No 2727/75 on the common organization of the market in cereals and in Council Regulation No 1127/78

amending Regulation No 2742/75 on production refunds in the cereals and rice sectors is to maintain the profitability of the potato starch industry and thus indirectly to ensure an outlet for an agricultural product, the importance of which for the agricultural economy in certain regions of the Community is evident. There is therefore no doubt whatever that these regulations are within the ambit of the objectives of the Common Agricultural Policy as such objectives are defined in Article 39 of the Treaty.

5. The granting of a production premium to one branch of industry to the exclusion of a competing branch does not amount to discrimination within the meaning of the second subparagraph of Article 40 (3) of the Treaty if the premium has been introduced for the purpose of obviating the special difficulties found to exist in the sector in question following the trend, unfavourable to that sector, of economic factors, such as the value of the by-products of both of the principal products.

In Case 166/78

GOVERNMENT OF THE ITALIAN REPUBLIC, represented by the Italian Ambassador in Luxembourg, A. Maresca, acting as Agent, assisted by M. Cevaro, Deputy State Advocate, with an address for service at the Italian Embassy,

applicant,

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by D. Vignes, Director of the Legal Department of the Council, acting as Agent, assisted by its Legal Adviser, A. Sacchetti, with an address for service in Luxembourg at the office of J. N. Van den Houten, the Director of the Legal Department of the European Investment Bank, 2 Place de Metz,

defendant,

supported by

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, C. Maestripiéri, acting as Agent, assisted by G. Berardis, a member of the Legal Department of the Commission, with an address for service in Luxembourg at the office of its Legal Adviser, M. Cervino, Jean Monnet Building, Kirchberg,

intervener,

APPLICATION for the annulment of Council Regulation (EEC) No 1125/78 of 22 May 1978 amending Regulation (EEC) No 2727/75 of the Council on the common organization of the market in cereals and of Council Regulation (EEC) No 1127/78 of 22 May 1978 amending Regulation (EEC) No 2742/75 of the Council on production refunds in the cereals and rice sectors (Official Journal L 142 of 30 May 1978, pp. 21 and 24),

THE COURT

composed of: H. Kutscher, President, J. Mertens de Wilmars and Lord Mackenzie Stuart (Presidents of Chambers), P. Pescatore, M. Sørensen, A. O'Keeffe, G. Bosco, A. Touffait and T. Koopmans, Judges,

Advocate General: G. Reischl

Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

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

I — Facts and procedure

1. Regulation No 120/67/EEC of the Council of 13 June 1967 on the common organization of the market in cereals (Official Journal, English Special Edition 1967, p. 33) granted a production refund for maize used by the starch industry for the manufacture of starch and quellmehl and also a production refund for potato starch.

The amounts of these production refunds were fixed by Regulation No 178/67/EEC of the Council of 27 June 1967 fixing production refunds for starches and quellmehl (Journal Officiel of 28 June 1967, p. 2617).

The third recital in the preamble to this regulation reads:

“Whereas taking into account the connexions which occur between production prices of raw materials used in the manufacture of cereals and non-cereal starches and the possibility of these two products being substituted to one another, it is appropriate to maintain a balanced relationship between the prices of the latter; whereas for that purpose it is appropriate to fix at the same level the refund granted in both cases; whereas, however, the refund paid to potato starch producers should enable a definite assurance to be given to potato producers in the Community of a price allowing them a fair income, while the conditions of the market in cereals used for the manufacture of starch and quellmehl and the common organization of the markets governing them, are sufficient to ensure that their price shall definitely be placed at the level of the threshold price; whereas, therefore, it is appropriate to lay down provisions to ensure that potato producers should definitely benefit from the refund made to potato starch manufacturers.”

The first paragraph of Article 1 of Regulation No 178/67 fixed for 100 kilograms of maize processed into starch a production refund equal to the difference between the threshold price of maize and a fixed sum of 6.80 units of account, whilst Article 1 (2) thereof provides that the production refund for 100 kilograms of potato starch shall be equal to “the arithmetical average of the amounts of the refund granted during the same marketing year for 161 kilograms of maize intended for the manufacture of starch”. That implies therefore that the production refund for 100 kilograms of maize starch and of potato starch is the same because in actual fact 161 kilograms of maize are required to manufacture one tonne of maize starch.

Article 3 (1) of the same regulation provides that

“The price to be charged by the producer at the delivered-to-factory stage, for the quantity of potatoes required to manufacture 100 kilograms of starch should be equal to the amount of the production refund laid down in Article 1 (2), increased by an amount equal to at least 8.18 units of account.”

2. The system introduced in this way has been maintained by later regulations. Nevertheless the amount of the production refund and the minimum free-at-factory price payable to the potato grower have been altered on several occasions.

3. The rules at issue were introduced by Council Regulation No 1125/78 of 22 May 1978 amending Regulation No 2727/75 on the common organization of the market in cereals and Council Regulation No 1127/78 of 22 May 1978 amending Regulation No 2742/75 on production refunds in the cereals and

rice sectors (Official Journal L 142 of 30 May 1978, pp. 21 and 24).

Article 2 of Regulation No 1125/78 reads as follows:

"Article 11 (3) of Regulation (EEC) No 2727/75 shall be replaced by the following paragraphs:

3. A premium may be paid to potato starch manufacturers.
4. The Council, acting by a qualified majority on a proposal from the Commission, shall adopt rules for the application of this article and fix the amount of the production refund and the amount of the premium."

whilst Article 3 of Regulation No 1127/78 provides that:

"The following Article 3a shall be added to Regulation (EEC) No 2742/75:

Article 3a

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

In addition Article 2 of Regulation No 1127/78 increased the minimum price payable to potato growers from 175 to 178.50 units of account.

The present application for annulment brought by the applicant on the basis of Article 173 of the Treaty challenges the legality of Article 2 of Regulation No 1125/78 and of Article 3 of Regulation No 1127/78.

The last recital in the preamble to Regulation No 1125/78 reads as follows:

"Whereas the constraints imposed on the potato starch industry could lead to a disturbance of the balance between the different starch industries and whereas it may also prove necessary to provide for

a premium to be paid to potato starch manufacturers;"

The second and third recitals in the preamble to Regulation No 1127/78 read as follows:

"Whereas, in view of the situation which will exist as from the beginning of the 1978/79 marketing year, particularly as a result of the increase in Community farm prices for that marketing year, the minimum price paid to the producer of potatoes intended for starch manufacture should be adjusted;

Whereas the aforesaid regulation provides that a balanced relationship should be maintained between potato starch and maize starch prices and that the production refund should be the same for both products; whereas, however, in order to maintain this balanced relationship and taking into account the increasing advantage enjoyed by the maize starch industry, particularly because of the by-products obtained from such manufacture, a premium should be paid to potato starch producers."

4. The parties agree that in order to maintain a balanced relationship between the prices of the two products in question account must be taken when the production refund and the minimum price of potatoes are fixed, on the one hand, of the cost of the raw materials and, on the other hand, of the cost of processing. In order to arrive at the cost price of either one or the other product the value of the by-products must be deducted from the sum of those two components.

To denote the difference between the cost of obtaining sufficient supplies of potatoes to produce 100 kilograms of potato starch (based on the minimum free-at-factory price payable to the potato grower), on the one hand, and

the cost of obtaining sufficient supplies of maize to produce 161 kilograms of maize starch (based on the threshold price for 161 kilograms of maize less the production refund), on the other hand, the expression "the actual delta" is generally used.

5. The application was lodged on 31 July 1978.

When the Italian Government lodged the said application it applied at the same time for the adoption of an interim measure suspending the operation of the provisions which it requests the Court to annul. The application was dismissed on 28 August 1978 by an order made by Judge Pescatore, deputizing for the President of the Court.

The Commission by an application lodged on 5 December 1978 requested the Court to allow it to intervene in the case in support of the submissions of the Council. The Court allowed the intervention by an order of 6 December 1978.

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

II — Conclusions of the parties

1. The *Italian Government* claims that the Court should:

- annul Regulations No 1125/78 and No 1127/78 in relation to the provisions concerning the possibility and the amount respectively of a premium of 10 units of account per tonne payable to potato starch manufacturers (Article 2 of Regulation

No 1125/78; Article 3 of Regulation No 1127/78); with all consequential measures including costs.

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

- dismiss all the claims made in the application by the Italian Government as unfounded.

III — Submissions and arguments of the parties

A — *Preliminary question concerning the vote by the Italian Government within the Council in favour of the regulations challenged*

1. *The Council* stresses that the representative of the Italian Government stated within the Council that he was in favour of the acts which have been challenged.

According to the Council in these circumstances the application for annulment raises a question of principle, especially as the act in question is an act of economic policy based on an evaluation of a specific economic situation. The Council leaves it to the Court to determine whether the said circumstances are not such as to involve certain legal consequences, especially with reference to the success with which the action of the Member State concerned may meet. The Council takes the view that arguments based on legal certainty may be put forward in support of the view that the Italian Government can neither in general have any right to bring an action for the annulment of acts in favour of which it has voted nor specifically challenge those acts by pleading such legal grounds as the complaint of disproportionality in so far as such grounds are directly connected with the economic assessment which that State has helped to arrive at.

The Council goes on to say that, if the applicant's complaints based on infringement of the Treaty or of any rules of law relating to its application were taken into consideration, the result would be that not only the advisability of the measure adopted but also its character as an institutional measure would be called in question again.

The Council points out in this connexion that the judgment of the Court of 18 February 1970 in Case 38/69 *Commission of the European Communities v Italian Republic* [1970] 1 ECR 47, at pp. 56 and 57 makes it clear that a Member State cannot be regarded as being able to bring an action in the above-mentioned circumstances against the act in question in reliance on such complaints relating to infringement of the Treaty as those pleaded by the Italian Government, the principal aim of which is to show that the interests of the Member State in question, which the latter has not succeeded in getting acknowledged during the political discussion in which it participated, have been disregarded.

In the view of the Council considerations derived from the interest which a legal person has in instituting legal proceedings supports this finding; it seems to be difficult to concede that a Member State, which during the Council's deliberations had contributed to the Council's assessment of the economic situation culminating in the measures decided upon by accepting it, can afterwards claim to have an interest as a member of the Community in the annulment of those measures. In such a case its interest can quite clearly only be an interest as an individual State.

Finally the Council submits that, as far as concerns the sphere of public law in general, the academic writers have confirmed that there are several reasons why an authority or an agent of a public body cannot challenge the act of an

authority coming under the jurisdiction of the same public body. The application cannot in fact in such a case be based on the interest of the public body.

2. The *Italian Government* submits that the Council is not the organ of the Member States but a Community organ as is shown by the two observations to the effect, firstly, that the relationship of subordination, which is peculiar to common bodies, in relation to the organization to which they belong, is completely lacking and, secondly, that any decisions taken by the Council, the content of which differs from the specific instructions given by the governments to their representatives, also bind the Member States. This position of independence is confirmed by the fact that the Council adopts most of its decisions by a simple majority. Thus the vote of the representative of the Member States does not have any independent significance but is one aspect of the collegiate will of the Council.

Consequently the Italian Government takes the view that the Member States are free to challenge the acts of the Council irrespective of the way they vote.

It is of the opinion that the principle of legal certainty relied on by the Council requires that the rule be expressed in unambiguous language that the method of interpreting the rule does not admit of any abuse and that the rule be adopted before the events occur; but this principle is not applicable to the problem in question.

It is the view of the Italian Government that no blame attaches to it for challenging an act which is its own: the vote within the Council of the representative of a Member State cannot be attributed to the latter, because it is not cast on behalf of an organ of that State but as an act of a Community organ;

consequently the measure adopted by vote was willed by the Council and not by the Member State. The latter is therefore entitled to challenge it as an act originated by a third party but not by itself.

B — Substance

1. Introductory remarks on the relationship between the cost of the raw material, maize, and the cost of raw material, potatoes

The Italian Government quotes in support of these above-mentioned observations of Italian and German writers in particular. In this context it emphasizes in conclusion that the Member States do not, within the context of the first paragraph of Article 173 of the Treaty, have to furnish proof of any special circumstances in particular with reference to the interest they have in instituting proceedings.

(a) The *Italian Government* first of all examining, by way of a preliminary statement of the situation on which the disputed regulations have exerted an influence, the history of the rules and regulations on production refunds for maize starch and potato starch.

In this connexion it has produced to the Court a working paper of the Commission which contains *inter alia* the following figures:

(1 000 tonnes)

Production						
	1967	1968	1973	1974	1975	1976
Maize starch	1 195	1 303	1 952	2 070	1 993	2 201
Potato starch	509	493	776	929	698	507

(in u.s. per tonne)

Marketing year	1967/68	1968/69	1973/74	1974/75	1975/76	1976/77	1977/78	1978/79
Average threshold price of maize	91.63	95.94	104.33	115.26	130.98	142.79	149.91	152.15
Minimum price of potatoes	81.80	81.80	81.80	104.50	162.00	172.00	175.00	178.50
Grower's receipts:								
— Maize	147.52	154.46	167.97	185.56	210.87	229.89	241.35	244.96
— Potatoes	119.84	126.78	140.29	142.33	178.10	194.54	202.37	205.87
Production refund:								
— Maize starch	23.63	27.94	36.33	23.50	10.00	14.00	17.00	17.00
— Potato starch	38.04	44.98	58.49	37.83	16.10	22.54	27.37	27.37
Industrial costs:								
— Maize starch	109.48	109.48	109.48	147.73	197.77	207.35	213.90	217.59
— "Actual delta"	27.68	27.68	27.68	43.23	32.77	35.35	38.90	39.05

It points out with reference to these figures that the quasi-equilibrium which has existed as far as concerns the increase in the production of and trade in potato starch and the increase in the production of and trade in maize starch from the 1967/68 marketing year to the 1973/74 marketing year changed unexpectedly with the approach of the 1974/75 marketing year: on the one hand the production refund for maize starch was reduced; on the other hand the income from its by-products was calculated on new bases with the result that there was a substantial increase in the "actual delta".

According to the Italian Government this gap was in no way justified by the trend of the income from by-products and in particular by the costs of the said by-products, and it resulted in an increase of some 20% in the production of potato starch, whilst during the same year the production of maize starch for industrial uses only showed an increase of some 6%.

The Italian Government then calls attention to the fact that the Council, for the 1975/76 marketing year, without basing its decision on any check of an economic and technical nature, reduced the above-mentioned gap by lowering the figure from 43 to 32 and that at the same time the minimum price of potatoes was increased from 104.50 to 162 units

of account. In its view the result of this irregular movement up and down, followed by a fresh increase of the difference in the evaluation of the income from by-products (from 32.77 to 35.35 units of account) and a subsequent increase of the income of potato growers (from 173 to 194 units of account), has been a fall in the production of potato starch (from 929 to 698 thousand tonnes) which it is wrong to attribute to greater competition from the maize starch industry, seeing that during the same period, the production of maize starch for industrial uses (50% of total production) has also fallen. According to the Italian Government the real reason is the lack of development of industries using maize starch and potato starch when account is taken of the extent to which the industrial maize starch quotas may vary. Since during these years the prices of agricultural foodstuffs have continued to rise, there has, according to the Italian Government, been a change in the use of potatoes which have been used for human consumption and feeding-stuffs.

The Italian Government then submits that from the 1974/75 marketing year onwards, whereas the price of maize continued to rise year by year, the production refunds for maize starch began to fall with the result that the industrial costs of maize starch increased more than those of potato starch.

(in u.a. per tonne)

	Cost of obtaining supplies		Income of the potato grower
	Maize starch	Potato starch	
1973/74	109.48	81.80	140.29
1977/78	213.90	175.00	202.34
	104.42	93.20	62.05

The Italian Government goes on to say that these figures indicate that neither the potato grower nor the potato starch industry has derived any benefit from part of the burden placed on the maize starch industry and that such part is therefore revenue forming part of Community resources, a kind of concealed tax on the manufacture of maize starch. The Italian Government stresses that during the same period the "actual delta" moved from 27.68 to 38.90 units of account.

Finally it points out in this context that the disputed regulations, by introducing in particular a premium for potato starch, the passing on of which to the potato grower has not been provided for, have appreciably altered the relationship between maize starch and potato starch.

(b) *The Council* points out that, although in 1967 the selling price of the finished product manufactured from potato starch and from maize starch was approximately the same and although the processing costs of each of these two finished products were also very similar, the cost of the raw material for potato starch was on the other hand less than that for maize starch, whereas the proceeds of sale of maize starch by-products were on the contrary much higher than those of potato starch by-products.

The Council goes on to say that when, between 1974 and 1976 prices doubled as a result of the inflation caused by the oil crisis, the system proved to be inadequate, especially as the prices of by-products diverged. This caused a crisis in the potato starch sector and that is why the Council has adopted a premium of 10 units of account payable to producers of potato starch.

The Council explains that the "actual delta" which remained the same from 1967 to 1974 then leaped up because of the increase in prices of cereals on the world market, the rise in all prices at that time, the reduced competition from substitute products made from petrochemicals as far as concerned maize starch and, more generally, because of a complete change in the economic situation. It points out furthermore that from 1974 to 1978 the minimum price of potatoes required for one tonne of potato starch payable to the potato grower went up by 118%, whereas during the same period the price of supplies of maize only went up by 99%.

It also stresses that the production of maize starch went up between 1967 and 1976 whereas the production of potato starch was stagnant.

The Council then mentions certain changes and constraints peculiar to potato starch; the manufacturer thereof, in addition to having to pay the minimum price, is usually bound by purchase contracts entered into before the harvest and even by long term contracts; since the crop year is short he must cover the cost of his plant and machinery in a shorter time than the manufacturer of maize starch; there are also charges for storing the manufactured product; since the potato starch industry is regarded as very pollutant it has had to carry out a large amount of work from the standpoint of ecology. According to the Council the difficulties peculiar to potato starch are to be seen in the closing of several potato starch factories and also in other undertakings making an ever increasing loss.

The Council points out that it has founded its argument on the following calculations, the figures disputed by the Italian Government being underlined:

ITALY - COUNCIL

(in u.s. per tonne)

	Maize starch		Potato starch	
	1967	1978	1967	1978
Cost of raw materials	109.48	217.62	81.80	178.50
Processing costs	+ 39.00 148.48	+ 49.00 266.62	+ 40.00 121.80	+ 51.00 229.50
Value of by-products	- 40.00	- 79.16	- 5.00	- 22.30
Cost price of 1 tonne of the finished product	108.48	187.46	116.80	207.20

The Council, for the purpose of justifying the introduction of the premium at issue, points out that in 1978 the value of the by-products increased considerably with the result that the processor of maize starch, but not the grower of maize, made an additional profit; since the system had thus become unbalanced in such a way that maize starch benefited it was necessary to restore the balance in favour of potato starch, although it was not the potato grower who was to profit by this increase in the cost of the by-products of maize and maize starch; understandably it was the manufacturer of potato starch who benefited from the payment of the premium.

The Council stresses that the Italian Government's criticism is not just aimed at the premium but rather at the entire system stemming from an assessment of a complicated economic situation. The Council draws attention to the fact that in its case-law the Court has repeatedly held that in assessing such a situation Community institutions may exercise a wider discretion.

(c) The *Italian Government* replies that the figures produced by the Council must be corrected, the figures disputed by the Council being underlined:

(in u.s. per tonne)

	Maize starch		Potato starch	
	1967	1978	1967	1978
Cost of raw materials	109.48	217.59	81.80	178.50
Processing costs	+ <u>58.40</u> 167.88	+ <u>77.00</u> 294.59	+ <u>46.30</u> 128.10	+ <u>51.00</u> 229.50
Value of by-products	- 40.00	- 79.16	- 5.00	- 22.30
Cost price of 1 tonne of the finished product	127.88	215.43	123.10	207.20

The Italian Government, for the purpose of calculating the processing costs for 1978, takes as its starting-point those of Italian maize starch manufacture which came to 86.10 units of account. In its view the efficiency of Italian maize

starch manufacture is not below that of other countries and the upward trend of the production factors must be calculated in the same way in the other countries concerned. It submits that the processing costs of the European maize starch

industry must, for guidance, be fixed on average at 77 units of account.

In the view of the Italian Government the figures calculated in that way show that the payment in 1978 of a premium of 10 units of account to the producers of potato starch meant that in the end the production costs of maize starch were heavier than those of potato starch, by more than 18.23 units of account ($215.43 - 207.20 + 10 = 18.23$), leaving the by-products out of account.

The Italian Government submits that, apart from certain maize starch factories and some small potato starch factories discontinuing operations, the potato starch sector has felt the effects of the crisis, which KSH, a large Netherlands producer, is passing through, even though the causes of its difficulties are connected with the maize starch and not with the potato starch industry.

According to the Italian Government the annual rates of development of the potato starch industry until 1974 were greater than those of the maize starch industry: in that year this trend came to an end, with production falling from 929 000 tonnes to 507 000 tonnes in 1976 for two different reasons: drought and the fact that it seemed to potato growers to be more profitable to market their potatoes for human consumption and animal feed rather than for potato starch. According to the Italian Government the production of potato starch went up again to 780 000 tonnes in 1977 and it is estimated that it will reach 840 000 tonnes or probably more in the 1978/79 marketing year. The production of maize starch did not increase from 1974 to 1976.

(d) The *Council* annexed to its rejoinder a general review of the economic data relating to the cost price

of the products in question undertaken by the Institute of Agricultural Economics of the University of Göttingen, which reaches the conclusion that, in the circumstances prevailing during the 1978/79 marketing year and taking into account the cost of the two raw materials, the respective processing costs and finally, the return from the respective by-products, maize starch manufacture was less expensive than potato starch manufacture. According to this expert opinion the difference was 12.66 units of account per tonne.

2. The statement of reasons for the regulations at issue

(a) The *Italian Government*, with reference to the last recital in the preamble to Regulation No 1125/78, draws attention to the fact that the reason for the introduction of the premium is that the potato starch industry could find itself in difficulties. Now the statement of the reasons upon which that regulation is based does not mention these difficulties.

Furthermore the Italian Government points out that the second and last recitals in the preamble to Regulation No 1125/78 are incompatible in so far as the first calls attention to the judgments in which the Court held that giving preferential treatment to one product when a similar product competes with it is prohibited, whilst the second recital states that it is necessary to grant a premium in respect of potato starch to the detriment of maize starch.

The Italian Government's last complaint relating to the said statement of reasons concerns the third recital in the preamble to Regulation No 1127/78. In its view that recital should state the reasons for the increasing advantage enjoyed by the

maize starch industry because of its by-products.

(b) The *Council* submits that the Court's decided cases make it clear that, since the regulations at issue are part of a set of regulations concerning the same subject-matter, the claim of lack of reasoning must be examined in the light of the statements of reasons not only in the regulations at issue but also in the regulations which they have amended. The Council also draws attention to the fact that the Court has also held that the requirements of Article 190 of the EEC Treaty are met if the reasons given explain in essence the measures which are adopted by regulation.

The Council emphasizes that the constraints mentioned in the last recital in the preamble to Regulation No 1125/78 are the difficulties inherent in the potato starch industry. As these latter difficulties have from the outset justified potato starch being given different treatment from maize starch, they do not therefore, in the opinion of the Council, need to be stated in detail, since the situation has not changed. According to the Council the competition from substitute products of chemical origin is another circumstance for which a detailed statement of reasons is unnecessary, because it has already been set out in the basic regulation. The Council goes on to say that there is a third circumstance, which is new, namely, the competitive advantage derived by maize starch from the value of its by-products which has been explained in detail in the third recital in the preamble to Regulation No 1127/78.

In addition the Council points out that the second and last recitals in the

preamble to Regulation No 1125/78 can hardly be said to be inconsistent because they relate to two different provisions. According to the Council the last recital in the preamble to that regulation and Article 2 thereof are not incompatible with the decided cases of the Court mentioned in the second recital: those cases were based on the finding that there was equality of treatment of the products in question; but maize starch and potato starch have from the outset been treated differently in order to achieve a balanced relationship.

The detailed reasons which the applicant claims the third recital in the preamble of Regulation No 1127/78 should contain, according to the Council, go beyond the requirements in the case of a legislative act. Furthermore the Council submits that when this recital refers to the fact that the balance between the two products at issue has been disturbed because of the increasing value of the by-products of maize starch, it implies that other factors forming part of their relationship have not undergone any substantial change. The Council calls attention to the fact that one way of remedying this imbalance has been mentioned, namely the premium. There appears to the Council to be no doubt whatever that the reasons explain the substance of the measure adopted. According to the Council maize starch has in fact during the last few years enjoyed an increasing advantage.

(c) The *Italian Government*, with reference to the alleged difficulties peculiar to the potato starch industry, replies that the factors referred to by the Council are not mentioned in the regulation and that the statements in the defence cannot fill the gap in the measure which has been challenged. In order to justify the adoption for the first

time of a measure there must moreover be a new statement of the reasons on which it is based.

According to the Italian Government the lack of reasoning in Regulation No 1125/78 cannot be remedied by using that in Regulation No 1127/78, because that reasoning is itself inadequate; on the other hand the statement of the reasons upon which the latter regulation is based deals with the amount of the premium, whilst that in Regulation No 1125/78 is concerned with its advisability; Regulation No 1127/78 does not mention this, since it presupposes that it has already been established.

The Italian Government admits that the second and sixth recitals in the preamble to Regulation No 1125/78 refer to different products but takes the view that that does not prevent the principle laid down by the Court for quellmehl from being incompatible with the one laid down for starch products.

3. The alleged infringements of the combined provisions of the first paragraph of Article 40 (3) and of Article 39 of the Treaty

(a) The *Italian Government* is of the opinion that if two different products are applied for a specific use, but one of them is bound to be dearer than the other, it would be inconsistent with the obligation to increase agricultural productivity laid down by Article 39 (1) of the Treaty artificially to equalize the costs by way of aid.

(b) The *Council* submits that, in so far as the Italian Government complains that the measures in question do not seek to attain the objectives of Article 39 in the

proper way, the complaint is in substance in line with the specific submissions that there have been breaches of the principle of non-discrimination and of the principle of proportionality.

4. The alleged breach of the principle of non-discrimination laid down in the second subparagraph of Article 40 (3) of the Treaty

(a) The *Italian Government* submits, as far as concerns Regulation No 1125/78, that the premium alters in an unexpected manner the usual relationship between the two branches of industry in question by encouraging one to the detriment of the other and it accordingly discriminates between them.

The Italian Government, as far as concerns Regulation No 1127/78, goes on to submit that the regulations in force before the introduction of the premium at issue have not established a balance of competition between the products in question but that they could be accepted, because they enabled the industries concerned to survive. Now when intervention goes so far, as it has in the case of the premium in question, that it renders production extremely difficult or brings it to a halt such intervention may, according to the Italian Government, be classed as discriminatory and invalidate the underlying measure.

(b) The *Council* replies that this complaint presupposes that two similar situations have been dealt with in a different manner or that dissimilar situations have been dealt with in the same way. Now, in the present case, there are, in its opinion, two different situations which have been dealt with differently so as to maintain a balanced relationship between two different products.

(c) The *Italian Government* replies that the concept of the comparability of situations must not be confused with the absolute identity of the latter. In its view maize starch and potato starch are in every way comparable: potato starch can also be used for the purposes for which maize starch is intended; Community rules presuppose that the products in question are competitive.

According to the Italian Government there are no objective reasons of such a kind as to justify the discrimination. In its view the increase in the value of maize starch by-products cannot be relied on in this context; there was no such increase from 1977 to 1978; during the preceding years, when there was an increase, the Council's answer to such an increase was to increase the "actual delta". In order to justify a measure, which was entirely different and in addition to the increase of the "actual delta", there ought to have been a reason other than the alleged increase in the value of the by-products which had been made good.

(d) The *Council* in its rejoinder refers to the following objective reasons which would justify different treatment of the products in question: the different value of the by-products; the different circumstances in which supplies of raw materials are procured and the finished product is marketed; the differing conditions of production due not only to technical reasons but also to the environmental laws in force. According to the Council the objection cannot be raised in this connexion that a measure which is absolutely different from the one which had been adopted until then and is in

addition to the latter requires a fresh reason for its adoption: the Council is free to choose the measures which it considers to be the most suitable for the achievement of the objectives of Article 39 of the Treaty; the mere confirmation that the measures adopted before have not enabled these objectives to be attained justifies having recourse to fresh measures; the discriminatory nature of a measure must be determined solely in the light of the objective circumstances justifying it and the aims which it seeks to attain.

(e) The *Commission* expresses its opinion on this submission and also on the alleged breach of the principle of proportionality. As far as concerns the other submissions it refers to the Council's defence.

According to the Commission the following factors show clearly how precarious the economic situation of potato starch is compared with maize starch: the increase in the value of maize starch by-products which have several outlets; the derived products of potato starch on the contrary have a very low value and are used mainly for feeding-stuffs or as fertilizers; about 80% of the production of potato starch is intended for the technological industrial sector and this makes it especially vulnerable *vis-à-vis* synthetic products; as far as maize starch is concerned this percentage is about 40% whilst 60% of its production goes to the food sectors where there is no competition from chemical products; unlike the maize starch industry the potato starch industry only operates for three months each year and is in the main forced to enter into all

its contracts with producers before the processing starts; potato starch factories, unlike maize starch factories, depend for their raw materials entirely on Community resources; furthermore they give rise to serious effluent problems.

To allow natural products to be exposed to the competition of chemical products and at the same time to guarantee a balance within this category are objectives which come within Article 39 of the Treaty. In the Commission's view granting aid to a product, which is in serious difficulties as a result of competition and whose function of guaranteeing outlets to a sensitive agricultural product must be protected, is not discriminatory.

The Commission adds that having regard in particular to the increase in the value of the by-products of maize starch the production refund is no longer able to fulfil its function; that is why a premium has had to be paid to producers of potato starch by means of which it was expressly sought to re-establish the balance between two dissimilar situations.

5. The alleged misuse of powers

(a) The *Italian Government* argues in the context of this claim that through the granting of the premium at issue the agricultural policy is being used for the purpose of pursuing an industrial policy.

In its view reliance cannot be placed on the fact that the premium is a means of assisting the potato grower: either the crisis in the potato starch manufacturing

industry is due to the absence of raw materials in which case the measure adopted comes up against the principle of proportionality since it goes further than the objective which it seeks to obtain; or that crisis has been caused by reasons inherent in the potato starch manufacturing industry and then the principle of non-discrimination enjoined that the maize starch manufacturing industry should not be threatened.

(b) The *Council* submits that the industries concerned are agricultural industries.

(c) The *Italian Government's* reply is to concede that the industries concerned form part of the agricultural sector. It goes on to argue that, although in the absence of special objective reasons the costs of the two competing products may not be equalized artificially, granting aid to one of them not only infringes Article 39 of the Treaty but — in so far as it is not aimed at dealing with the crisis which has arisen in the sphere of basic agricultural products but at increasing the profitability of the associated processing industry — also amounts to a misuse of powers.

(d) The *Council* points out in its rejoinder that the preceding argument of the applicant is likely to create some confusion in the statement of the grounds of its case: if it is accepted that the processing industries in question form part of the agricultural sector the Council does not easily understand what other complaints may be made against it except those which relate to infringement of the Treaty or of essential procedural requirements.

6. The alleged manifest error in determining the value of the by-products

(a) The *Italian Government*, with reference to the figures given under 1 (a) above, submits that the big drop in the production of potato starch recorded since 1974 was due to the poor potato crops in Europe and to the fact that large quantities of potatoes which usually went to potato starch factories were diverted to other uses because prices were more favourable.

The Italian Government goes on to say that the production of maize starch continued to increase each year, if the loss of that part of the market suffered by both the maize starch and potato starch industries is disregarded. If the argument that the potato starch factories are placed at a disadvantage compared with maize starch factories was correct, the loss suffered by potato starch ought, according to the Italian Government, to have benefited maize starch and this is not borne out by the figures.

Finally the Italian Government points out that the value of the by-products, on which Regulation No 1127/78 is based, has been calculated without taking into account the costs which the industry had to bear in the case of these products.

(b) According to *the Council* the figures, given under 1 (a) above, indicate that maize starch stood up better than potato starch to the effects of the general economic crisis, even if account is taken of the poor potato crops during the last few years, and this proves that the more productive manufacturing process in the case of maize starch to a great extent enabled the producers thereof to

eliminate from the market the manufacturers of potato starch. This conclusion is corroborated by the recent closing down of certain potato starch factories and by the fact that the potato starch manufacturers were losing money or no longer making a profit. The Council in this context draws attention to the fact that the premium at issue is payable only during the 1978/79 marketing year. The Council points out that the figures for the value of the by-products clearly start out with the implied assumption that the processing costs for the two products in question and their by-products are at approximately the same level.

The Council's conclusion is that the disputed measure manifestly does not exceed the discretion which it has in the matter and does not appear to be based on a manifestly erroneous assessment of the facts either.

(c) The *Italian Government* replies that the issue in this case is not what are the limits of the discretion but rather whether the exercise of that discretion is based on a manifest error of fact.

7. The alleged breach of the principle of proportionality by Regulation No 1127/78

(a) The *Italian Government* stresses, in the context of this submission, that the objective of the regulation in question was to assist the potato grower. It takes the view that, in order to attain this objective, it was unnecessary to alter the balance between the maize starch and the potato starch industries. The potato grower has been able to profit from the increase in the minimum price of potatoes, from the increase in the

production refund or from the granting of a premium.

The Italian Government adds, with reference to its observations submitted under 1 (a) above, that part of the financial burden imposed on the maize starch industry during the last four years has benefited the Community. In its view this amount is a concealed tax for the benefit of the Community so that the system in force before the disputed regulation was adopted was already in breach of the principle of proportionality.

(b) The *Council* replies that if it is asserted, as it must be, that the premium in fact maintains the balance between maize starch and potato starch the Italian Government's submission comes up against this premise. The *Council* goes on to argue that if it is accepted that the aim is to ensure that there is a large outlet for certain categories of agricultural producers, for whom it is desired to ensure at the same time a fair income, the solutions advocated by the Italian Government do not merit consideration.

In fact granting a larger refund for potato starch together with a corresponding increase in the refund for maize starch would not have any effect at all on the relationship of the one product to the other in the field of competition; paying a premium only to potato growers would not solve the financial difficulties of potato starch manufacturers and would not improve their unfavourable position compared with maize starch manufacturers caused by the smaller returns from potato starch by-products.

(c) The *Italian Government's* reply is that to assert, as the *Council* has done, that the premium ensures that the balance between maize starch and potato starch is maintained, does not indicate that the means adopted is proportional to the aim. On the other hand this assertion is belied by the arguments put forward by the Government which establish that the premium has artificially aggravated the production costs of maize starch manufacturers to a greater extent than those borne by potato starch manufacturers.

To say that increasing the refund has no effect on the competitive position of the products in question is, according to the Italian Government, tantamount to forgetting that an increase in the subsidy to potato growers results from the increase in the refund. To say that a premium paid to the latter would not remove the difficulties of the potato starch industry amounts to forgetting that the objective in relation to which the proportionality of the means adopted has to be determined, is aid to potato growers. Finally to say that the measures proposed by the Government would not make good the lower return from potato starch by-products is to forget that this disadvantage, as the Italian Government has shown, does not exist.

(d) The *Council* points out in its rejoinder, that, as the apportionment of the financial burdens is not discriminatory, one of the elements of a breach of the principle of proportionality is absent in this case. Furthermore the arguments in the *Council's* defence are of such a kind as to prove that the introduction of a premium payable to

producers of potato starch was the only appropriate measure for achieving the objective sought to be attained. The second constituent element, according to the case-law of the Court, of a breach of the said principle is missing.

As far as concerns the alleged concealed tax on the production of maize starch represented by the increase in the cost of obtaining supplies the Council submits that its observations make it clear that the percentage increase in the cost of obtaining supplies of potato starch was higher than in the case of maize starch. In any case the Council finds it difficult to accept that the effect of the increase in the cost of obtaining supplies of maize starch, following changes in the prices of agricultural products, may be regarded as a concealed tax.

(e) The *Commission* draws attention to the fact that the measure at issue cannot be abandoned in the context which it has described (under 4 (e) above), and if it is desired to keep open the vital outlets for Community production of potatoes granting a larger refund for potato starch with an equivalent increase for maize starch would have no effect whatever on the situation, apart from the fact that the refund would have to be paid to the potato grower; paying a premium directly to the latter would not get over the difficulties faced by the producer of potato starch. According to the Commission the premium payable to the producer of potato starch is not of such a kind as to affect adversely the maize starch producers who are in a sufficiently favourable situation not to feel the effects of a premium the amount whereof is in any case limited, and which only partially covers the element of cost which one tonne of potato starch has to bear compared with a corresponding quantity of maize starch: ± 20 units of account. Finally the Commission recalls that the premium has only been

introduced for the current marketing year.

The Commission point out on the question of production costs that even if the figures put forward by the Italian Government are acknowledged to be justified, it is unlikely that the increase only affects maize starch and does not affect potato starch to the same extent. According to the Commission, once this proposition is accepted, the whole of the argument formulated by the Italian Government inevitably falls to the ground.

The Commission contends in conclusion that the introduction of a premium for the benefit of producers of potato starch is not a breach of the principle of proportionality. It adds that the economic statistical data upon which its argument is based were evaluated at the time by the Member States within the Council and were not disputed by any of the delegations, not even by the Italian delegation; that is further proof of their correctness.

8. (a) The *Italian Government* submits in its reply that the tax on the production of isoglucose, which was at issue in the judgment of the Court of 25 October 1978 in Case 125/77 *Koninklijke Scholten-Honig N.V. and de Verenigde Zetmeelbedrijven 'De Bijenkorf' B.V. v Hoofdprodukschap voor Akkerbouwprodukten* [1978] ECR 1991 and also in Joined Cases 103 and 145/77 *Royal Scholten Honig (Holdings) Limited v Intervention Board for Agricultural Produce; Tunnel Refineries Limited v Intervention Board for Agricultural Produce* [1978] ECR 2037 and the increase in the production costs of maize starch are very similar.

(b) In its rejoinder the *Council* points out on this aspect of the matter that it does not appear that the principles which

the Court has laid down in relation to a production levy specifically introduced as such, can be invoked with a view to applying this case-law to a completely different economic situation, the particular feature of which is a difference in the costs of obtaining supplies resulting from Council decisions fixing agricultural prices.

IV — Oral Procedure

1. The Italian Government, represented by M. Cevaro, the Council represented by D. Vignes, assisted by A. Sacchetti and the Commission, represented by C. Maestripietri presented oral argument at the hearing on 15 May 1979.

2. The Court had invited the parties during the hearing to give their views on the question whether, and, if so, to what extent, the application of the second paragraph of Article 174 of the Treaty is to be considered if the Court grants the main application of the Italian Government.

The *Italian Government* replied that there was nothing to prevent the sums referable to the payments which had been made being refunded. The principle *factum infectum fieri nequit* cannot, according to the Italian Government, be invoked to advantage for three reasons:

— not even one year has elapsed since the provisions were first paid so that it is not possible to talk of financial situations, established or consolidated;

— from the subjective standpoint the persons who had received the subsidy

knew perfectly well that the regulations forming the legal foundation thereof were open to contention and that therefore they might possibly be obliged to refund the amounts which they had received;

— such a recovery of an amount paid but not owed might very well be carried out by means of a set-off, which could be effected at the time of the next marketing year against the debit balance of the potato starch manufacturer, of this credit which the latter holds by way of production refunds relating to potato starch.

The *Council* emphasizes in this connexion that if the Court were simply to annul Regulation No 1125/78, potato starch manufacturers ought to repay the premium and, when they did so, their established rights would have to be taken into consideration. But in the Council's view it would then be necessary for the Council to adopt a decision to enable these sums to be recovered. If the Court should confine itself to ruling that the premium should only cease to be paid from the date of judgment, the view could be taken, according to the Council, that the maize starch manufacturers, after the judgment, would be entitled to receive compensation for having suffered discrimination, provided always that the Court acknowledges that these maize starch manufacturers may take advantage of Article 215 of the Treaty; especially as for as the existence of damage is concerned.

The *Commission* submits that to compel potato starch manufacturers to repay the premium is a breach of the principle of legitimate expectations.

3. The *Italian Government* also points out that the investigation carried out, at

the request of the Council, by the Institute of Agricultural Economics of the University of Göttingen does not provide a solution of the problems at issue in the present case. In its view the Court must obtain a further expert opinion.

The *Council* did not consider that it was necessary to obtain a further expert opinion.

4. The Advocate General delivered his opinion at the hearing on 13 June 1979.

Decision

1. By an application, registered at the Court on 31 July 1978, and brought against the Council of the European Communities, pursuant to Article 173 of the EEC Treaty, the Government of the Italian Republic requested the Court to annul the provisions relating to a premium payable to potato starch manufacturers contained in Council Regulation (EEC) No 1125/78 of 22 May 1978 amending Regulation (EEC) No 2727/75 on the common organization of the market in cereals and in Council Regulation (EEC) No 1127/78 of 22 May 1978 amending Regulation (EEC) No 2742/75 on production refunds in the cereals and rice sectors (Official Journal L 142 of 30 May 1978, pp. 21 and 24).
2. The Council, the defendant in this action, supported by the Commission as intervener, contends that this application should be rejected.
3. The last recital in the preamble to Regulation No 1125/78 draws attention to "the constraints imposed on the potato starch industry" which "could lead to a disturbance of the balance between the different starch industries" and Article 2 thereof provides for the insertion in the basic regulation for the market in cereals (Regulation No 2727/75) of a provision authorizing the payment of a premium to potato starch manufacturers. Pursuant to this provision Article 3 of Regulation No 1127/78 provides that "Member States shall grant a premium of 10 units of account per tonne of potato starch payable to the starch manufacturer".
4. The provisions at issue form part of the general pattern of Community rules relating to starch products the main purpose of which is to enable products based on raw materials of agricultural origin to stand up to competition from

synthetic products. One of the ways of attaining that end is the granting of production refunds. The rate of these refunds is fixed in such a way that the balance between competing products such as maize starch and potato starch is not disturbed. The balance which has existed traditionally between these two products primarily due to the fact that, although the raw material of maize starch is more expensive than that of potato starch, and although the respective production costs are comparable, the value of maize starch by-products is greater than that of potato starch by-products with the result that the cost price of the two products does not differ appreciably. The cause of action is the introduction by the disputed regulations of a premium payable only in respect of potato starch whilst the system of comparable refunds is retained for the benefit of both products.

Admissibility

- 5 The Council has invoked the plea that the application is inadmissible by reason of the affirmative unqualified vote cast by Italy when the regulations in question were adopted by the Council and also of the vote cast by the Italian representative on the Management Committee for Cereals when the implementing measures, which in the meantime have been brought into force by Commission Regulation (EEC) No 1809/78 of 28 July 1978 laying down rules for the payment of a premium to producers of potato starch, were considered (Official Journal L 205 of 29 July 1978, p. 69).
- 6 This plea of inadmissibility cannot be upheld. The first paragraph of Article 173 of the Treaty confers on every Member State the right to challenge, by an application for annulment, the legality of every Council regulation, without the exercise of this right being conditional upon the positions taken up by the representatives of the Member States of which the Council is composed when the regulation in question was adopted.

Substance

The statements of the reasons upon which the regulations at issue are based

- 7 The Italian Government's application is based on a number of complaints the first of these being that there is a failure to give an adequate statement of

reasons. As far as concerns Regulation No 1125/78 that Government submits, in the first place, that the statement of reasons upon which it is based is inadequate because it is impossible to find out from it what kind of difficulties the potato starch industry is experiencing and, in the second place, it is inconsistent in that it shows, on the one hand, that the system of refunds must be applied equally to competing products whilst, on the other hand, it states that preferential treatment of potato starch by the granting of a premium is necessary. As far as concerns Regulation No 1127/78 the Government submits that the recitals in the preamble thereto merely refers to the value of the by-products obtained from the manufacture of maize starch without giving particulars either of their value or of their production costs which, however, have not remained the same.

8 On this point, as the Court has repeatedly held in its decided cases, it should be stressed that, as far as concerns general acts, especially regulations, the requirements of Article 190 of the Treaty are satisfied if the statement of reasons given explains in essence the measures taken by the institutions and that a specific statement of reasons in support of all the details which might be contained in such a measure cannot be required, provided such details fall within the general scheme of the measures as a whole.

4 In the case in point the statements of the reasons upon which the regulations in question are based meet these requirements. The last recital in the preamble to Regulation No 1125/78 which confers the power to introduce the premium at issue states "... the constraints imposed on the potato starch industry could lead to a disturbance of the balance between the different starch industries". The consequence of this situation as the recital goes on to state is that "it may also prove necessary to provide for a premium to be paid to potato starch manufacturers". These reasons are not at all inconsistent with the second recital which states that the principle of equality is to be applied to products having the same outlets, especially if account is taken of the fact that the absence of a common organization of the market in potatoes may give rise in the case of this product to a special situation requiring specific measures with a view to establishing actual equality with the products within the scope of the common organization of the market in cereals.

- 10 The statement of the reasons upon which Regulation No 1127/78, which implemented the granting of the premium and fixed the amount thereof, is based also meets the requirements of Article 190 of the Treaty. The third recital in the preamble in fact indicates that the payment of a premium to potato starch manufacturers is necessary in order to maintain a balanced relationship between potato starch and maize starch prices, taking into account "the increasing advantage enjoyed by the maize starch industry, particularly because of the by-products obtained from such manufacture". Since attention has been drawn to the difference between the two industrial sectors there is no need for the statement of reasons to give details concerning this difference.

The evaluation of the economic facts

- 11 Another complaint, which relates in particular to Regulation No 1127/78, is based on the manifest error which the Council is said to have made when it evaluated certain economic factors upon which its introduction of the premium at issue was founded.
- 12 The applicant Government submits in this connexion that the balance between the cost price of maize starch and potato starch when production refunds were introduced in 1967 no longer existed in 1978, the special reason for this being the increase in the cost of processing maize into starch. Thus that Government maintains that the costs of this Italian maize starch manufacturing industry put at 58 units of account per tonne in 1967 had gone up in 1978 to 86 units of account and estimates that they are 77 units of account per tonne on average throughout the Community. The Council maintains for its part that maize starch manufacturing costs were only 39 units of account per tonne in 1967 and that they went up in 1978 to 49 units of account per tonne.
- 13 The Italian Government also submits that, when the Council took into consideration the value of the maize starch by-products and calculated that value for 1978 at 79 units of account per tonne, it only took account of the proceeds of sale of the by-products without deducting the production costs attributable to the latter, and in so doing overestimated the difference between their value and that of potato starch by-products, evaluated at 22 units of account. The Council's answer to this objection is that, although the production costs attributable to the by-products have not been expressly

set out in the calculations, the figures which are given are based on the finding arrived at by implication that the trend of production costs was comparable and that they remain at more or less the same level.

- 14 In order to weigh the arguments put forward by the parties it should in the first instance be placed on record that it is an implication of the objective of the Community regulation at issue, which is to ensure that the organization of the market makes proper allowance for the balance between the competing products, that the Council has to assess a complex economic situation. Although some of the constituent elements of this situation may be ascertained in accordance with objective criteria, such, for example, as the prices of raw materials which are determined by the actual organization of the market in cereals, there are others which are more difficult to apprehend with any accuracy. This applies especially to production costs in an industry such as the one in this case, the distinguishing feature of which is the existence of a large number of undertakings of different size and economic structure and situated in different Member States. In such circumstances the discretion which the Council has when it assesses a complex economic situation is not only exercisable in relation to the nature and scope of the provisions which are to be adopted but also, to a certain extent, to the findings as to the basic facts, especially in this sense that the Council is free to base its assessment, if necessary, on findings of a general nature.
- 15 To prove that the Council has made a serious mistake in the exercise of the discretion given to it would require evidence more definite and less disputable than that adduced by the Italian Government during the proceedings. In this particular case the burden of proof lies all the more on the applicant Government as it had the opportunity through its representatives taking part in the work of the Council of participating in the assessment of the economic situation which is the underlying reason why the disputed regulations were adopted.
- 16 It should be added that the amount of the premium, compared with all the factors which make up the cost price of the products at issue, does not seem likely to lead to a fundamental change in conditions of competition between maize starch and potato starch. In this connexion it must be pointed out that the applicant Government, which forecast serious and irreparable damage to the maize starch industry at the time when, at the commencement of the

proceedings, it requested the Court to suspend the operation of the measure at issue (see Order of 28 August 1978 [1978] ECR 1945) has not since been able to furnish any proof whatever in support of its allegations.

- 17 For these reasons it must be concluded that the complaint based on a manifest error in assessing the economic factors cannot be upheld.

Compliance with Articles 39 and 40 of the Treaty

- 18 The Italian Government also complains that the regulations at issue do not seek to attain the objectives of Article 39 of the Treaty in a correct manner and amount to discrimination infringing the second subparagraph of Article 40 (3) of the Treaty. The arguments put forward in support of these two complaints are, in substance, so similar that it is appropriate to consider them together. In effect these complaints are that the premium at issue favours one branch of industry, that of potato starch, to the detriment of the maize starch industry.
- 19 It is an established fact that potato starch as well as maize starch, being products processed from agricultural products, are covered by the agricultural policy. The purpose of the premium payable to the producers of one of these two products, potato starch, is to maintain the profitability of this branch of industry and thus, indirectly, to ensure an outlet for an agricultural product, the importance of which for the agricultural economy in certain regions of the Community is evident. There is therefore no doubt whatever that the measure at issue is within the ambit of the objectives of the Common Agricultural Policy as such objectives are defined in Article 39 of the Treaty.
- 20 Although it is true that the premium at issue has been granted to one branch of industry to the exclusion of a competing branch this difference nevertheless does not amount to discrimination within the meaning of the Treaty. The premium has been introduced for the purpose of obviating the special difficulties which the Council has found to exist in the potato starch sector following the trend, unfavourable to that sector, of certain economic factors, especially of the value of the by-products of both of the principal products. The difference cannot be regarded as discriminatory.

- 21 It follows from the foregoing that the complaints based on failure to comply with Articles 39 and 40 of the Treaty cannot be upheld.

The principle of proportionality

- 22 Finally the Italian Government complains that Regulation No 1127/78 is in breach of the principle of proportionality which requires the imposition of a burden to be proportionate to the objective to be attained. It submits on this point that the objective sought to be attained by the introduction of the premium at issue has been to give preference to potato growers. This objective, it claims, could have been attained by means other than the payment of a premium to the producers of potato starch which has in fact imposed on the maize starch industry an additional burden because the two industries are in competition.

- 23 On this issue it must be borne in mind that the aim of the premium payable to producers of potato starch was not to ensure that the growers received a better income but to maintain the profitability of the potato starch industry and in this way to protect the traditional opportunities for marketing potato products in so far as these products do not find any other outlets. The introduction of the premium at issue cannot in the prevailing economic conditions be regarded as disproportionate to the objective sought to be attained and the complaint cannot therefore be upheld.

- 24 As none of the complaints made by the applicant Government has been upheld the application must be dismissed.

Costs

- 25 Under Article 69 (2) of the Rules of Procedure the unsuccessful party shall be ordered to pay the costs; since the applicant has failed in its application it must be ordered to pay the costs.

On those grounds

THE COURT

hereby:

1. Dismisses the application
2. Orders the applicant to pay the costs.

Kutscher Mertens de Wilmars Mackenzie Stuart Pescatore Sørensen
O'Keefe Bosco Touffait Koopmans

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

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 13 JUNE 1979¹

*Mr President,
Members of the Court,*

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

The aim of the rules for production refunds, which have been in force for

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

¹ — Translated from the German