OPINION OF MR ADVOCATE GENERAL CAPOTORTI DELIVERED ON 15 JUNE 1982 [1]

Mr President,
Members of the Court,

1. In the judgment given on 19 October 1977 in Joined Cases 117/76 and 16/77 (*Ruckdeschel and Hansa-Lagerhaus Ströh* v *Hauptzollamt Hamburg-St. Annen* and *Diamalt AG* v *Hauptzollamt Itzehoe* [1977] ECR 1753) the Court declared Article 5 of Regulation No 1125/74 of the Council of 29 April 1974 to be incompatible with the principle of equality in so far as it no longer provided for production refunds for maize used in the manufacture of quellmehl and thus involved discrimination between quellmehl and pregelatinized starch, which continued to enjoy refunds for the maize used in its manufacture.

By an interlocutory judgment of 4 October 1979 ([1979] ECR 3045) in the present cases, brought by Interquell Stärke-Chemie GmbH and Diamalt AG on 15 December 1978 pursuant to Articles 178 and 215 of the EEC Treaty, the Court ordered the European Economic Community to pay the applicants "the amounts equivalent to the production refunds on quellmehl intended for use in the bakery industry which each of those undertakings would have been entitled to receive if, during the period from 1 August 1974 to 19 October 1977, the use of maize for the production of quellmehl had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch" (paragraph 1 of the operative part). The same judgment provided further that the parties should inform the Court within 12 months "of the amounts of compensation arrived at by agreement". In the absence of agreement the parties were to transmit to the Court within the same period "a statement of their views, with supporting figures" (paragraphs 3 and 4 of the operative part).

2. The area of disagreement between the parties after the negotiations between them is now strictly limited as regards Case 262/78 (Diamalt). Agreement has been reached regarding the amount of refunds to which the applicant would have been entitled in respect of the quellmehl produced during the above-mentioned period for use in the baking of bread. The sum was fixed at DM 248 621.99. On the other hand, the defendant considered unfounded the further claim for DM 85 054.43 made by the applicant as compensation for the refunds not received in respect of the production of quellmehl intended for human consumption but not for bread-making.

The problem of deciding the scope of the finding in the judgment of 19 October 1977 of the unlawfulness of the measure abolishing refunds for quellmehl has already been discussed at the previous

1 — Translated from the Italian.

stage of the proceedings, which terminated with the interlocutory judgment of 4 October 1979. The Council and the Commission maintained that the measure had been declared unlawful only as regards the manufacture of quellmehl intended for use in the baking of bread, whereas the applicants claimed that equality of treatment with pre-gelatinized starch must be assured irrespective of the purpose of the quellmehl (that is to say, both for quellmehl intended for human consumption in general and for quellmehl used in the manufacture of animal feed).

In my opinion of 12 September 1979 ([1979] ECR 2976, at p. 3013), I said that, whilst the problem of equality of treatment with starch did not arise in respect of quellmehl intended for animal feed, compensation ought to be payable in respect of all quellmehl intended for human consumption and should not be limited to quellmehl intended for baking. At paragraphs 8 to 10 of the judgment of 4 October 1979 the Court gave a ruling on the question and, after referring to what the Court had already said in the judgment of 28 March 1979 in Case 90/78 *(Granaria BV* v *Council and Commission)* (namely, that in finding in its judgment of 19 October 1977 that the abolition of refunds was unlawful it took the view "that the principle of equality is breached to the detriment of quellmehl producers only on the assumption that quellmehl is put to its traditional uses in food for human consumption"), it added: "The traditional use of quellmehl, as it had been explained in the course of the procedure in the above-mentioned cases, was limited to bread-making, where it served as an additive to products based on rye flour. The traditional use explained why quellmehl ... had benefited from production refunds in Germany since 1930 and in the Community since the first common organization of the market in cereals." After stating that premise the Court drew the conclusion that "it is *only as regards the quellmehl used for bread-making* that the abolition of the production refunds for quellmehl was incompatible with the principle of equality for the reasons accepted by the Court in its judgment of 19 October 1977" (paragraph 10).

Accordingly, the operative part of the same judgment of 4 October 1979 confined the award against the European Economic Community to the payment, by way of compensation for the damage suffered by Interquell and Diamalt, of "the amounts equivalent to the production refunds on quellmehl *intended for use in the bakery industry* ...". Compensation for damage in respect of the production of quellmehl for purposes other than bread-making was thus excluded by a judgment directly binding on Diamalt. That is sufficient ground, in my opinion, for regarding a claim by that undertaking for damages in respect of the abolition of production refunds for quellmehl for uses other than bread-making as having already been rejected by the Court.

3. I shall now turn to the issues raised in Case 261/78 *(Interquell).* During the course of the proceedings the applicant abandoned its claim for amounts equivalent to the refunds which it had not received in respect of quellmehl produced from maize flour, since it recognized that that flour was, in its case, a residue from the making of gritz intended for the brewing industry and thus had already benefited from refunds. Interquell is therefore now confining itself to a claim for amounts corresponding to the refunds which it did not receive during the period in question for the quellmehl made from common-wheat flour and intended for baking. Although the Court has not given a ruling on the Community's liability in respect of the abolition of refunds for quellmehl made from common wheat, the Commission does not deny in principle that damages may be recoverable on that head; in fact it took account of such production in calculating the damages paid to other undertakings. However, the defendant expresses doubts about the admissibility of the claim made by Interquell because the Court in the aforesaid judgment of 4 October 1979 omitted to rule on that aspect of the claim (see the facts of the said judgment: [1979 ECR 3051) and the applicant did not within a month after service of the judgment apply to the Court requesting it to supplement its judgment pursuant to Article 67 to the Rules of Procedure. Nevertheless, the defendant makes no formal plea of inadmissibility.

There is nothing in the interlocutory judgment to suggest that the Court intended to exclude compensation for damage resulting from the abolition of refunds for quellmehl made from common wheat. Further, it seems to me that there are no objective reasons for interpreting that omission in the previous judgment of the Court as a rejection of the claim. I therefore think the claim is admissible and the Court is still entitled to give a ruling on its merits.

4. In that regard, it must be observed first of all that the Commission abandoned its initial reservations during the course of the proceedings and no longer denies that during the period with which we are concerned Interquell produced quellmehl for use in the baking of bread. That production would certainly have given entitlement to refunds if they had not been abolished by Regulation No 1125/74: Article 11 (1) of Regulation No 120 of the Council of 13 June 1967, as amended in 1974, provided for the grant of production refunds for maize and *common wheat* used in the manufacture of starch and quellmehl. The existence of damage suffered by Interquell is therefore beyond dispute and, in my opinion, that company's right to compensation is undeniable, since the grounds on which the Court recognized in its interlocutory judgment of 4 October 1979 its right to compensation for not receiving production refunds for quellmehl intended for bread-making apply in the same way both to quellmehl made from maize and quellmehl made from common wheat.

The problem of proving the extent of the damage remains to be resolved. In the Commission's view, to obtain the compensation claimed, Interquell must produce the same evidence as would be required for the payment of the refunds. The rules implementing the relevant Council regulations (see in particular Article 3 of Regulation No 1060 of the Commission of 24 July 1968) are confined to providing that the production refund shall be paid to the manufacturer who "furnishes proof that the cereal has been processed". In Germany, according to a letter from the Federal Ministry for Food, Agriculture and Forestry of 22 December 1967, the payment of the refunds in question is subject *inter alia* to the keeping by the quellmehl producer of accounts specifying entries, exits and other movements, the stocks of basic products and of flour used, the quantities of quellmehl and secondary products produced and the profits achieved. Each undertaking must retain such records and vouchers appertaining thereto for seven years (paragraph XI of the said letter).

The applicant admits that it is not able to supply all the items of evidence for the relevant period for the purpose of obtaining compensation and it observes that after the abolition of the production refunds for quellmehl it no longer continued to keep the internal accounts prescribed by the rules governing refunds. It nevertheless claims that, since it is a question of proving damage suffered by reason of an unlawful measure of the Council, the Commission cannot require observance of the terms laid down by the national authorities for the payment of the subsidy which was subsequently abolished.

The argument seems to me correct. Although the amount of damages payable and the amount of the unpaid refunds are the same, there is no question but that the payment which is now claimed from the Community by way of compensation is of quite a different nature from the payment of refunds which, without the unlawful act of the Council, would have been made by the national authorities. It is understandable that in order to facilitate administrative checks and to ensure the proper functioning of the system of production refunds strict rules should have been established and that disregard of those rules should be penalized by loss of the Community subsidy. The normal functioning of such intervention machinery involves the payment over a long period of large sums for different types of production and consequently a considerable number of operations have to be performed by the administrative authorities; that is why particular requirements in relation to the internal accounts of the undertakings entitled to benefit is in accordance with obvious practical requirements closely connected with the application of the system of refunds. However, there is no justification for applying to the Community's non-contractual liability (that is to say, to extend to cases which must be assumed to be exceptional) rules conceived for a completely different purpose. Furthermore, it should be borne in mind that the application of restrictive rules in relation to proof would be

contrary to the principle of freedom to prove damage which is generally applied in relation to non-contractual liability.

5. Let us now turn to the question of the quantum of damages.

Interquell is claiming damages of DM 641 234.27; of that sum DM 95 175.97 relate to the processing of 922 235 kg of common-wheat flour into quellmehl intended for bakers and DM 546 058.30 relate to the processing of 5 423 138 kg of the same type of flour into quellmehl intended for manufacturers of products used in bread-making. The main item of evidence is a report prepared by German experts (officials of the Oberfinanzdirektion, Munich) on 16 May 1980 after an inspection of the manufacture of quellmehl at the company's premises. In addition there are the answers given by the parties to a number of questions put by the Court on 19 May 1981 and 3 February 1982, affidavits sworn by customers of Interquell (produced by Interquell to prove the destination of the quellmehl sold) and finally explanations given at the hearing on 18 May 1982 by the German experts who drew up the aforesaid report.

Two facts emerge from the report and have been checked by the experts against the invoices and accounts of the applicant company: the quantities of common-wheat flour purchased between 1 January 1975 and 18 October 1977 and the quantities of quellmehl sold during the same period. Those quantities (appreciably higher than those on which the claim for compensation is based) have not been challenged. Further, the report specifies (at p. 7) the quantities of quellmehl sold to bakers and manufacturers of baking additives and calculates the respective rates of production refunds. Those figures agree with those in the claim for compensation. Similarly, the quantities of quellmehl which Interquell claims to have sold for use in baking are not disputed by the defendant; after production of the affidavits sworn by customers of the company the defendant abandoned its original reservations regarding the destination of the said quantities. Finally, it must be pointed out that, in agreement with the applicant, the experts have fixed at 100 % the yield for the processing into quellmehl of common-wheat flour of Type 550 purchased by the applicant; it may therefore be assumed that the quantities of common-wheat flour equalled the quantities of quellmehl sold for baking.

What then is the point at issue? It is that, according to the Commission, the applicant has not shown *that it itself produced* all the quellmehl sold for baking. Whilst Interquell's accounts are recognized as correct, they do not specifically record the processing of the flour into quellmehl although the rules governing refunds required the accounts to contain such evidence. Since the Commission remains convinced that it is necessary to adduce the same evidence before the Court as was required under the system of refunds, it considers insufficient the statement in the report that "the common-wheat flour delivered

after order *was processed immediately* and at weekends within a maximum of three days" (p. 5). In particular, the Commission objects that the applicant also used common-wheat flour for making "flakes" (Quellflocken), which gave no entitlement to refunds; it sometimes mixed the flour with quellmehl in a way and to an extent which remain uncertain; it described consignments of quellmehl as products made with maize flour, whereas it was quellmehl made with common-wheat flour; finally, the existing stocks of flour and quellmehl were not taken into account.

Without attaching decisive importance to any of those various facts the Commission considers that as a whole they justify its refusal to accept Interquell's claim for compensation.

6. It seems to me that the explanations given by the German experts at the hearing on 18 May 1982 supplement the report and enable the defendant's objections to be seen as invalid.

In the first place, the experts confirmed their opinion that in view of the applicant's technical organization and the orders for quellmehl which it had received it used almost the whole of the common-wheat flour of Type 550 which it had bought for the manufacture of quellmehl. That opinion coincides with the undeniable fact that the production of quellmehl is Interquell's specific, permanent business. The purely hypothetical case put forward by the Commission to the effect that Interquell may without profit have sold part of the common-wheat flour which it had brought and may at the time have sold quellmehl made by third parties (that is to say, quellmehl which had already enjoyed the refund) is not credible. Such a transaction may have been attractive if it had been carried out at a time when quellmehl enjoyed refunds, but that was not the case during the period in question.

Since therefore it has been established that during the relevant period the applicant continued its normal business of making quellmehl (it had available very much larger quantities of 550 flour than it needed to make the consignments of quellmehl sold to bakers) and since the sale of those consignments to the extent set out in the report is not disputed, it may very reasonably be thought that the processing of the flour into quellmehl was carried out by the applicant. As for the danger to which the Commission alluded at the hearing that Interquell may *ex post facto* have given an inaccurate picture of its purchases and sales, that is a supposition contradicted by the findings of the experts based on the invoices and there is no objective evidence to support it.

As regards the specific factors of uncertainty, the following is apparent from the statements of the experts:

(a) The manufacture of flakes represented only a very small percentage of Interquell's production and, moreover, even a part of that was made into quellmehl. The remaining part used in the production of animal feed is shown in the undertaking's accounts.

(b) The flour which Interquell added to the quellmehl was of the 1600 variety, which is different from that in relation to which compensation must be calculated. Such additions have generally been deducted in the calculation of the quellmehl produced; moreover, the cases in which such flour may have been added must be held to be insignificant and may in any event be regarded as offset by the rate of yield fixed at a particularly low level and thus unfavourable to the undertaking.

(c) Cases found of the incorrect description of the quellmehl have resulted in the selling of quellmehl in fact made of common-wheat flour as quellmehl made of maize flour. However, for the purposes of the present case it has meant a disadvantage for the applicant since it has not claimed compensation for the quellmehl made from maize flour.

(d) The stocks of flour by Interquell were only sufficient for a few days' production whereas the quellmehl produced was usually sold during the two days following its manufacture.

Finally, it must be remembered that the Commission also attached importance to the fact that when the bakers and manufacturers of baking additives were requested to co-operate in the inspections ordered by the German authorities they made it a condition that they should receive part of the refunds in question. The Commission inferred from that that during the period under consideration the applicant probably increased its prices to compensate for there being no refunds and that fact, if true, sufficed to justify its refusal to pay compensation. At the hearing, however, the applicant gave a different explanation and claimed that its customers were not prepared without consideration to bear the inconvenience of the inspections, which the applicant was asking for in its own interest. That explanation seems to me perfectly plausible. Moreover, the Commission has adduced no evidence capable of supporting the validity of its assumption.

7. In conclusion, for the reasons set out above, I propose that the Court should dismiss Diamalt's claim for compensation in respect of the refunds which it did not receive for the quellmehl produced by it for use in food for human consumption other than bread; I propose, on the other hand, that the claim by Interquell Stärke-Chemie should be upheld.

In the Diamalt case, having regard to the fact that an agreement was reached with the Commission for compensating the damage caused by the absence of refunds for the quellmehl intended for use in the baking of bread and that the amount agreed to be paid to the applicant was three times the amount of compensation to which it was not entitled, I propose that the Commission should be ordered to pay the applicant three-quarters of its costs. In the Interquell case I propose that the Commission should be ordered to pay the whole of the applicant's cost.