JUDGMENT OF THE COURT
6 OCTOBER 1982 [1]

Diamalt AG
v European Economic Community

(Quellmehl — Liability)

Case 262/78

Non-contractual liability — Unlawful abolition of production refunds on quellmehl — Liability incurred by reason of the abolition only of production refunds on quellmehl intended for bread-making.

(EEC Treaty, Art. 215, second para.)

In Case 262/78

DIAMALT AG, Munich, represented by K.-D. Rathke, Rechtsanwalt, Augsburg, with an address for service in Luxembourg at the Chambers of A. Bonn, 22 Côte d'Eich,

applicant,

v

EUROPEAN ECONOMIC COMMUNITY, represented by:

the Council of the European Communities, represented by D. Vignes, Director of the Legal Department, acting as Agent, assisted by B. Schloh and A. Brautigam, respectively Legal Adviser and Administrator in the said department, acting as Joint Agents, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of the Legal Department of the European Investment Bank, Boulevard Konrad-Adenauer, Kirchberg,

and

the Commission of the European Communities, represented by its Legal Adviser, J. H. J. Bourgeois, acting as Agent, assisted by J. Sack, a member of

1 — Language of the Case: German.

its Legal Department, with an address for service in Luxembourg at the office of O. Montalto, a member of the Legal Department of the Commission, Jean Monnet Building, Kirchberg,

defendant,

concerning, at the present stage of the proceedings, the assessment of damages which the European Economic Community was ordered to pay the applicant by the interlocutory judgment of 4 October 1979 in Joined Cases 261 and 262/78 *(Interquell Stärke-Chemie* and *Diamalt* v *Council and Commission* [1979] ECR 3045),

THE COURT

composed of: J. Mertens de Wilmars, President, A. Touffait and O. Due (Presidents of Chambers), Lord Mackenzie Stuart, U. Everling, A. Chloros and F. Grévisse, Judges,

Advocate General: F. Capotorti
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

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

I — The course of the procedure

The interlocutory judgment of the Court of 4 October 1979 in Joined Cases 261 and 262/78 *(Interquell Stärke-Chemie and Diamalt* v *Council and Commission* [1979] ECR 3045) ordered the European Economic Community to pay the applicants in those cases:

"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."

The Court further ordered that:

"Interest at 6% shall be paid on the above-mentioned amounts as from the date of this judgment."

The parties were ordered to "inform the Court within 12 months from the delivery of this judgment 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". Costs were reserved.

In spite of various extensions of the period of 12 months laid down in the aforesaid judgment the parties have only partially succeeded in reaching agreement on the amounts of damages. They are now asking the Court to give a ruling on the issues on which they have not been able to reach agreement.

II — Facts, procedure and conclusions of the parties

The parties have agreed that the Community should pay the applicant the sum of DM 248 621.99, plus interest at 6% from 4 October 1979, by way of refunds on the manufacture of quellmehl for bread-making.

The applicant is also claiming that the Community should pay it the sum of DM 85 054.43 by way of production refunds for quellmehl for food purposes other than bread-making.

The Council asks the Court to dismiss that claim as inadmissible, or alternatively as unfounded, and to order the applicant to pay the costs.

The Commission contends that the applicant's claim should be dismissed as inadmissible. It further asks that it should be ordered to pay only half the applicant's costs and that the applicant should be ordered to pay all the costs in relation to its supplementary claim.

III — Submissions and arguments of the parties

1. The *applicant* observes that the judgment of the Court of 4 October 1979 dealt solely with production refunds for quellmehl for bread-making; thus no decision has been given yet on the granting of production refunds for quellmehl for purposes other than bread-making.

The judgment of the Court of 19 October 1977 in Joined Cases 117/76 and 16/77 (*Ruckdeschel and Diamalt* [1977] ECR 1753), which found that quellmehl producers and starch producers were treated unequally, is not restricted to particular usages of quellmehl and pre-gelatinized starch.

Even if the decision of 19 October 1977 had to be regarded as confined to the use of quellmehl for bread-making that would in no way change the fact that there was also inequality of treatment between producers of quellmehl and

producers of pre-getalinized starch as regards the use of quellmehl in other food sectors; at least since 1960 quellmehl and pre-gelatinized starch have been used similarly in sectors other than bread-making, in particular in the manufacture of other bakery products and pastry products.

It is moreover irrelevant to inquire whether the use of quellmehl for food purposes other than bread-making is or is not traditional. Where competitors are treated unequally, inasmuch as the production refund is abolished for some and not for others in spite of equal treatment lasting decades, such unequal treatment applies not just to the main use but to all uses of the competing products.

2. The *Council* and the *Commission* observe that the application is inadmissible, in the first place, because the Court in its judgment of 4 October 1979 held "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 inequality" and, in the alternative, because the period of one month laid down in Article 67 of the Rules of Procedure has expired.

As regards the substance of the application, the Council refers once again to the judgment of 4 October 1979, in which the Court awarded damages only in respect of quellmehl for bread-making. That is the specific use to which quellmehl is traditionally put, according to the judgment of 19 October 1977. In the judgment of 4 October 1979 the Court specified that damages were recoverable only in respect of quellmehl intended for breadmaking.

IV — Oral procedure

At the sitting on 18 May 1982 oral argument was presented by the following: for the applicant, K.-D. Rathke, Rechtsanwalt, Augsburg; for the Council, its Legal Adviser, B. Schloh; and for the Commission, J. Sack, a member of its Legal Department.

The Advocate General delivered his opinion at the sitting on 15 June 1982.

Decision

1 The interlocutory judgment of the Court of 4 October 1979 in Joined Cases 261 and 262/78 *(Interquell Stärke-Chemie and Diamalt* v *Council and Commission* [1979] ECR 3045) ordered the European Economic Community to pay the two applicants, as damages for which it was non-contractually liable, 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. The Court further ordered that interest at 6% should be paid on the said amounts as from the date of judgment and 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. The costs were reserved.

2 In Case 262/78 *(Diamalt)* the parties agreed that the Community should pay the applicant the sum of DM 248 621.99 as damages for the production of quellmehl for bread-making. On the other hand, the defendants consider unfounded the applicant's claim for the sum of DM 85 054.43 in respect of the production of quellmehl for use in food for human consumption other than bread. They contend that that part of the claim has already been rejected by the interlocutory judgment.

3 In Case 261/78 *(Interquell)* the defendants contend that the action should be dismissed in its entirety because the applicant has adduced insufficient evidence of the amount of common-wheat flour made into quellmehl.

4 In view of the completely different nature of the issues still outstanding in the two cases it is appropriate to disjoin the cases for the purposes of the judgment.

5 The question on which the parties in the Diamalt case seek the Court's ruling concerns the interpretation of the interlocutory judgment of 4 October 1979.

6 As is apparent from the operative part of that judgment set out above, the Community was ordered to compensate the applicants only in respect of the production of quellmehl intended for bread-making.

7 That restriction in the operative part must be compared with paragraph 10 of the decision, according to which "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".

8 It follows that the interlocutory judgment of 4 October 1979 must be understood to mean that the Court thereby rejected the applicants' claims in relation to quellmehl intended for purposes other than bread-making.

Costs

9 Article 69 (2) of the Rules of Procedure provides that the unsuccessful party shall be ordered to pay the costs. According to Article 69 (3), where each party succeeds on some and fails on other heads the Court may order that the parties bear their own costs in whole or in part.

10 Since the action has been held to have been well-founded, save as regards the quellmehl used for purposes other than bread-making, the Community must be ordered to pay three-quarters of the applicant's costs in relation to the proceedings prior to the interlocutory judgment and to bear its own costs occasioned by those proceedings. Since the applicant has failed in its submissions in the proceedings subsequent to the interlocutory judgment it must be ordered to pay the costs of those proceedings.

On those grounds,

THE COURT

hereby:

1. **Orders the European Economic Community to pay Diamalt AG, Munich, the sum of DM 248 621.99, less amounts of damages already provisionally paid, with interest at 6% from 4 October 1979 on the balance of the sums remaining due at the date of the present judgment. For the rest, the application is dismissed;**

2. **Orders the Community to pay three-quarters of the costs incurred by the applicant as a result of the proceedings prior to the interlocutory judgment of 4 October 1979 and to bear the costs incurred by itself as a result of those proceedings; and**

Orders the applicant to pay the costs of the proceedings subsequent to the interlocutory judgment.

Mertens de Wilmars Touffait Due
Mackenzie Stuart Everling Chloros Grévisse

Delivered in open court in Luxembourg on 6 October 1982.

P. Heim
Registrar

J. Mertens de Wilmars
President

OPINION OF MR ADVOCATE GENERAL CAPOTORTI

(see Case 261/78, p. 3285)