

JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
21 June 1996 *

In Case T-226/94,

Paul Dischamp SA, a company governed by French law, established at Sayat (France), represented by François Vignancour, of the Clermont-Ferrand Bar, and Louis Schiltz, of the Luxembourg Bar, with an address for service in Luxembourg at the latter's Chambers, 2 Rue du Fort Rheinsheim,

applicant,

v

Commission of the European Communities, represented by Gérard Rozet, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for compensation for the damage allegedly suffered by the applicant following suspension of the arrangements for the buying-in of butter by the intervention agencies from 11 January 1991 to 26 February 1991,

* Language of the case: French.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: R. Schintgen, President, R. García-Valdecasas and J. Azizi, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 28 March 1996,

gives the following

Judgment

Legislative background

- 1 Under Article 6(1) of Regulation (EEC) No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (OJ, English Special Edition 1968(I), p. 176), the intervention agency designated by each Member State is under an obligation to buy in all butter offered to it.
- 2 Article 1 of Council Regulation (EEC) No 777/87 of 16 March 1987 modifying the intervention arrangements for butter and skimmed-milk powder (OJ 1987 L 78, p. 10) provides that the buying-in of butter may be suspended when the quantities

offered for intervention exceed 180 000 tonnes (Article 1(1)) and that, by way of an alternative arrangement, butter may be bought in under a standing invitation to tender (Article 1(3)(a)), in accordance with detailed rules laid down by Commission Regulation (EEC) No 1589/87 of 5 June 1987 on the sale by tender of butter to intervention agencies (OJ 1987 L 146, p. 27).

- 3 Article 1(4) of Regulation No 777/87, as amended by the second indent of Point VII in Annex VI to Council Regulation (EEC) No 3577/90 of 4 December 1990 on the transitional measures and adjustments required in the agricultural sector as a result of German unification (OJ 1990 L 353, p. 23), provides that the standing intervention arrangements are nevertheless to be resumed if, for a representative period, the market price of butter falls to a level equal to, or less than, 92% of the intervention price. However, should the actual stocks of butter exceed in total 275 000 tonnes, buying-in is to be resumed only if the market price is at a level equal to, or less than, 90% of the intervention price.
- 4 Article 1 of Commission Regulation (EEC) No 1547/87 of 3 June 1987 laying down detailed rules for applying Regulation (EEC) No 777/87 as regards the buying in of intervention butter (OJ 1987 L 144, p. 12) establishes the representative period as two consecutive weeks.
- 5 On 25 June 1987, the Commission took the view that the condition set out in Article 1(1) of Regulation No 777/87 was satisfied and adopted Regulation (EEC) No 1772/87 suspending the buying-in of butter by the intervention agencies (OJ 1987 L 167, p. 47).

Facts

- 6 During the period from 11 January 1991 to 26 February 1991, although Regulation No 1772/87 was in force, the applicant ('Dischamp') offered the French intervention agency — on 11 and 22 January and on 6, 8, 12, 22 and 26 February 1991 — consignments of butter totalling 1 968 000 kg, which it hoped to sell at the intervention price.
- 7 By letters of 17 January and 1 February 1991, the intervention agency informed Dischamp that it could not take those offers of butter into consideration because the standing intervention arrangements had been suspended and, pursuant to Regulation No 1589/87, replaced by a standing invitation to tender.
- 8 Dischamp therefore had to sell a large quantity of that butter under the tendering procedure.

Procedure and forms of order sought

- 9 By application lodged at the Registry of the Court of First Instance on 9 June 1994, Dischamp brought the present proceedings.
- 10 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber) decided to open the oral procedure without any preparatory inquiry. However, it asked the Commission, by way of measures of organization of procedure, to produce certain documents and to answer two written questions.

11 The hearing was held on 28 March 1996. Counsel for the parties presented oral argument and replied to questions put by the Court.

12 The applicant claims that the Court should:

— declare the Commission liable for the applicant's losses following the wrongful maintenance in force, in relation to France, of Regulation No 1772/87 from 11 January to 26 February 1991;

— order the Commission to pay FF 5 000 000, together with interest;

— order the Commission to pay the costs of the procedure.

13 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay the costs.

14 In its rejoinder, the Commission asks the Court to declare inadmissible, by reason of their confidential nature, certain internal working documents produced by Dischamp in annex to its reply.

- 15 At the hearing, the Commission stated that it no longer contested the admissibility of those documents.

The claim for compensation

The sole plea in law: infringement of Article 1(2) of Regulation No 1547/87 and Article 1(4) of Regulation No 777/87

Arguments of the parties

- 16 Dischamp essentially alleges that the Commission infringed Article 1(2) of Regulation No 1547/87 and Article 1(4) of Regulation No 777/87 by not re-establishing the standing arrangements for intervention buying when prices on the butter market were observed to be less than, or at a level equal to, 92% of the intervention price from the 52nd week of 1990 to the 9th week of 1991.
- 17 The Commission contends that the conditions for applying the standing intervention arrangements were not satisfied, since at times the price of butter on the French market rose to 92.01% of the intervention price and was therefore higher than 92%, and at other times the price was below the 92% threshold but nevertheless higher than 90% at times when butter stocks exceeded 275 000 tonnes.

— The degree of accuracy of the market price percentage

- 18 By way of a contrary inference from the fact that the percentages quoted in Regulation No 1547/87 are expressed as whole numbers — while under Commission

Regulation (EEC) No 3578/88 of 17 November 1988 laying down detailed rules for the application of the system for the automatic dismantlement of negative monetary compensatory amounts (OJ 1988 L 312, p. 16) figures are to be calculated to six decimal places — Dischamp argues that the Commission was not entitled to calculate that percentage to the degree of accuracy of two decimal places. Furthermore, the figures given in a table drawn up by the Commission, summarizing current butter prices in the Member States, are all expressed to one decimal place. In the present case, if the Commission had based its calculations on a percentage figure rounded off to the nearest whole number or expressed to one decimal place, the conditions for resuming the standing intervention arrangements would have been satisfied.

- 19 The Commission contests Dischamp's argument based on a regulation in the monetary field, where, as a general rule, rates and coefficients are expressed to six decimal places, explaining that there is no comparison between the precision called for in monetary matters and that in agricultural affairs. Referring to Council Regulation (EEC) No 1180/90 of 7 May 1990 fixing the target price for milk and the intervention prices for butter, skimmed-milk powder and Grana Padano and Parmigiano Reggiano cheeses for the 1990/91 milk year (OJ 1990 L 119, p. 23) and Commission Regulation (EEC) No 1552/90 of 8 June 1990 determining the reduced ecu values of milk sector prices and amounts consequent on the monetary realignment of 5 January 1990 (OJ 1990 L 146, p. 14), the Commission states that, as a general rule, the Council defines the intervention price in ecus, accurate to two decimal places. It is only logical that the market price should be determined with the same degree of accuracy. However, if Dischamp's argument were accepted, the market price could not be established in ecus accurate to two decimal places, since the range of figures corresponding to a percentage rounded off to a whole number would span almost ECU 3.

— The calculation of the actual stocks

- 20 Dischamp contests the method used by the Commission to calculate the actual stocks of butter. The term 'actual stocks of butter held by intervention agencies', in the second subparagraph of Article 1(4) of Regulation No 777/87, does not cover, according to Dischamp, quantities of butter which are accepted under the tendering procedure but not actually in stock. On the basis of the information regarding

stocks communicated by the Member States pursuant to Regulation (EEC) No 210/69 of the Commission of 31 January 1969 on communications between Member States and the Commission with regard to milk and milk products (OJ, English Special Edition 1969(I), p. 28), Dischamp maintains that the stocks to be taken into consideration did not reach the 275 000 tonnes ceiling until the end of February 1991. Consequently, the Commission should have resumed the standing intervention arrangements earlier.

- 21 Furthermore, Dischamp criticizes the Commission for having included in its calculation of the stocks quantities of butter which were accepted under the tendering procedure after the reference period for that calculation. For example, when calculating the actual stocks for the week from 4 to 10 February 1991, the Commission included 21 332 tonnes of butter which were accepted under the tendering procedure on 14 February 1991.
- 22 The Commission states that it calculates butter stocks on the basis of the volume of actual stock at the end of each month — as communicated to it by the Member States — with the addition of quantities accepted in the interim period under tenders under the management committee procedure, but with the deduction of quantities released from stock.

Findings of the Court

- 23 The question whether the Commission complied with Regulations No 1547/87 and No 777/87 depends, first, on the degree of accuracy to be met in determining the percentage of the intervention price represented by the market price of butter and, secondly, on the detailed rules for calculating the actual stocks of butter held by the intervention agencies.

— The degree of accuracy of the market price percentage

- 24 The Court notes, first of all, that in both Regulation No 777/87, modifying the intervention arrangements for butter, and Regulation No 1547/87, laying down

detailed rules for applying Regulation No 777/87, the reference percentages are rounded off to a whole number and the degree of accuracy in calculating percentages is not prescribed.

- 25 Secondly, the Court notes that Regulation No 1180/90 fixing the intervention prices for butter for the 1990/91 milk year quotes prices in ecus expressed to two decimal places, and that Article 4 of Regulation No 1547/87 requires the Commission to compare the market price with the intervention price in order to establish the percentage of the intervention price represented by the market price.
- 26 The Court considers that those two prices can be validly compared only if they are expressed to the same degree of accuracy. However, as the Commission rightly pointed out, the range of figures corresponding to the percentage rounded off to a whole number, as quoted in the regulation concerned, would span almost ECU 3.
- 27 As regards the table produced by Dischamp, it is true that the figures therein are expressed to only one decimal point, but the fact remains that, as the Commission pointed out at the hearing, that document is a purely internal summary table for purposes which do not require accuracy to two decimal points.
- 28 Lastly, the Court finds that Dischamp's argument on the basis of a monetary regulation is not relevant, given that a regulation dealing with monetary matters has no bearing on the fixing of official prices in the agricultural sector.
- 29 In the light of the above, the Court concludes that the Commission was fully entitled to calculate the relationship between the market price and the intervention price in figures accurate to two decimal places.

— The calculation of the actual stocks

- 30 The Court notes, first of all, that the applicable regulations do not specify the detailed rules for calculating the actual stocks.
- 31 Secondly, if the Commission had to refer solely to the data on stocks communicated by the Member States twice monthly relating to the preceding fortnight, in accordance with Regulation No 210/69, it could not at the same time monitor both the market price threshold — as it is obliged to do each week under Article 4(2) of Regulation No 1547/87 — and the actual stocks threshold. For the stocks to be determined correctly, the relevant data communicated by the Member States must be updated weekly. The Court considers that the method employed by the Commission — whereby the volume of actual stocks, according to the information communicated by the Member States, is increased by the quantities accepted in the interim period under tenders under the management committee procedure, with the deduction of quantities released from stock — is appropriate for correctly determining actual stocks.
- 32 In the Court's view, the term 'actual stocks of butter held by intervention agencies' in the second subparagraph of Article 1(4) of Regulation No 777/87 does not preclude taking into account quantities of butter accepted under the tendering procedure but not yet put into store, since, as the Commission pointed out at the hearing, the objective of removing butter from the market in order to cause prices to rise is attained as soon as the intervention agencies buy in surplus quantities. Also, the wording of that provision does not rule out the possibility of the quantities bought being held by an intermediary acting for a third party. Consequently, the Court considers that the Commission was not at fault, when calculating the actual stocks, in including the quantities of butter bought by the intervention agencies under the tendering procedure, irrespective of when they were put in the agencies' stores.
- 33 The Court considers that the errors which Dischamp has pointed out in the Commission's calculations (see above, paragraph 21) do not affect the fact that the actual

stocks, updated as described above, exceeded 275 000 tonnes throughout the period when the market price was at a level equal to, or less than, 92% of the intervention price. In those circumstances, the Commission cannot be accused of wrongful or unlawful conduct, since the conditions laid down in Article 1(4) of Regulation No 777/87 and Article 1(2) of Regulation No 1547/87 for the resumption of the buying-in of intervention butter — as provided for in Article 6(1) of Regulation No 804/68 — were never satisfied during the period at issue.

34 The Court accordingly considers that the Commission did not infringe the rules applicable in the present case.

35 This plea in law must therefore be rejected.

The damage

Arguments of the parties

36 Dischamp claims to have suffered the following damage as a result of the Commission's failure to comply with Regulation No 1547/87:

- loss of earnings of FF 3 881 482.20, corresponding to the difference between the intervention price and the price paid under the tenders;
- FF 59 515 by way of financing costs for the lost earnings and the cost of storing the butter, resulting from the fact that sales by tender are twice-monthly and not daily, as under the standing intervention arrangements;
- loss of earnings through being unable under the tendering procedure to sell all quantities of butter offered, as is possible under the standing intervention arrangements.

- 37 According to Dischamp, the damage is real, certain and serious and exceeds the limits of economic risk inherent in the activities of the sector concerned. By maintaining in force Regulation No 1772/87 during the period at issue, the Commission infringed Dischamp's established rights under Regulation No 777/87 and breached the principle of the protection of legitimate expectations.
- 38 The Commission maintains that it strictly complied with the applicable regulations and contends that the action for damages should be rejected. In the alternative, the Commission submits that the application as a whole has been insufficiently substantiated. In particular, it points out that Dischamp failed to establish that the consignments of butter which, during the period at issue, it sold on the market and not by tender, met the conditions for intervention buying-in, and queries the accuracy of the assessment of the financing and storage costs constituting the second head of alleged damage.

Findings of the Court

- 39 According to established case-law, the Community incurs liability only where the wrongfulness of the conduct alleged against the institutions, the fact of the damage and the existence of a causal link between that conduct and the alleged damage are established (see Joined Cases 197/80, 198/80, 199/80, 200/80, 243/80, 245/80 and 247/80 *Ludwigshafener Walzmühle Erling and Others v Council and Commission* [1981] ECR 3211, paragraph 18, and the case-law cited; Case C-182/91 *Forafrique Burkinabe v Commission* [1993] ECR I-2161, paragraph 21; Case T-168/94 *Blackspur DIY and Others v Council and Commission* [1995] ECR II-2627, paragraph 38; and Joined Cases T-481/93 and T-484/93 *Vereniging van Exporteurs in Levende Varkens and Others v Commission* [1995] ECR II-2941, paragraph 80).
- 40 Since the Court has not discerned any infringement of the applicable rules in the present case, it considers that Dischamp has failed to prove wrongful conduct on the part of the Commission.
- 41 The claim for compensation must therefore be rejected.

Costs

- 42 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful in its pleadings, it must be ordered to bear its own costs and pay those incurred by the Commission.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

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

Schintgen

García-Valdecasas

Azizi

Delivered in open court in Luxembourg on 21 June 1996.

H. Jung

R. Schintgen

Registrar

President