JUDGMENT OF THE COURT (Second Chamber)
8 December 1987 *

In Case 50/86

Les Grands Moulins de Paris, France, represented and assisted by Lise Funck-Brentano, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Marlyse Neuen-Kauffman, 18 avenue de la Porte-Neuve, BP 191, L-2011,

applicant,

v

European Economic Community, represented by:

(1) Council of the European Communities, represented by Jacques Delmoly, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of Dr Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer; and

(2) Commission of the European Communities, represented by Denise Sorasio, a member of its Legal Department, acting as Agent, with an address for service in Luxembourg at the office of G. Kremlis, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendants,

APPLICATION under Article 178 and the second paragraph of Article 215 of the EEC Treaty for compensation for the damage suffered owing to the refusal to grant production refunds on the product known as 'Granidon',

THE COURT (Second Chamber),

composed of: O. Due, President of Chamber, K. Bahlmann and T. F. O'Higgins, Judges,

Advocate General: C. O. Lenz
Registrar: H. A. Rühl, Principal Administrator

* Language of the Case: French.

having regard to the Report for the Hearing and further to the hearing on 24 September 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 27 October 1987,

gives the following

Judgment

1 By application lodged at the Court Registry on 20 February 1986, the society Les Grands Moulins de Paris brought an action under Article 178 and the second paragraph of Article 215 of the EEC Treaty against the Council and the Commission of the European Communities for compensation for the damage alleged to have been suffered by it owing to the refusal to grant production refunds for a new product known as 'Granidon' which it has manufactured since 1969.

2 The applicant maintains that the Community has incurred non-contractual liability towards it by virtue of the fact that the Council and the Commission refused to grant for Granidon, notwithstanding the requests made by the applicant to the Commission, the production refunds laid down for products traditionally used in the brewing industry (maize gritz and starch). According to the applicant, Granidon, which it describes as wheat starch, is substitutable for such purposes.

3 The Council maintains that it was never in a position to decide on whether Granidon qualified for production refunds since the Commission had never made any proposal on the matter. It is therefore a matter for the Commission alone to represent the Community before the Court.

4 The Commission contends that the application should be dismissed. It maintains in particular that Granidon is a preliminary product in the manufacture of wheat starch which does not correspond to any generally recognized category and that the applicant has by no means established that Granidon is substitutable for products traditionally used in brewing which qualify for refunds.

5 It is not disputed by any of the parties that Granidon is a product obtained from common wheat which contains 85% starch. It is therefore not a product identical to those envisaged by Regulation No 367/67 of the Council of 25 July 1967 (Official Journal, English Special Edition 1967, p. 216) fixing production refunds on maize groats used in the brewing industry, as subsequently amended. It is moreover common ground that when in 1969 the applicant submitted a request for refunds for Granidon, the French authorities considered themselves unable to treat that product as wheat starch eligible for refunds pursuant to Regulation No 371/67 of the Council of 25 July 1967 (Official Journal, English Special Edition 1967, p. 219) fixing production refunds for maize and common wheat for use in the production of starch, as subsequently amended, because of its excessive protein content. In this context the Commission has maintained, without being contradicted by the applicant, that purification of Granidon leads to wheat starch which qualifies for refunds under the rules in force. Finally it is also common ground that production refunds for all food uses of starch products were abolished in 1986 subject to a transitional period of three years.

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

Conditions for the incurring of the Community's non-contractual liability

7 The Court has consistently held (judgments of 2 July 1974 in Case 153/73 *Holtz & Willemsen* v *Council and Commission* [1974] ECR 675, and of 4 March 1980 in Case 49/79 *Pool* v *Council* [1980] ECR 569) that the liability of the Community on account of its legislative powers depends on the coincidence of a set of conditions as regards the unlawfulness of the act of the institution, the fact of damage and the existence of a direct link in the chain of causality between the act and the damage complained of.

8 The Court has also stated with regard to the first of those conditions (judgments of 4 October 1979 in Joined Cases 241, 242 and 245 to 250/78 *DGV and Others* v *Council and Commission* [1979] ECR 3017, and in Joined Cases 261 and 262/78 *Interquell Stärke Chemie* v *Council and Commission* [1979] ECR 3045) that the Community does not incur liability on account of a legislative measure which, like

that at issue here, involves choices of economic policy unless a sufficiently serious breach of a superior rule of law for the protection of the individual has occurred. In the context of Community provisions in which one of the chief features is the exercise of a wide discretion indispensable for the implementation of the common agricultural policy, the Community can incur liability only in exceptional cases, namely where the institution concerned manifestly and gravely disregarded the limits on the exercise of its powers.

9 The refusal of the Community institutions to grant for Granidon the production refunds laid down for products traditionally used in the brewing industry forms part of the legislative function of the Community. It is therefore necessary to consider in the light of the criteria set out above whether the Community has incurred non-contractual liability on account of that refusal.

The submission relating to the breach of the principle of equal treatment

10 The applicant maintains that by refusing to grant for Granidon the refunds laid down for products traditionally used in the brewing industry the institutions acted in breach of the general principle of equality embodied in the second subparagraph of Article 40 (3) of the EEC Treaty. That principle is a superior rule of law for the protection of individuals which the Court has always applied when holding that discrimination between producers of substitutable products who are in comparable situations is unlawful.

11 It is true that in its judgment of 19 October 1977 cited by the applicant (Joined Cases 124/76 and 20/77 *Moulins et Huileries de Pont-à-Mousson and Others* v *ONIC* [1977] ECR 1795), the Court held that the abolition in 1975 of the production refunds that had previously been granted for maize gritz and the retention of refunds for a substitutable product, maize starch, was in the circumstances of that case a breach of the principle of equal treatment. There was no objective factor to establish that the products in question had ceased to be in comparable circumstances, in particular in so far as starch can be substituted for maize gritz in the manufacture of beer and the choice of the brewing industry between the two products largely depends on the cost of supplies.

12 In this case, however, the Court considers that the applicant has not adduced sufficient evidence to show that Granidon and products traditionally used in the brewing industry are indeed in a comparable situation as defined in the aforementioned judgment.

13 First of all, the applicant has not been able to establish that Granidon is indeed substitutable for the products traditionally used. Although some breweries do in fact make some use of Granidon, it is clear from the documents before the Court that the use of this product in brewing poses certain technical problems.

14 Secondly, the applicant was unable, even in response to an invitation to that effect by the Court, to produce documents from breweries to bear out its contention that traders tended to prefer the traditional products chiefly because of the difference in the cost of supplies resulting from the refusal of refunds. A report on the visits made by the applicant to breweries shows, for example, that one large brewery would in any event not have bought Granidon even if its price had been the same as that of gritz.

15 Already on the ground that it has not been established that there has been any breach of a superior rule of law for the protection of individuals, the Community cannot be held to have incurred non-contractual liability in this instance.

The submission relating to the institutions' manifest and grave disregard of the limits of their discretion

16 Nor has the applicant established that by withholding production refunds from Granidon the institutions manifestly and gravely disregarded the limits of their discretion in such a way as to incur the liability of the Community.

17 It is true that in its aforesaid judgments of 4 October 1979 the Court did indeed consider that the Community had incurred liability as a result of the unlawful abolition of refunds for maize gritz and quellmehl which had led to the ending, without sufficient justification, of the equality of treatment between producers

although such equality had been ensured as from the outset of the common organization of the markets in cereals. The Court also found that the damage alleged by the applicants exceeded the limits of the economic risks inherent in commerce in the sector in question.

18 In this case, on the other hand, it is clear from the documents before the Court that Granidon did not exist when the common organization of the markets was set up. It further appears that the product has recently been subject to technical tests whose conclusions have not yet gained general acceptance. Furthermore a document from 1983 produced by the applicant makes it clear that one brewery is interested in continuing experiments with Granidon in order to determine precisely how the product behaves in its plant. Finally it appears that the applicant has marketed the product for a number of years only in small quantities and on an experimental basis.

19 It should also be borne in mind that notwithstanding Granidon's exclusion from eligibility for the refunds granted under Regulation No 367/67, the applicant could have obtained, from the Granidon wheat, starch which did qualify for refunds under the rules in force.

20 In those circumstances the Community institutions cannot be held to have manifestly and gravely disregarded the limits of their discretion by refusing production refunds to a product which was still new at a time when the Commission had already embarked on the process of abolishing them for all uses of starch products in connection with foodstuffs.

21 That legislative trend was foreseeable and the applicant had been aware of it for some time. The institutions' conduct has not therefore had the effect of retroactively imposing an economic risk in the form of the abolition without objective justification of refunds which had previously been granted. To that extent the alleged damage, if it were established, could not be regarded as going beyond the bounds of the economic risks inherent in the applicant's business.

22 It is clear from the foregoing that the applicant has not been able to establish the existence of the breach of a superior rule of law for the protection of individuals or the manifest and grave disregard by the Community institutions of the power of assessment they enjoy in agricultural matters. That finding alone is sufficient for the application to be dismissed without there being any need to rule on the existence and nature of the damage or on its causal link with the conduct of the institutions that is complained of.

Costs

23 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party must be ordered to pay the costs if they have been asked for in the successful party's pleading. Since the applicant has failed in its submissions, it must be ordered to pay the costs of the Commission which has asked for them.

On those grounds

THE COURT (Second Chamber)

hereby:

(1) Dismisses the application;

(2) Orders the society Les Grands Moulins de Paris to pay the costs of the Commission;

(3) Orders the Council to bear its own costs.

Due Bahlmann O'Higgins

Delivered in open court in Luxembourg on 8 December 1987.

P. Heim
Registrar

O. Due
President of the Second Chamber