In Case 250/78

DEKA GETREIDEPRODUKTE GMBH & CO. KG, I.L. (in liquidation), Oldenburg (FORMERLY FIRMA CONTIFEX GETREIDEPRODUKTE GMBH & CO. KG), represented by Fritz Modest and Partners, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Madame J. Jansen-Housse, PO Box 16, Steinfort,

applicant,

v

EUROPEAN ECONOMIC COMMUNITY, represented by:

the Council of the European Communities, itself represented by D. Vignes and B. Schloh, Director and Adviser respectively, in its Legal Department, acting as Agents, assisted by Y. Crétien, Administrator in the said Department, acting as Co-agent, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of the Legal Department of the European Investment Bank, Kirchberg,

and

the Commission of the European Communities, represented by its Legal Adviser, R. Wainwright, and by J. Sack, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of O. Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendant,

APPLICATION at the present stage of the procedure relating to the question whether the Commission may set off a claim relating to the recovery of a wrongly paid amount against the applicant's claim for compensation,

THE COURT

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

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

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

I — Facts, procedure and conclusions of the parties

1. In an interlocutory judgment of 4 October 1979 in Joined Cases 241, 242 and 245 to 250/78 *(DGV and Others* v *Council and Commission* [1979] ECR 3017), the Court ordered the European Economic Community to pay the applicants "the amounts equivalent to the production refunds on maize gritz used by the brewing industry which each of those undertakings would have been entitled to receive if, during the period from 1 August 1975 to 19 October 1977, the use of maize for the production of gritz had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch".

2. The parties in this case have agreed that the Community should pay to the applicant the sum of DM 311 836.93.

The Commission however raises as a set-off against the applicant's claim for compensation a claim relating to the reimbursement of export refunds and monetary compensatory amounts wrongly paid to the applicant.

The present stage of the proceedings concerns the question whether the claim for compensation is extinguished by way of set-off.

3. The applicant company has been in liquidation since 3 March 1978. At that time it was called Contifex Getreideprodukte GmbH & Co. KG. Because of a risk of confusion, the applicant's name was altered at the request of the authority responsible for the commercial register, by a decision of 13 January 1979, to DEKA Getreideprodukte GmbH & Co. KG.

On 18 March 1978 the applicant assigned the claim for compensation against the Community, which was the subject of the action for compensation for damage brought on 10 November 1978, to Curavest NV, a company established in Curaçao. Curavest waived repayment of a loan of HFL 900 000 which it granted to the applicant in 1976.

Curavest assigned 2.5% of the amount of the compensation to the lawyers representing Contifex in the present proceedings, with a minimum of DM 7 800 plus 6.5% VAT on the sum assigned. According to the document of assignment, the assignment by Curavest had priority over that made by Contifex.

The applicant did not notify the Commission of the latter assignment until 16 February 1981. On 18 March 1980 the German authorities decided that the applicant must repay them the sum of DM 736 106.81, being export refunds wrongly paid to the applicant during 1976 and 1977.

On 3 April 1981 Curavest, in its turn, notified the Commission of the assignment in question.

On 10 August 1981 the Commission obtained from the German authorities an assignment of the claim for reimbursement of the wrongly paid refunds.

By letter of 8 October 1981 sent to Curavest, the Commission protested against the assignment made by the applicant and stated that it was of the opinion that the claim for compensation was extinguished by way of set-off.

4. In the course of the written procedure, subsequent to the interlocutory judgment of 4 October 1979 the applicant, in its pleading of 17 March 1981, amended its original conclusions in which it claimed that the Community should pay it DM 311 838.93, and it now claims that the Community should be ordered to pay that sum to Curavest. By telex message of 15 January 1982 that company asked to be substituted as applicant in this case. By order of 22 September 1982, the Court refused Curavest's request.

5. The Commission asks the Court to declare that the applicant's claim for compensation is extinguished by way of set-off.

II — Submissions and arguments of the parties

1. The validity of the assignment of the claim for compensation and the possibility of set-off

(a) The *Commission* argues that the assignment of a claim for compensation must be regarded as invalid for the purposes of the judgment of the Court of 4 October 1979 in Case 238/78 (*Ireks-Arkady* v *Council and Commission* [1979] ECR 2955) in a case, like this one, where the result would be that a company in liquidation could obtain payment of compensation from the Community, without the latter's being able to raise by way of set-off a claim in a larger amount.

The Commission takes the view that even if the assignment must be considered valid the set-off may be raised against Curavest in accordance with the principle stated, *inter alia*, in paragraph 409 of the Bürgerliches Gesetzbuch [Civil Code] according to which, in the case of assignment of a claim, the legal position of the debtor must not be weakened: since the Commission's claim arose during 1976 and 1977, the claim for compensation assigned to Curavest was already capable of being the subject of a plea of set-off at the time of the assignment.

Such a result also follows from the fact that the Commission contested the assignment between the applicant and Curavest in accordance with paragraphs 1, 2, 3 (1) point 1., 5, 7 and 11 (2) point 1. of the *Anfechtungsgesetz* (a German statute concerning the judicial annulment, otherwise than in bankruptcy proceedings, of the acts of the debtor). The legal act in question was performed by a debtor (Contifex) with the intention, known to the other party (Curavest), of causing damage to its creditors. The fact that Curavest was aware of the applicant's intention to act to the detriment of its creditors may be inferred from the fact that the assignment was made some 15 days after the applicant's decision to go into liquidation.

The Commission observes that the claim for compensation from the Community represented the applicant's sole asset after its liquidation. In those circumstances, under paragraph 419 of the Bürgerliches Gesetzbuch Curavest is liable for the applicant's debts by reason of the assignment of assets which had been made.

(b) The *applicant* argues that according to paragraph 406 of the Bürgerliches Gesetzbuch the debtor under the assigned claim cannot raise a set-off against the assignee when, at the time of the acquisition of the claim, he knew of the assignment or where the claim did not become enforceable until after he acquired that knowledge and at a date subsequent to that of the assigned claim. These alternatives exist in this case.

Nor, according to paragraph 393 of the Bürgerliches Gesetzbuch, is a set-off allowed against a claim arising from an unlawful act intentionally committed.

Such rules also exist in Community law.

The other objections which the Commission bases upon an assignment of assets within the meaning of paragraph 419 of the Bürgerliches Gesetzbuch and upon the Anfechtungsgesetz raise, according to the applicant, matters of national law and must be judged by the national courts.

The applicant observes, however, that Curavest has no liability under paragraph 419 of the Bürgerliches Gesetzbuch because the applicant's rights to compensation from the Community were not, at the time of the assignment, the applicant's sole asset.

Furthermore, according to German case-law, Curavest is entitled to be paid in priority, since its claim against the applicant exceeds the claim for compensation against the defendant.

The Commission's objection to the assignment, for the purposes of the Anfechtungsgesetz, which is based upon the applicant's intention to act to the disadvantage of the Community as creditor, is defeated by the good faith of Curavest.

(c) The *Commission* replies that the applicant cannot rely upon paragraph 406 of the Bürgerliches Gesetzbuch in respect of the set-off raised by the Commission. Since the set-off concerns a claim for the recovery of payments made under Community agricultural legislation, the German authorities and the Commission must be considered as constituting a single entity. When they acquired the debt against the applicant, they had not been informed of the applicant's assignment of the claim for compensation to Curavest.

The Commission considers that the applicant's right to compensation from the Community is not a right based upon an unlawful act intentionally committed. Article 393 of the Bürgerliches Gesetzbuch does not, therefore, apply.

(d) The *Council* concurs with the observations of the Commission.

2. The request for payment to Curavest

According to the *Commission*, Curavest's request is inadmissible by virtue of Article 42 (2) of the Rules of Procedure since it is not founded upon matters of law or of fact which came to light in the course of the written procedure.

The Commission further observes that the interlocutory judgment of 4 October 1979 has already ruled in favour of the applicant. It would be contrary to procedural principles for it to be possible for a final decision to be given in favour of Curavest.

III — Applicant's reply to a question put by the Court

At the request of the Court the applicant, by letter of 28 October 1982, supplied the Court with information concerning its financial position, and also its relations with Curavest, *inter alia* by way of a report drawn up by accountants.

IV — Oral procedure

At the sitting on 24 November 1982, the applicant, represented by B. Festge, Rechtsanwalt, Hamburg, the Council, represented by its Legal Adviser B. Schloh, acting as Agent, and the Commission, represented by J. Sack of its Legal Department, acting as Agent, presented oral argument.

On that occasion the Commission provided the Court with additional information in particular on the claim for the reimbursement of export refunds and wrongly received monetary compensatory amounts which it raises against the applicant.

The Advocate General delivered his opinion at the sitting on 13 January 1983.

Decision

1 By application lodged at the Court Registry on 10 November 1978, Contifex Getreideprodukte GmbH & Co. KG brought an action pursuant to Article 178 and the second paragraph of Article 215 of the EEC Treaty, for an order for the payment to it by the European Economic Community of the sum of DM 311 836.93 as compensation for damage resulting from the abolition of production refunds for maize gritz for use in the brewing industry between 1 August 1975 and 19 October 1977.

2 The applicant was a limited partnership of which one of the two limited partners, Mr D. K., was also the manager. The partner having unlimited liability was a limited liability company, Contifex Getreideprodukte GmbH, of which Mr D. K. was also one of the three members. Prior to bringing the action, the two undertakings went into voluntary liquidation, and Mr D. K. also acted as liquidator. Following a change of business name, which was required by the authorities in charge of the commercial register and which was the subject of a decision dated 13 January 1979, the undertaking is now called DEKA Getreideprodukte GmbH & Co. KG i. L. (in liquidation). Both the liquidation and the change of business name were made known to the Court only on 19 November 1981 by a procedural document lodged by the applicant.

3 By an interlocutory judgment of 4 October 1979 given in Joined Cases 241, 242 and 245 to 250/78 *DGV and Others* v *Council and Commission* [1979] ECR 3017, the Court ordered the European Economic Community to pay to

a number of undertakings, including the applicant, sums equivalent to the production refunds for maize gritz used by the brewing industry to which each of those undertakings would have been entitled if, during the period from 1 August 1975 to 19 October 1977, the use of maize for the production of gritz had conferred an entitlement to the same refunds as the use of maize for the manufacture of starch.

4 Under the terms of the judgment the parties were required to transmit to the Court a statement of the amounts of compensation arrived at by agreement, or in the absence of agreement, a statement of their views with supporting figures. Costs were reserved.

5 Following that judgment the parties in this case agreed that the amount of the compensation was the same as that claimed by the applicant in its application. The Commission has, however, raised by way of set-off against the applicant's claim for compensation a claim for reimbursement of export refunds wrongly paid to the applicant. The applicant has responded to that plea by contending that prior to bringing the action it had assigned its claim for compensation to Curavest NV of Curaçao (Netherlands Antilles) and that that assignment, which was made known to the Court only by the aforementioned procedural document lodged on 19 November 1981, precluded the set-off. Consequently, it has asked the Court to order the Community to pay the sum of DM 311 836.93 to Curavest.

6 As regards the applicant's financial position and its relations with Curavest, the documents before the Court and in particular the report drawn up by accountants on 30 November 1978 provide the following information:

Since 1973 the applicant's results were consistently unfavourable. The losses were in the region of DM 1 665 000 on 31 December 1976 and reached DM 2 264 000 by the end of the financial year 1977, thus completely exhausting the capital which was originally DM 1 000 000.

By a contract dated 25 August 1976, Curavest granted the applicant a loan of HFL 900 000. The contract did not provide for terms of repayment but only for the payment of interest at 9% per annum. The loan was secured by the creation of a low-ranking charge on the applicant's plant and machinery,

whose book-value on 1 January 1977 was DM 686 227. The debts owed by the applicant to the two banks in favour of whom it had granted prior charges on the same plant and machinery amounted to DM 1 318 388.49 on 31 December 1976.

The loan granted by Curavest is entered in the applicant's balance sheets in the sum of DM 860 000 on 1 January 1977 and of DM 930 548.10 on 31 December 1977. However, it appears from the accountants' report that there were further financial relations between Curavest on the one hand and the applicant and its manager on the other, and the applicant has stated that the total debt amounted to HFL 1 400 000 on 31 December 1977 and to HFL 1 775 000 on 31 December 1978.

7 On 3 March 1978 it was decided to liquidate the two Contifex undertakings. An out-of-court arrangement involving relinquishment of rights in the assets was reached with the applicant's creditors other than Curavest on the basis of a partial satisfaction of the creditors to the extent of 25%. The arrangement entered into force on 31 July 1978. In order to enable this arrangement to be made, Curavest, by an agreement made on 18 March 1978, waived its claim on condition that the applicant's claims, including the claim for compensation from the Community, be assigned to it.

8 The assignment was notified to the Commission by the applicant on 16 February 1981 and by Curavest on 3 April 1981, that is to say almost three years after the contract of assignment and after the applicant had brought this action and obtained judgment against the Community in the above-mentioned interlocutory judgment.

9 The claim for reimbursement of sums wrongly paid which the Commission has raised against the applicant company arises from the grant of export refunds and monetary compensatory amounts, in respect of maize gritz exported during 1976 and 1977, the total of which far exceeds the applicant's claim for compensation. These sums were granted by the German authorities

in pursuance of Community rules. Having realized that the grant of the amounts had been obtained as the result of fraudulent activities of the manager of the undertaking, Mr D. K., for which he had been sentenced to an immediate term of imprisonment, the German authorities, in a series of decisions, claimed from the applicant reimbursement of the wrongly paid sums. By a document dated 10 August 1981 they assigned the claim which was the subject of one of the aforementioned recovery decisions, dated 18 March 1980 and relating to an amount of DM 736 106.81, in order to enable the Commission to raise a set-off against the applicant's claim for compensation.

10 The Commission raises an objection of inadmissibility to the applicant's request for an order that the Community pay the compensation to Curavest. It believes that, whether that request be classified as a fresh issue or as a new head of claim, it is inadmissible according to the Rules of Procedure of the Court. Furthermore it conflicts with the principle of *res judicata* since, in the interlocutory judgment referred to above, the Community has already been ordered to pay those sums to the applicant.

11 As regards the substance of the case, the main contention of the Commission is that the assignment to Curavest is invalid or at least that it cannot be raised against the Commission because it constitutes a clear abuse on the part of the applicant. In this respect the Commission refers to the judgment of 4 October 1979 (Case 238/78 *Ireks-Arkady* [1979] ECR 2955) in which the Court recognized the assignment of a claim for compensation for damage whilst emphasizing that in circumstances such as those of the case before it there was no cause to believe that the assignment might have led to an abuse.

12 Since the question whether the assignment constitutes an act which is valid as against the Community authorities must be considered as a preliminary issue, not only with regard to the other submissions on the substance of the case raised by the Commission, but also with regard to the objection of inadmissibility, it is appropriate to examine it first.

13 In this respect, it must be borne in mind that the Community rules on production or export refunds may give rise not only to debts which traders may raise against the authorities entrusted with administering the system, but also to claims, directed against traders, for the reimbursement of wrongly paid sums whose recovery is required by the Community rules. Those rules may thus give rise, as between authorities and traders, to reciprocal and even related claims which are an appropriate subject for set-off.

14 In the case of an insolvent trader, such a set-off may in fact constitute the only practicable way open to the authorities to recover the wrongly paid sums. In that case the assignment of the trader's claims against the authorities to a third party can, depending on the circumstances, amount to an abusive transaction.

15 In this connection, the reservation intimated in the aforementioned judgment rests upon the same considerations as those which are based upon national rules which, in the Member States, provide that certain acts of a debtor to the detriment of the interests of creditors and, in particular, those which are of a fraudulent nature *vis-à-vis* creditors, either cannot be pleaded against the creditors or may be set aside under procedures specifically prescribed for that purpose. Those national rules constitute the expression of a general principle common to the laws of the Member States. That principle, when applied in Community law, a possibility expressly provided for in the second paragraph of Article 215 of the Treaty, makes it necessary to consider whether the assignment upon which the applicant relies in this case is of such an abusive nature that it must be regarded as invalid as against the Community authorities.

16 It appears from the documents before the Court that the contract of assignment was concluded at a time when the assignor undertaking was in a state of insolvency and that its purpose was to make possible an amicable out-of-court arrangement with the other creditors, followed by the disposal of all the undertaking's assets, while the person who was at one and the same time a principal member, the manager and liquidator of the undertaking knew perfectly well that by reason of his fraudulent activities the undertaking had obtained Community refunds which were not due to it and which were

far greater in amount than the assigned claim. In these circumstances the assignment must be held to constitute a clear abuse *vis-à-vis* the Community authorities.

17 However, since national provisions dealing with the setting aside of acts of a debtor as a general rule safeguard the interests of a third party acting in good faith, it is appropriate to examine not only the position of the assignor but also that of the assignee, namely Curavest.

18 In this respect it appears from the text of the assignment itself that Curavest was perfectly well aware of the financial position of the assignor as well as of the objective, described above, which the latter was seeking to achieve by means of the assignment. This fact as well as the conditions, which were unusual to say the least, under which Curavest granted an extraordinarily large loan to Contifex, given the latter's situation, the commonalty of interests which is suggested by the further financial relations mentioned in the accountant's report and the fact that the action was brought and prosecuted almost to its conclusion not by the assignee, Curavest, but by the assignor, Contifex, in the unexplained absence, until February 1981, of any notification to the Community of the assignment, warrant the finding by the Court that Curavest cannot rely upon good faith worthy of being protected.

19 It follows from the foregoing that the claim for an order for the payment by the Commission of the amount of the compensation to Curavest is unfounded and that it must therefore be dismissed without there being any necessity to consider the objections of inadmissibility.

20 As far as the applicant's original claim is concerned, it is sufficient to make a finding that the claim for compensation is extinguished by way of set-off. It is true that the applicant has pleaded a rule of German law according to which there can be no set-off in respect of a claim arising from an intentional unlawful act. Without its being necessary to decide whether that rule has its equivalent in Community law, it is sufficient to point out that the abolition by the Council of the refunds for the production of maize gritz cannot be said to constitute such an act.

21 The application must therefore be dismissed in its entirety.

Costs

22 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. As the applicant has failed in its submissions 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.**

Mertens de Wilmars Pescatore O'Keeffe

Mackenzie Stuart Bosco Koopmans Due

Delivered in open court in Luxembourg on 1 March 1983.

P. Heim
Registrar

J. Mertens de Wilmars
President