JUDGMENT OF THE COURT
18 March 1986 *

In Case 244/83

Meggle Milchindustrie GmbH & Co. KG, Reitmehring, Federal Republic of Germany, represented by Fritz Modest and Barbara Festge, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 34 B rue Philippe-II,

applicant,

v

Council of the European Communities, represented by its Legal Adviser, Bernhard Schloh, and by Arthur Brautigam, a member of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of H. J. Pabbruwe, Director of the Legal Affairs Directorate of the European Investment Bank, 100 boulevard Konrad-Adenauer,

and

Commission of the European Communities, represented by Jörn Sack and Bernhard Jansen, members of its Legal Department, acting as Agents, with an address for service in Luxembourg at the office of Manfred Beschel, also a member of its Legal Department, Jean Monnet Building, Kirchberg,

defendants,

both supported by

The French Republic, represented by François Renouard, acting as Agent, with an address for service in Luxembourg at the French Embassy, 2 rue Bertholet,

intervener,

ACTION for damages brought against the European Economic Community under the second paragraph of Article 215 of the EEC Treaty,

* Language of the Case: German.

THE COURT

composed of: Lord Mackenzie Stuart, President, T. Koopmans, U. Everling, K. Bahlmann and R. Joliet, Presidents of Chamber, G. Bosco, O. Due, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: P. VerLoren van Themaat
Registrar: P. Heim

after hearing the Opinion of the Advocate General delivered at the sitting on 26 June 1985,

gives the following

JUDGMENT

(The account of the facts and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By application lodged at the Court Registry on 27 October 1983 Meggle Milchindustrie GmbH & Co. KG (hereinafter referred to as 'Meggle'), of Reitmehring, Federal Republic of Germany, brought an action under the second paragraph of Article 215 of the EEC Treaty for an order requiring the European Economic Community, represented by the Council and the Commission, to pay it DM 19 794 848.62 together with interest calculated at the rate of 6% from 1 September 1983 on the first DM 15 602 580.27 and from the date of the application on the remaining DM 4 192 268.35 or, in the alternative, from the date of the judgment on the entire sum.

2 Meggle runs a dairy and milk-processing business in the Federal Republic of Germany and produces casein and caseinates from skimmed milk. Sales of those products account for approximately 10% of its turnover. It considers that it has suffered a loss as a result of the Community regulations in force, in particular because of the combined effect of the measures governing the common organ-

ization of the market in milk and milk products and monetary measures in the agricultural sector; in its view, those measures have led to discrimination against manufacturers of casein and caseinates in Member States with a strong currency in favour of manufacturers in Member States with weak currencies.

3 As Meggle points out in its application, although casein and caseinates do not appear in the list of products contained in Annex II to the EEC Treaty and are not therefore subject to the provisions concerning agriculture in Articles 39 to 46 of the Treaty, as are, by virtue of Article 38, the products appearing in that list, their cost price is inevitably affected by the price of the agricultural product which is the raw material from which they are made, namely liquid skimmed milk. Under the common organization of the markets in milk and milk products established by Regulation No 804/68 of the Council of 27 July 1968 (Official Journal, English Special Edition 1968 (I), p. 176), a uniform intervention price for the entire Community is fixed for skimmed-milk powder. It follows that the intervention price, less the producers' costs of processing liquid skimmed milk into powdered skimmed milk, is necessarily the lowest price at which a milk producer, who could otherwise sell his milk to intervention agencies, is prepared to sell his product.

4 Since the uniform intervention price, which until the end of 1978 was fixed in units of account and subsequently in ECU, is converted into the national currencies of the various Member States on the basis of the so-called representative exchange rates or 'green' rates, which diverge to some extent from the actual exchange rates in order to prevent currency fluctuations from producing a reduction in farmers' earnings in certain Member States, the intervention price expressed in national currency turns out to be much higher in countries with a strong currency than if converted at the actual exchange rates, whereas the opposite occurs in countries with weak currencies.

5 However, in intra-Community trade, it is the market exchange rates which are used so that if no adjustment were made the agricultural produce of countries with strong currencies would be likely to be handicapped compared with the agricultural produce of countries with weak currencies. In order to prevent disruption of trade, monetary compensatory amounts covering the difference between the representative rates and the market rates were introduced by Regulation (EEC) No 974/71 of the Council of 12 May 1971 (Official Journal, English Special

Edition 1971 (I), p. 257). Those amounts are paid on exports from countries with strong currencies and are levied on exports from countries with weak currencies where a disruption of trade has occurred or a risk of such a disruption is found.

6 According to Article 1 (2) of Regulation No 974/71, monetary compensatory amounts may be applied not only to products covered by intervention arrangements under a common organization of the markets but also to products whose price depends on the price of one of the aforementioned products and which are governed by a common organization of the markets or are the subject of a specific arrangement under Article 235 of the Treaty. The parties to the proceedings agree that casein and caseinates are products whose price depends on the price of a product covered by intervention arrangements, namely skimmed milk.

7 Despite repeated representations from the German industry, the Community institutions have not as yet extended the application of monetary compensatory amounts to casein and caseinates. Article 16 (2) of Council Regulation (EEC) No 3033/80 of 11 November 1980 laying down the trade arrangements applicable to certain goods resulting from the processing of agricultural products (Official Journal 1980, L 323, p. 1), which is a measure adopted under Article 235 of the EEC Treaty, provides that:

'(2) The arrangements laid down by this Regulation shall apply with effect from 1 January 1981. However, their application to caseins falling within subheading 35.01 A of the Common Customs Tariff and to caseinates and other casein derivatives falling within subheading 35.01 C of the Common Customs Tariff shall be deferred until a further decision of the Council.'

8 According to Meggle, the Community institutions have not adopted any other measure to offset the disadvantage which it claims to have suffered on its home market as well as on foreign markets compared with its competitors in countries with weak currencies owing to the application of the system of representative rates to milk and milk products.

9 Meggle contends that the Community regulations at present in force have an extremely adverse effect on the competitive position of manufacturers of casein and caseinates located in countries with strong currencies. In particular, German producers, of which Meggle is the leader, are exposed to very keen competition from French producers since France is one of the Member States with a weak currency.

10 Like the other German producers, it has suffered injury, mainly due to competition from French producers, in two ways: first of all, in order to dispose of its products, it has been obliged to sell them at a price lower than their cost price, as determined on the basis of the 'standard method' of calculation used by the Commission for the purpose of granting the production aid on casein provided for in Regulation No 987/68 of the Council of 15 July 1968 (Official Journal, English Special Edition 1968 (I), p. 262); secondly, it had to forego sales which would have been possible if conditions of competition had not been distorted.

11 In its application Meggle seeks compensation only for the losses incurred on casein and caseinates sold at a lower price. That claim relates to the period after 1 October 1978 since any action for damages in respect of previous years is time-barred under Article 43 of the Statute of the Court.

12 Meggle contends that the injury was caused by the failure of the Community institutions to take the measures necessary to alleviate the discrimination against it arising from the application of the representative rates. In view of the degree of discrimination which it has suffered because of the Community regulations, such a failure to act constitutes a serious breach of a higher-ranking rule of law for the protection of individuals and consequently gives rise to an obligation to pay compensation.

13 In view of the Court's recent case-law (judgment of 17 December 1981 in Joined Cases 197 to 200, 243, 245 and 247/80, *Ludwigshafener Walzmühle Erling KG and Others* v *Council and Commission* [1981] ECR 3211), according to which only a real possibility of bringing an action in the national courts may bar an action under Article 215 of the EEC Treaty, the Council has no objection to the admissibility of the action.

14 The Commission refers to the same case-law but takes the view that actions for damages which are in substance designed solely to secure an amendment of Community legislation in the future must be considered inadmissible. By bringing an action under Article 215 Meggle is indirectly seeking to have the legislation in force amended in its favour. It chose that form of action because it cannot attack the provisions concerning representative rates by means of an action under Article 173 of the Treaty since it is not directly and individually concerned by them. Nor may it challenge, by means of an action for failure to act based on Article 175, the non-adoption of measures, which, if adopted, would not be addressed to it. In the Commission's view, the applicant should not be allowed to bring an action for damages in order to achieve, in a roundabout way, aims which ought to be pursued by means of an action for annulment or an action for failure to act, depending on the case. The Commission has not, however, raised a formal objection of inadmissibility.

15 As regards the substance of the case, the Council and Commission submit that the conditions under which the Community may incur liability under the second paragraph of Article 215 of the EEC Treaty are not fulfilled simply because the institutions failed to adopt measures of the kind sought by Meggle. They point out in particular that, according to established case-law, where a complex economic situation must be assessed in the context of the implementation of the Common Agricultural Policy, which is precisely the situation in this case, the institutions have a wide discretion not only in deciding upon the nature and scope of the measures to be taken but also, to some extent, in ascertaining the basic facts. The Community cannot therefore incur liability unless the applicant can show that in exercising their wide discretion the institutions committed a manifest error, misused their powers or manifestly exceeded the scope of their discretion. The Council and Commission in any event dispute that any causal link exists between their conduct and the alleged injury, and finally they contend that Meggle has not in any case proved that it actually suffered such injury.

16 The Government of the French Republic, which was granted leave to intervene in support of the Council's and Commission's submissions by order of the Court of 27 March 1984, observes that the export success of the French casein industry is essentially due to the efforts it has made in recent years to modernize and increase

its capacity and is in no way due to monetary measures adopted in the agricultural sector by the Community institutions.

17 As far as Meggle's arguments are concerned, it should be borne in mind that it claims that there has been a clear breach of the prohibition of discrimination, a higher-ranking rule of law for the protection of individuals. In Meggle's view, such a breach occurs each time a distortion of competition, causing considerable injury to manufacturers and traders, is brought about or maintained by the adoption of legal measures or by the failure to adopt such measures.

18 In Meggle's view, the fact that the Community institutions have not applied monetary compensatory amounts to casein and caseinates or granted aid for their production in an amount varying from Member State to Member State has led to distortions of competition and to discrimination on the market in those products as well as between producers in the individual Member States. According to Meggle, statistics on production and sales and on imports and exports would suggest that for several years such distortion and discrimination has produced and continues to produce an abnormal shift in trading patterns owing to the green rates and the failure to abolish such discrimination. It considers that the omission of which the institutions are accused also affects the proper operation of the intervention system under the common organization of the market in milk and milk products owing to its adverse effect on the processing of skimmed milk into casein and caseinates, which has an essential function in regulating the market.

19 As regards the effects which the absence of the measures sought by Meggle allegedly has on the proper functioning of the intervention system for skimmed milk, the Court would emphasize first of all that the production of casein and caseinates has certain special features. As is clear from the documents before it, those products are chiefly made between May and September when liquid skimmed milk, the raw material from which they are made, may be bought more cheaply. At that time of the year the seasonal milk surplus exceeds by a large margin the capacity to process liquid skimmed milk into skimmed milk powder and prevents milk producers from resorting to intervention. It follows that, since the quantities of milk that manufacturers of casein and caseinates buy during that

period cannot in any event be sold to the intervention agencies, the fact that the measures suggested by Meggle have not been adopted cannot cause any disruption of the intervention system.

20 Meggle maintains, however, that, even though more casein and caseinates are produced in the months in which milk production is at its highest, they are also produced, albeit in smaller quantities, in other months of the year. Because monetary compensatory amounts are not applied to casein and caseinates and differential aid is not granted for their production, the possibilities for selling those products are reduced when they are made in the Federal Republic of Germany, and this has an adverse effect on production growth. According to Meggle, this fall in production leads in turn to less liquid skimmed milk being used by manufacturers of casein and caseinates and thereby increases the quantity of milk sold to intervention agencies.

21 In this regard it must be observed that, as is shown by the statistics produced by the Commission in the annex to its rejoinder, which are not disputed by Meggle, in the years which followed the introduction of representative rates the production of casein and caseinates in fact consistently increased in the Federal Republic of Germany and in the other Member States which produce those products, so that there is no evidence to suggest that the failure to adopt the measures sought by Meggle caused, or could cause, a disruption of the market in milk.

22 A further point to be considered is whether the inaction of the Community institutions in the above-mentioned circumstances caused, or could cause, deflections of intra-Community trade in casein and caseinates, as contended by Meggle.

23 On the basis of the relevant statistics produced by the Commission it is possible to establish that between 1973 and 1983 two of the Community's leading producers of casein and caseinates, the Federal Republic of Germany, a country with a strong currency, and France, a country with a weak currency, lost part of their market shares; Germany's share fell from 25.2% to 17.1% and France's from 39% to 31%. On the other hand, the Netherlands, a country with a strong currency, and Ireland, a country with a weak currency, increased their market shares from 18% and 13% respectively to 19%. It is clear therefore that those changes in

market shares were not brought about by the operation of the representative rates since, if that had been the case, all the countries with weak currencies would have benefited and all the countries with strong currencies would have been placed at a disadvantage.

24 Nor do statistics on production and exports for the same period reveal any link between the representative rates and the changes in those areas. In fact, the production of casein and caseinates in the Federal Republic of Germany increased to an extent which is neither below the Community average nor below the figure reported for France whereas, if markets had shrunk, this would have had an adverse effect on German production. It is also notable that exports from the Federal Republic of Germany have increased and the fact that they are mainly to non-member countries is irrelevant in that regard since the system of representative rates should also have affected those exports.

25 It should also be borne in mind that, as appears from the fourth recital in the preamble to Council Regulation No 3033/80, the application of the provisions of that regulation to casein and caseinates has been deferred on the ground that, 'in accordance with Article 11 (1) of Council Regulation (EEC) No 804/68 of 27 June 1968 on the common organization of the market in milk and milk products, as last amended by Regulation (EEC) No 1761/78, aid is granted for Community-produced skimmed milk processed into casein, if such milk and the casein produced from it satisfy certain conditions laid down in Article 1 of Regulation (EEC) No 987/68'. That aid, when converted into the various national currencies on the basis of the representative rates, has been, if the actual exchange rates are taken into account, much higher for German producers than for French producers, at least until 1 June 1983 when the French green rate was increased. It follows that the disparities between German and French producers have been largely offset over a very long period by the Community aid granted for the production of casein, which is another factor suggesting that trade on the market in this product has not been deflected.

26 The considerations set out above therefore lead to the conclusion that the statistical information made available to the Court by the parties to the proceedings

does not disclose the existence, or even the risk, of distortions or deflections of trade on the market in casein and caseinates.

27 It may be concluded from that information and from those considerations that it has not been proved that considerable disparities exist between German and French producers of casein. In those circumstances, Meggle's submission alleging a breach of the prohibition of discrimination must be rejected.

28 In this regard, it must also be borne in mind that, as the Court stated in its judgment of 21 February 1979 in Case 138/78, *Stölting* v *Hauptzollamt Hamburg-Jonas* [1979] ECR 713, although in certain transactions the application of the green rates may possibly involve advantages or disadvantages which may appear to constitute discrimination, it none the less remains true that in general the application of the green rates serves to remedy monetary situations which, in the absence of those rates, would result in much more serious, obvious and general discrimination.

29 Therefore, although it is not without certain drawbacks, the adoption of the system of 'green' exchange rates is justified by the requirements of the Common Agricultural Policy and is not contrary to the prohibition of discrimination. The same conclusion must be drawn as regards the effects of the application of that system on the position of producers of casein and caseinates.

30 It follows from the foregoing that Meggle's claim for damages is unfounded and that the action must therefore be dismissed.

31 In those circumstances, the Court considers it unnecessary to rule on the arguments advanced by the Commission on the question of the admissibility of the action.

Costs

32 Article 69 (2) of the Rules of Procedure provides that 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, including those of the intervener, which has asked for them in its submissions.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicant to pay the costs, including those of the intervener.

Mackenzie Stuart Koopmans Everling Bahlmann

Joliet Bosco Due Galmot O'Higgins

Delivered in open court in Luxembourg on 18 March 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President