JUDGMENT OF THE COURT (Sixth Chamber)
5 December 1996 *

In Case C-69/95,

Italian Republic, represented by Umberto Leanza, Head of the Legal Department in the Ministry of Foreign Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy, 5 Rue Marie-Adélaïde,

applicant,

v

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

defendant,

APPLICATION for partial annulment of Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1994 L 352, p. 82),

* Language of the case: Italian

THE COURT (Sixth Chamber),

composed of: J. L. Murray, President of the Fourth Chamber, acting for the President of the Sixth Chamber, P. J. G. Kapteyn (Rapporteur), G. Hirsch, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,
Registrar: H. von Holstein, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 12 September 1996,

after hearing the Opinion of the Advocate General at the sitting on 26 September 1996,

gives the following

Judgment

1 By application lodged at the Court Registry on 10 March 1995, the Italian Republic brought an action under Article 173 of the EC Treaty for partial annulment of Commission Decision 94/871/EC of 21 December 1994 on the clearance of the accounts presented by the Member States in respect of the expenditure for 1991 of the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section (OJ 1994 L 352, p. 82, hereinafter 'the contested decision'), inasmuch as, in determining the total expenditure chargeable to the EAGGF, the Commission made financial adjustments detrimental to the applicant by excluding the sum of LIT 103 161 493 560, corresponding to expenditure on the acquisition of milk quotas under a milk production restructuring programme.

The applicable rules

2 Council Regulation (EEC) No 856/84 of 31 March 1984 amending Regulation (EEC) No 804/68 on the common organization of the market in milk and milk products (OJ 1984 L 90, p. 10) established an additional levy system applicable with effect from 2 April 1984. Article 4(1)(a) of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13) provides that, in order to complete the restructuring of milk production, Member States may grant compensation to producers undertaking to discontinue such production definitively.

3 By Council Regulation (EEC) No 1183/90 of 7 May 1990 amending Regulation (EEC) No 857/84 (OJ 1990 L 119, p. 27), action was taken in favour of small producers in the milk sector in order to bring them as a whole up to a level of production better adapted to market requirements.

4 Regulation No 1183/90 inserted an Article 3c into Regulation No 857/84. That article provides that producers whose individual reference quantity at the beginning of the seventh 12-month period of application of the additional levy scheme was less than 60 000 kg, or 100 000 kg in mountain areas, could obtain additional reference quantities, on condition that they did not seek to benefit under any programme for the cessation of milk production until the end of the additional levy arrangements as regards either the basic individual reference quantity or the additional reference quantity received under the restructuring programme.

5 The fourth recital in the preamble to Regulation No 1183/90 states as follows:

'Whereas, under the arrangements to curb production, additional quantities can be granted only if, in this particular case, they have first been released by other producers; whereas a new Community programme for financing the cessation of milk production should therefore be established, particularly for those Member States where the comparative situation of the various collection areas so warrants, whereby producers who fulfil certain eligibility requirements will be paid compensation following the total and definitive cessation of their activities.'

6 Having regard to the amendments made to Article 4 of Regulation No 857/84 by Regulation No 1183/90, Community financing for the milk production restructuring programme is limited to a quantity of 500 000 tonnes. Within that limit, producers who undertook before 1 November 1990 to discontinue their milk production totally and definitively by 1 April 1991 received compensation of ECU 36 per 100 kg of milk or milk equivalent in the form of a single payment before 1 July 1991.

7 In the case of Italy, the Commission, by decision of 25 January 1991, fixed the quantity referred to in Article 4(1) of Regulation No 857/84 at 164 100 tonnes.

8 Commission Regulation (EEC) No 1546/88 of 3 June 1988 laying down detailed rules for the application of the additional levy referred to in Article 5c of Regulation (EEC) No 804/68 (OJ 1988 L 139, p. 12) was amended by Commission Regulation (EEC) No 2138/90 of 25 July 1990 (OJ 1990 L 195, p. 23). The latter regulation inserted an Article 3b into Regulation No 1546/88. According to Article 3b(1), Member States were to notify the producers referred to in Article 3c(1) or (3) of Regulation No 857/84, not later than 1 June 1991, of the additional quantity allocated to them.

9 Articles 2 and 3 of Council Regulation (EEC) No 729/70 of 21 April 1970 on the financing of the common agricultural policy (OJ, English Special Edition 1970 (I), p. 218) provide that only expenditure incurred in accordance with the Community rules on the common organization of agricultural markets is to be chargeable to the EAGGF.

10 According to Article 4(1b) of Regulation No 857/84, as inserted by Regulation No 1183/90, Community financing for the milk production restructuring programme is deemed to constitute intervention within the meaning of Article 3 of Regulation No 729/70.

11 Article 8 of Commission Regulation (EEC) No 1723/72 of 26 July 1972 on making up accounts for the European Agricultural Guidance and Guarantee Fund, Guarantee Section (OJ, English Special Edition, Second Series III, p. 109) provides that the decision to make up the accounts mentioned in Article 5(2)(b) of Regulation No 729/70 is to cover, in particular, the determination of the amount of expenditure incurred in each Member State during the year in question, recognized as chargeable to the EAGGF, Guarantee Section.

The contested decision

12 The consolidated report of 21 December 1994 on the results of the inspections carried out for the clearance of the accounts chargeable to the EAGGF Guarantee Section for 1991 shows that, in the context of the restructuring programme established by Regulation No 1183/90, Italy purchased 163 592 tonnes of quotas at a total cost of LIT 103 161 493 560. In that report, the Commission refused to arrange for the financing of that sum by the EAGGF, on the ground that 'Italy did not at that time apply the milk quota scheme and, in particular, had not allocated the reference quantities necessary in order to give any meaning to the buying-up programme ... moreover, Italy has never reallocated the quantities concerned to the producers specified in Article 3 of Regulation (EEC) No 857/84'.

13 The Commission adopted the contested decision on 21 December 1994.

The pleas relied upon

14 The Italian Government claims that, by refusing to charge the sum of LIT 103 161 493 560 ('the sum at issue') to the EAGGF, the Commission has infringed Articles 1, 3 and 5 of Regulation No 729/70, Article 8 of Regulation No 1723/72 and Article 4 of Regulation No 857/84, has misused its powers and has failed to fulfil its obligation to provide a statement of reasons as required by Article 190 of the EC Treaty.

15 The documents before the Court show that, in advancing those pleas, the Italian Government is contesting the two grounds on which the Commission based its refusal to charge the sum at issue to the EAGGF, namely that the Italian Republic (1) did not apply the milk quota scheme during the 1991 financial year and (2) did not comply with the obligation to reallocate the quantities bought up to producers who fulfilled the relevant conditions before the date set by Article 3b of Regulation No 1546/88, as amended by Regulation No 2138/90.

16 First of all, it is settled case-law that Articles 2 and 3 of Regulation No 729/70 enable the Commission to charge to the EAGGF only sums paid in accordance with the rules laid down in the different agricultural sectors. In cases where Community rules authorize payment of aid only on condition that certain formalities relating to proof or supervision are observed, aid paid in disregard of that condition is not in accordance with Community law and the expenditure incurred therein may not therefore be charged to the EAGGF (Case C-197/90 *Italy* v *Commission* [1992] ECR I-1, paragraph 38).

17 The Court has also considered that strict interpretation of the conditions under which expenditure is to be borne by the EAGGF to be necessary, moreover, in view of the aim of Regulation No 729/70. The management of the common agricultural policy in conditions of equality between traders in the Member States requires that the national authorities of a Member State should not, by the expedient of a wide interpretation of a given provision, favour traders in that State to the detriment of those in other Member States where a stricter interpretation is applied. If such distortion of competition between Member States arises despite the means available to ensure the uniform application of Community law throughout the Community, it cannot be financed by the EAGGF but must, in any event, be borne by the Member State concerned (Case 11/76 *Netherlands* v *Commission* [1979] ECR 245, paragraph 9).

Non-application of the milk quota scheme

18 It is common ground that, during 1991, the milk quota scheme was not applied in Italy in a systematic and verifiable manner, as required by the Community rules.

19 The Italian Government maintains in that regard, first, that the non-application of the milk quota scheme does not in any event constitute a relevant factor for the purposes of charging to the EAGGF expenditure incurred in the buying-up of individual reference quantities. It maintains in that connection that the sums expended by it in buying up those quantities fully achieved their purpose, since producers who complied in 1991 with the milk production cessation programme not only discontinued production of the milk corresponding to the individual reference quantities released in accordance with Article 4(1b) of Regulation No 857/84, as amended by Regulation No 1183/90, but were excluded from any subsequent allocation of individual reference quantities.

20 Second, the Italian Government maintains that, when adopting the decision of 25 January 1991 fixing the maximum quantity which the Italian Republic could buy up, the Commission raised no objection to the fact that the Italian Republic was not applying — or, to be more precise, was not correctly applying — the milk quota scheme.

21 Third, the Italian Government asserts that the entire dispute concerning the incorrect application of the milk quota scheme in Italy was resolved by the increase in the total quantity allocated to it and by a financial adjustment which was applied in pursuance of the political agreement concluded within the Council in 1994.

22 Those arguments cannot be accepted.

23 As is apparent from the first recital in the preamble to Regulation No 1183/90, the milk production restructuring programme is designed to supplement the measure in favour of small producers in order to bring them as a whole up to a level of production better adapted to market requirements. The fourth recital in the preamble to that regulation states that, under the arrangements to curb production, additional quantities can be granted only if they have first been released by other producers. Consequently, the application of the milk production restructuring programme provided for by Regulation No 1183/90 necessarily presupposes the application of the milk quota scheme.

24 It is common ground that when the decision of 25 January 1991 was adopted, the Commission did not raise any objection to the fact that the Italian Republic was not applying, or not correctly applying, the milk quota scheme. However, the Italian Republic does not contest the fact that its failure to apply the milk quota scheme in a systematic and verifiable manner was only revealed by investigations carried out after the audit which took place between 27 and 31 May 1991.

25 As regards the argument concerning the political agreement reached by the Council in 1994, it need only be stated that the solution adopted relates to the additional levy not collected by the Italian Republic, and not to expenditure incurred under the milk production restructuring programme provided for by Regulation No 1183/90.

26 It follows that the Commission correctly based its refusal to charge the sum at issue to the EAGGF on the fact that the Italian Republic did not apply the milk quota scheme during the 1991 financial year.

Non-reallocation of the individual reference quantities released

27 It is not disputed by the Italian Republic that it did not reallocate the reference quantities released by the payment of compensation for the definitive cessation of milk production.

28 The Italian Government draws attention in that regard, first, to the special situation in which the Italian Republic found itself in relation to the application of the milk quota scheme. It became apparent in the course of 1991 that there was a substantial difference between actual milk production and the guaranteed national quantity. That situation prompted it to seek authorization for the use of national funds to supplement the Community financing of the cessation programme, with a view to meeting all the applications submitted, corresponding to approximately 600 000 tonnes.

29 The Italian Government points out, furthermore, that it was as a result of that situation that the Council decided in December 1992, when reaching an initial agreement on the request for an increase in the Italian quota, to finance a programme for the cessation of production in order to enable the Italian Republic to reduce

domestic production. According to the Italian Government, it is clearly a misuse of powers for the Commission to criticize it for not reallocating the quantities purchased pursuant to Regulation No 857/84 when, at the same time, the Council was taking a decision on Community financing to reduce Italian production. In those circumstances, the reallocation of 164 100 tonnes would have exacerbated the problem. That is why the Italian Republic preferred to suspend the reallocation, which appeared to run counter to the Community's actual requirements.

30 Lastly, the Italian Government maintains that it was subsequently authorized by the Commission temporarily to suspend the reallocation to producers of small quantities which had been released as part of a later programme for the cessation of milk production established by Council Regulation (EEC) No 1637/91 of 13 June 1991 fixing compensation with regard to the reduction of the reference quantities referred to in Article 5c of Regulation (EEC) No 804/68 and compensation for the definitive discontinuation of milk production (OJ 1991 L 150, p. 30), and by Council Regulation (EEC) No 3950/92 of 28 December 1992 establishing an additional levy in the milk and milk products sector (OJ 1992 L 405, p. 1).

31 Those arguments cannot be accepted.

32 As the Commission has observed, the restructuring programme provided for by Regulation No 1183/90 was designed not to reduce milk production but to promote improvement in the production structures of small holdings. The third recital in the preamble to that regulation states that the objective of that measure could be achieved only if holdings continued to produce milk. According to the fourth recital in the preamble to Regulation No 1183/90, it was precisely the financing of the total and definitive cessation of milk production which enabled the individual reference quantities thereby released to be allocated to producers.

33 It is true that other Community rules adopted within the framework of the milk quota scheme have established programmes for the cessation of production with a view to reducing milk production. However, that was not the case as regards the restructuring programme established by Regulation No 1183/90, which provided for cessation of production to be financed solely as a means of obtaining the additional quantities needed by small producers.

34 The fact that Italian milk production in 1991 far exceeded the maximum quantity allocated to Italy under the quota scheme cannot justify the unilateral suspension of the reallocation of the individual reference quantities released under the restructuring programme established by Regulation No 1183/90. In any event, the Italian authorities should have approached the Commission if they considered that the reallocation of the quantities released ran counter to the Community objective of the milk quota scheme.

35 It follows that, by failing within the prescribed period to reallocate the individual reference quantities released, the Italian Republic has infringed Article 3c of Regulation No 857/84, as amended by Regulation No 1183/90, and Article 3b of Regulation No 1546/88, as amended by Regulation No 2138/90. Consequently, the Commission acted correctly in basing its refusal to charge the sum at issue to the EAGGF on the fact that the Italian Republic did not comply with its obligation to reallocate the quantities bought up to producers fulfilling the relevant conditions before the date set by Article 3b of Regulation No 1546/88.

36 It follows from the foregoing considerations that the action must be dismissed in its entirety.

Costs

37 Under Article 69(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. The Commission has asked for the Italian Republic to be ordered to pay the costs. Since the Italian Republic has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders the Italian Republic to pay the costs.

Murray Kapteyn Hirsch

Ragnemalm Schintgen

Delivered in open court in Luxembourg on 5 December 1996.

R. Grass G. F. Mancini

Registrar President of the Sixth Chamber