JUDGMENT OF THE COURT
25 November 1987 *

In Case 343/85

Italian Republic, represented by Luigi Ferrari Bravo, Head of the Department of Contentious Diplomatic Affairs, acting as Agent, assisted by Oscar Fiumara, Avvocato dello Stato, with an address for service in Luxembourg at the Italian Embassy,

applicant,

v

Commission of the European Communities, represented by Alberto Prozzillo, 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,

defendant,

APPLICATION for a declaration that Commission Decision 85/460 of 28 August 1985 on the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1981 (Official Journal, L 267, p. 35), is partly void,

THE COURT

composed of: G. Bosco, President of Chamber, acting as President, G. C. Rodríguez Iglesias (President of Chamber), T. Koopmans, K. Bahlmann, R. Joliet, T. F. O'Higgins and F. Schockweiler, Judges,

Advocate General: J. L. da Cruz Vilaça
Registrar: D. Louterman, Administrator

* Language of the Case: Italian.

having regard to the Report for the Hearing and further to the hearing on 20 May 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 17 September 1987,

gives the following

Judgment

1 By an application lodged at the Court Registry on 15 November 1985, the Italian Republic brought an action under the first paragraph of Article 173 of the EEC Treaty for a declaration that Commission Decision 85/460 of 28 August 1985 on the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1981 (Official Journal, L 267, p. 35) is partly void.

2 The application seeks the annulment of that decision in so far as it refuses to recognize the following amounts as chargeable to the EAGGF:

(i) LIT 677 198 690 in respect of aid for skimmed-milk powder in intervention;

(ii) LIT 3 727 116 185 in respect of aid for the consumption of olive oil;

(iii) LIT 2 694 251 820 and 145 345 970 in respect of compensation for the withdrawal from the market of fishery products;

(iv) LIT 761 886 150 in respect of monetary compensatory amounts.

3 Reference is made to the Report for the Hearing for a more detailed statement of the facts of the case 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.

A — Aid for skimmed-milk powder in intervention

4 The disagreement between the parties on this point concerns the time at which aid for skimmed-milk powder should be calculated when that product is used to manufacture animal feedingstuffs. It falls in particular to be determined whether it is the day on which the skimmed-milk powder is purchased or that on which it is processed which is decisive in calculating the amount of the aid when the trader buys from the intervention body in his own country skimmed-milk powder coming from intervention stocks in another Member State.

5 In 1978, the Council decided to make available to the Italian intervention body part of the stocks of skimmed-milk powder held in intervention in other Member States. The detailed arrangements for the transfer of the second part of that quantity, which is at issue in this case, were laid down in Commission Regulation No 516/80 of 29 February 1980 on the transfer of skimmed-milk powder to the Italian intervention agency (Official Journal, L 58, p. 51). According to that regulation, the price paid to the Italian intervention agency by the purchaser is to be reduced by the amount of the aid paid under Article 10 of Regulation No 804/68 of the Council of 27 June 1968 on the common organization of the market in milk and milk products (Official Journal, English Special Edition 1968 (I), p. 176). That provision provides for aid to be granted for skimmed-milk powder produced in the Community for use as feedingstuffs.

6 It can be seen from the file that in respect of skimmed-milk powder from public stocks sold under Regulation No 516/80, traders received additional aid the amount of which was equal to the difference between the amount of the aid at the time that the contract was concluded and the amount applicable on the day on which it was processed. The Commission considered that the granting of that additional aid was not in accordance with the applicable Community provisions and, consequently, it could not be charged to the EAGGF.

7 The Italian Government points out that the grant of aid for skimmed-milk powder used in the manufacture of feedingstuffs is governed by Commission Regulation No 1725/79 of 26 July 1979 on the rules for granting aid to skimmed milk processed into compound feedingstuffs and skimmed-milk powder intended for feed for calves (Official Journal, L 199, p. 1). Article 9 of that regulation provides

that the amount of the aid is to be that applicable on the day on which the skimmed milk or skimmed-milk powder is denatured or on the day on which it is processed into compound feedingstuffs. According to the Italian Government, that provision contains an express rule concerning the day which is to be taken into consideration in calculating the aid whereas no exception to that rule is provided for in the particular case of the processing of skimmed-milk powder sold by intervention agencies.

8 The Commission contends that Article 9 of Regulation No 1725/79 governs only the granting of aid in cases in which a trader has bought skimmed-milk powder on the free market in his own country. Purchasers on the free market in another Member State are covered by the provisions of Commission Regulation No 1624/76 of 2 July 1976 (Official Journal, L 180, p. 9), according to which the aid may, under certain conditions, be paid to the exporter in advance. In such cases, the amount of the aid is that applicable on the day the customs formalities are completed but, according to Article 8 (2) of the regulation, an additional amount may be paid to traders who carry out the processing when the amount of the aid, expressed in national currency, increased between that day and the date of processing. Different rules apply where the trader buys the skimmed-milk powder from the intervention agency under Commission Regulation No 2213/76 of 10 September 1976 (Official Journal, L 249, p. 6). In that case, the aid granted in respect of skimmed-milk powder processed into feedingstuffs is the same as that provided for in the case of goods purchased on the free market.

9 According to the Commission, none of those three sets of rules applies to the particular case in which a trader buys from the intervention agency in his own country skimmed-milk powder coming from intervention stocks in another Member State. The possibility of transferring intervention stocks to the intervention agency of another Member State has been provided for periodically in favour of Italy, having regard to the absence of stocks of skimmed-milk powder in that country. In the absence of an express provision in regard to the day to be taken into consideration in calculating the amount of the aid, the general principle that the legal consequences of an act are governed by the provisions in force at the time that the act occurs (in this case, the date of the purchase) should prevail. If, in such a situation, the provisions of Regulation No 516/80 which govern the transfer of skimmed-milk powder to the Italian intervention agency provide that

the price to be paid by the trader to that agency is to be reduced by the amount of the aid, it is on the basis that the day of purchase is decisive in regard to the calculation of the aid.

10 It should be observed that according to the Commission's own argument, the time to be taken into consideration when calculating the amount of the aid is the day on which processing takes place where the skimmed-milk powder is purchased by the trader on the free market in his own country, in accordance with an express provision in Regulation No 1725/79, and also in the case of sales of that product by the intervention agency in the same country, in accordance with a provision referring back to the rules applicable to purchases on the free market. Different arrangements apply when the skimmed-milk powder is purchased on the free market of another Member State but an additional amount is paid if the amount of the aid is higher on the day on which the product is processed, in accordance with an express provision of Regulation No 1624/76. On the other hand, there is no provision for the particular case in which the skimmed-milk powder comes from intervention stocks held in another Member State.

11 Consequently, the applicable provisions, taken together, reveal the existence of a general rule to the effect that aid paid in respect of skimmed-milk powder must be calculated on the basis of the situation which exists on the day on which it is processed and an additional amount may be granted where there has been prior payment of aid of a lower amount.

12 In the absence of a contrary provision, the same rule applies to cases in which a trader buys from the intervention agency in his own country skimmed-milk powder coming from intervention stocks held in another Member State, unless the nature of that situation is such as to give strong evidence that the situation existing at another time is to be taken into account. No such indication is to be found in this case.

13 The Commission contends in that regard that, in that situation, the trader obtains certain advantages which do not exist where skimmed-milk powder is purchased in other circumstances for the purposes of processing. Thus, the trader does not have to pay the cost of transporting the milk powder, as he would have if the purchase had been made under Regulation No 1624/76 and he obtains the aid immediately, unlike a trader who purchases milk powder on the free market in his own country.

14 However, it must be observed that those circumstances do not justify a different method of calculation. The effect of transport costs varies greatly from one case to another. In particular, purchase on the free market in the trader's own country does not necessarily involve major transport costs. Although the aid is not immediately paid where the trader buys on the free market, it is immediately paid where Regulation No 1624/76 applies. Consequently, although the various situations which may be envisaged offer different advantages and disadvantages to the traders concerned, it cannot be argued that only the case at issue here differs significantly from the others.

15 Thus, the general rule for determining the time to be taken into consideration for the calculation of aid must be applied. Consequently, the Italian Government's complaints are justified.

16 Under those circumstances, the contested decision must be declared void in so far as it refers to the amount of LIT 677 198 690 in respect of aid for skimmed-milk powder held in intervention stocks.

B — Aid for the consumption of olive oil

17 Article 8 of Council Regulation No 3089/78 of 19 December 1978 laying down general rules in respect of aid for the consumption of olive oil (Official Journal, L 369, p. 12) provides that the aid in question is to be paid when the supervisory body designated by the Member State in which packaging takes place has checked that the conditions for granting the aid have been satisfied but the aid may be advanced as soon as the aid application is submitted, provided that sufficient security has been provided. Commission Regulation No 557/79 of 23 March 1979 (Official Journal, L 73, p. 13), later replaced by Commission Regulation No 3172/80 of 5 December 1980 (Official Journal, L 331, p. 27) laid down implementing rules in respect of the system of consumption aid for olive oil. According to those two regulations, the Member State is to pay the aid within 150 days of the submission of the aid application.

18 The Italian Government alleges that the Commission, after carrying out certain accounting checks, initially refused to charge considerable amounts to the EAGGF on the ground that the time-limit of 150 days from the submission of the aid

application had not been complied with. The Commission later withdrew that decision except in respect of aid which had given rise to administrative or judicial proceedings as a result of the discovery of irregularities on the part of the undertakings concerned. However, the initiation of criminal or administrative proceedings has no effect on whether or not expenses are to be chargeable to the EAGGF.

19 The Commission replies that where aid is paid in advance, the security lodged must be released within the time-limit laid down for the definitive payment of the aid, that is to say, within 150 days, and that, consequently, the necessary checks must be carried out within the same period. Thus, the Italian authorities' failure to comply with that time-limit caused those transactions to be not in accordance with the provisions of Community law. However, the Commission considered that financing could be granted, exceptionally, provided that subsequent checks showed that the transaction had been properly carried out. The only cases excluded were those in which no check was carried out, regardless of the reason for the omission.

20 It should be noted that the Italian Government admits that the necessary checks were not carried out within the time-limits laid down by the Community rules. The payment of the aid in question was therefore not in accordance with the requirements laid down by those rules. That conclusion is not affected by the fact that the Commission, for its own reasons, decided to accept the expenditure at issue in a certain number of cases.

21 In the alternative, the Italian Government also claims that the Commission could have awaited the end of the proceedings currently pending against certain undertakings before reaching a definitive decision and that it supplied the Commission with new figures which the latter refused to take into consideration.

22 Those arguments do not affect the conclusion that the aid payments were irregular. Furthermore, it should be observed, as the Commission has rightly pointed out, that checks which are not carried out within the prescribed time-limits are likely to become impossible after a certain time for reasons such as the fact that undertakings may have ceased trading or accounting documents may have been lost, etc. Moreover, consideration of the file shows that the correspondence

exchanged between the Italian Government and the Commission does not provide sufficiently precise information to permit the latter to make a fresh calculation of the amounts of aid which should not be charged to the EAGGF.

23 It follows from the foregoing that the complaint concerning aid for the consumption of olive oil must be rejected.

C — Financial compensation for the withdrawal from the market of fishery products

24 It can be seen from the file that the Commission refused to charge to the EAGGF all the expenditure declared by the producers' organization in the fisheries sector in Porto Garibaldi, Domar, because of the complete absence of a valid check on the operations of that organization and by the producers' organization in the same sector in Chioggia, San Marco, because of doubts as to whether it is actually functioning.

25 It is common ground that at the beginning of 1984, following checks carried out by the Guardia di Finanza (Revenue Enforcement Service), a complaint was made to the judicial authorities alleging that the officers of Domar were guilty of fraud and other offences inasmuch as they had unlawfully obtained, or attempted to obtain, the Community aid provided for where fishery products were withdrawn from the market during the period from 1978 to 1982. The members of the control board set up at local level to check that the products at issue were genuinely withdrawn from the market were also charged.

26 Following those events, EAGGF officials carried out an inspection of the San Marco organization, which is a subsidiary of Domar. During that inspection, it was discovered that the organization had neither staff nor offices, nor a warehouse or any of the other means necessary for the functioning of a producers' organization. It also emerged that the organization submitted abnormally high figures in respect of size of catch and withdrawals from the market.

27 The Italian Government claims that the Commission was wrong not to permit the contested expenditure to be charged to the EAGGF for two reasons. First of all,

no irregularity on the part of the Italian administration or State bodies was uncovered since the Italian Republic is not liable for the fraudulent conduct of the persons responsible for making the checks. Secondly, the accused in the various criminal proceedings denied the facts on which the charges are based and pleaded not guilty in the criminal proceedings currently pending. It is not therefore possible to rely on their negligence since there has not yet been any definitive judicial finding on that subject.

28 Those arguments cannot be accepted. Financial compensation for the withdrawal from the market of fishery products cannot be charged to the EAGGF if the producers' organization has not been subject to the checks provided for under Community rules. Article 8 of Commission Regulation No 2062/80 of 31 July 1980 on the conditions and procedure for granting or withdrawing recognition of producers' organizations and associations thereof in the fishing industry (Official Journal, L 200, p. 82) provides that 'the Member States shall exercise continuous supervision of the operation of recognized producers' organizations and associations', with particular regard to compliance with the conditions for recognition of such organizations and the marketing rules which they are required to lay down.

29 Under those circumstances, the question is not whether fraudulent behaviour on the part of the producers' organizations concerned can be shown to have existed at the time at which the contested decision was adopted, but whether the activities of those organizations were subject to continuous supervision. However, it can be seen from the file that in the case of Domar, the supervisory committee set up for that purpose by the Italian Government did not function and that no other form of supervision was exercised and that in the case of San Marco, no supervision whatsoever was exercised.

30 With regard more particularly to the expenditure declared by the San Marco organization, the Italian Government once again claims that a new inquiry showed that the irregularities committed were not substantial and that the structure of the organization could be put in order in a short period of time. However, those circumstances are not of such a nature as to affect the lawfulness of the contested decision, since the Italian Government has not contested the findings of fact made by the Commission's staff.

31 Thus, the allegations concerning financial compensation for the withdrawal from the market of fishery products cannot be upheld.

D — The monetary compensatory amounts

32 The Italian Government states that the Commission considered that it was required to charge to Italy an amount corresponding to the monetary compensatory amounts not collected by two undertakings, Cerealmangimi and Italgrani. However, those two undertakings have brought actions challenging the Commission's decision rejecting their application that the monetary compensatory amounts should not be recovered *a posteriori*. Under those circumstances, the Italian Government considers that the Commission should have excluded the amount concerned from the clearance of accounts for the 1981 financial year, or at least suspended its decision until the Court had ruled.

33 The Commission points out that the statement of the reasons on which the contested decision is based contains a general reservation concerning the consequences which the Commission would have to draw in the context of a later clearance of accounts from the judgments of the Court in the cases still pending.

34 It follows from the arguments of the parties that this part of the application is without purpose, since the Commission has undertaken to rectify its decision concerning the clearance of accounts if the Court declares void the decision concerning the recovery *a posteriori* of the monetary compensatory amounts in question.

35 It follows from all of the foregoing considerations that Commission Decision 85/460 on the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1981, must be declared void in so far as it refuses to charge to the EAGGF LIT 677 198 690 granted as aid for skimmed-milk powder in intervention, and that the remainder of the application should be dismissed.

Costs

36 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. However, under the first subparagraph of Article 69 (3) the Court may order that the parties are to bear their own costs in whole or in part where each party succeeds on some and fails on other heads.

On those grounds,

THE COURT

hereby:

(1) Declares Commission Decision 85/460 of 28 August 1985 on the clearance of the accounts presented by the Italian Republic in respect of the European Agricultural Guidance and Guarantee Fund, Guarantee Section, expenditure for 1981 (Official Journal, L 267, p. 35) void in so far as it refuses to charge to the EAGGF LIT 677 198 690 granted as aid for skimmed-milk powder in intervention;

(2) Dismisses the remainder of the application.

(3) Orders each party to bear its own costs.

Bosco Rodríguez Iglesias Koopmans

Bahlmann Joliet O'Higgins Schockweiler

Delivered in open court in Luxembourg on 25 November 1987.

Acting as President

P. Heim G. Bosco

Registrar President of Chamber