JUDGMENT OF THE COURT
17 October 1991 *

In Case C-346/89,

Italian Republic, represented by Professor Luigi Ferrari Bravo, Head of the Legal Department of 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 Dierk Booss and Eugenio de March, members of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION for the partial annulment of Commission Decision C(89)1525 of 30 August 1989 concerning an advance against entry in the accounts of expenditure financed by the EAGGF Guarantee Section in so far as the Commission reduced the amount of the advances applied for,

THE COURT,

composed of: O. Due, President, F. A. Schockweiler and F. Grévisse (Presidents of Chambers), G. F. Mancini, C. N. Kakouris, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: M. Darmon,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: Italian.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 16 April 1991,

after hearing the Opinion of the Advocate General at the sitting on 11 June 1991,

gives the following

Judgment

1 By an application lodged at the Court Registry on 9 November 1989, the Italian Republic brought an action under the first paragraph of Article 173 of the EEC Treaty in which it sought a declaration that Commission Decision C(89)1525 of 30 August 1989 concerning an advance against entry in the accounts of expenditure financed by the EAGGF Guarantee Section is partially void in so far as the Commission reduced the amount of the advances applied for.

2 Articles 1(2), 2 and 3 of Regulation (EEC) No 729/70 of the Council of 21 April 1970 on the financing of the common agricultural policy (Official Journal, English Special Edition 1970 (I), p. 218) provide that the EAGGF Guarantee Section is to finance refunds on exports to third countries and intervention intended to stabilize the agricultural markets. Pursuant to the third subparagraph of Article 4(2), as amended by Council Regulation (EEC) No 3183/87 of 19 October 1987 introducing special rules for the financing of the common agricultural policy (Official Journal 1987 L 304, p. 1), the financial resources earmarked to cover the expenditure referred to in Article 1(2) are to be mobilized by the Member States in accordance with the needs of their disbursing authorities.

3 Article 5(2)(a) of Regulation No 729/70 requires the Commission, after consulting the Fund Committee, to decide at the beginning of the year on an advance payment and, during the year, on additional payments. Pursuant to the final subparagraph of Article 5(2)(a), as added by Regulation No 3183/87 and amended by Council Regulation (EEC) No 2048/88 of 24 June 1988 amending Regulation (EEC) No 729/70 (Official Journal 1988 L 185, p. 1), the Commission, from January 1988, is to decide solely on monthly advances against booking of expenditure effected from the financial resources referred to in the third subparagraph of Article 4(2) of Regulation No 729/70.

4 The detailed rules for the payment of monthly advances are laid down by Commission Regulation (EEC) No 2776/88 of 7 September 1988 on data to be sent in by the Member States with a view to the booking of expenditure financed under the Guarantee Section of the Agricultural Guidance and Guarantee Fund (EAGGF) (Official Journal 1988 L 249, p. 9). Article 3(1) of that regulation requires Member States to inform the Commission on a regular basis of expenditure effected. The Commission is to have power, pursuant to the second subparagraph of Article 4(2) of that regulation, to defer payment of the advances to any Member States which have failed to make the notifications on time or where such notifications contain discrepancies which necessitate supplementary verification.

5 On the ground that the Italian Republic had failed to collect certain levies under the system of milk quotas during the 1988/89 marketing year and to pay the amounts in question to the Commission before 30 June 1989, the Commission, by way of the contested decision, deducted the sum of LIT 47 164 600 000 from the expenditure which the Italian Republic had declared that it had effected during July 1989.

6 It appears from the documents before the Court that that decision was taken following an exchange of correspondence between the Commission and the Italian Republic during which both parties put forward their respective points of view.

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

8 It is first of all necessary to determine the subject-matter of this application. The grounds for annulment relied upon by the Italian Republic and the parties' respective arguments are concerned not with whether the failure of the Italian authorities to collect certain levies under the system of milk quotas during the 1988/89 marketing year complied with Community rules but rather with the question whether the Commission has the power, when taking decisions concerning monthly advances, to check that expenditure effected by the Member States complies with Community law.

9 In support of its application, the Italian Republic claims first of all that the Commission is not entitled to reduce the advances applied for by a Member State on the basis of expenditure effected during a reference period. It takes the view that the system established by Regulations No 3183/87, No 2048/88 and No 2776/88 did not change the legal nature of advances into a system of reimbursement and that the Commission, pursuant to Article 4 of Regulation No 2776/88, has power to defer payment of advances only if the notifications are late in reaching it or contain discrepancies which necessitate supplementary verification. The Italian Republic goes on to claim that to authorize the Commission to reduce advances in the event of a breach of Community law would be tantamount to anticipating the procedure of the clearance of accounts and would ignore the Member States' right to a fair hearing.

10 The Commission replies, essentially, that Regulations No 3183/87 and No 2048/88 changed the system of advances into a system of monthly payments based on expenditure actually effected; Articles 1, 2 and 3 of Regulation No 729/70 reflect a general principle according to which the Commission is entitled to defray only expenditure effected in accordance with Community law. The Commission disputes the plea in law based on breach of the right to a fair hearing.

11 With regard, first of all, to the plea based on the Commission's lack of power to reduce the payment of the amounts due by way of monthly advances, it must be pointed out that, according to Articles 1, 2 and 3 of Regulation No 729/70, the EAGGF Guarantee Section is to finance refunds on exports to third countries and intervention intended to stabilize the agricultural markets undertaken 'according to Community rules within the framework of the common organization of agricultural markets'.

12 As the Court has consistently held (see judgments in Case 326/85 *Netherlands* v *Commission* [1987] ECR 5091, at paragraph 7, Case 332/85 *Germany* v *Commission* [1987] ECR 5143, at paragraph 7, and Case 347/85 *United Kingdom* v *Commission* [1988] ECR 1749, at paragraph 11), those provisions permit the Commission to charge to the Fund only sums paid in accordance with the rules laid down in the various sectors of agricultural production while leaving the Member States to bear the burden of any other sums paid, and in particular any amounts which the national authorities wrongly believed themselves authorized to pay or not to collect in the context of the common organization of the markets.

13 That interpretation of the conditions under which expenditure is to be borne by the EAGGF is unavoidable, moreover, in view of the purpose of Regulation No 729/70. If the common agricultural policy is to be applied in a manner which ensures equality between traders in the Member States, the national authorities of a Member State cannot, through a broad 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 by the competent authorities.

14 It follows from the foregoing reasoning that the Commission is not entitled, when managing the common agricultural policy, to commit funds which fail to comply with the rules governing the common organization of the market in question.

15 That rule is of general application and applies not only at the time of the annual clearance of the accounts of national authorities and bodies but also to the additional payments during the year which, since the change to the system of advances introduced by Regulations No 3183/87 and No 2048/88, have been made on the basis of the booking of expenditure effected during a certain prior period.

16 It follows from the foregoing reasoning that the Commission, while awaiting the final decision on the clearance of the annual accounts, has power to reduce the payment of amounts due under monthly advances according to the state of the account of each Member State with the EAGGF when it establishes that the national body has, contrary to Community law, failed to collect certain payments intended for the EAGGF or effected certain expenditure chargeable to the Fund.

17 Secondly, with regard to the plea in law based on the breach of the right to a fair hearing, it must be pointed out that the scope of that principle has to be assessed in the light of the nature of the decision in question.

18 In that respect, it must be noted that decisions concerning monthly advances adopted during the year on the basis of the only data available at that time are merely interim and temporary in nature and cannot prejudge the final and conclusive decision on the annual clearance of accounts. That decision is taken at the conclusion of the specific procedure giving effect to the *audi alteram partem* rule, during which the Member States concerned are provided with all the guarantees necessary for them to present their point of view.

19 Such a Commission decision concerning monthly advances thus remains subject to review until the annual clearance of accounts and therefore cannot definitively have an adverse effect on the financial interests of the Member State in question.

The decision on the annual clearance alone can determine conclusively the Member State's financial position in relation to the EAGGF. If it should transpire, when that decision is taken, that the Commission was wrong to have made reductions in the advances, it will be required to compensate the Member State in question for the damage caused.

20 In those circumstances, in view of the particular nature of the decisions on monthly advances, the observance of the right to a fair hearing, the fundamental nature of which has always been emphasized by the Court, does not require that the complex procedure, ensuring that the *audi alteram partem* rule is observed, employed during the annual clearance of the accounts must be complied with when those decisions are taken.

21 It must for that reason be held in this case that the opportunity given to the Italian Republic to submit its point of view during the exchange of correspondence preceding the adoption of the contested decision satisfies the requirements of the principle that the right to a fair hearing should be observed.

22 In those circumstances, the application must be dismissed.

Costs

23 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the Italian Republic 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 Italian Republic to pay the costs.

Due Schockweiler Grévisse

Mancini Kakouris Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 17 October 1991.

J.-G. Giraud
Registrar

O. Due
President