ORDER OF THE COURT OF FIRST INSTANCE (Fifth Chamber)
11 December 1998 *

In Case T-22/98,

Scottish Soft Fruit Growers Ltd, a corporation registered under the law of Scotland, established at Blairgowrie, Scotland, represented by Fergus Randolph, Barrister, of the Bar of England and Wales, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8—10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by Xavier Lewis, of its Legal Service, 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 annulment of the decision of the Commission, expressed in its letter of 16 October 1997 to the Scottish Office, refusing to accede to a request

* Language of the case: English.

concerning the interpretation and application of Council Regulation (EEC) No 1991/92 of 13 July 1992 establishing a special scheme for raspberries intended for processing (OJ 1992 L 199, p. 1), and of Commission Regulation (EEC) No 2252/92 of 30 July 1992 laying down detailed rules for applying that scheme (OJ 1992 L 219, p. 19),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Fifth Chamber),

composed of: J. D. Cooke, President, R. García-Valdecasas and P. Lindh, Judges,

Registrar: H. Jung,

makes the following

Order

Legislation

1 Council Regulation (EEC) No 1991/92 of 13 July 1992 establishing a special scheme for raspberries intended for processing (OJ 1992 L 199, p. 1) applies, by virtue of Article 1, to Community producers of raspberries falling within CN Code ex 0810 20 10. Under Article 2(1) thereof, producers' organisations are to be

recognised by the competent authorities of the Member States provided that their members produce more than 1 000 tonnes in the marketing year preceding the application for recognition under that regulation. The marketing year runs from 1 June to 31 May.

2 In accordance with Article 2(2) and (3) of Regulation No 1991/92, recognised producers' organisations which have submitted a programme to improve the competitiveness of the sector producing raspberries for processing, approved by the competent national authorities, are to receive a single flat-rate grant of aid paid by the Member States. The amount of the aid is fixed at ECU 50 per tonne of raspberries marketed for processing by the producers' organisation, normally during the first marketing year following the date of specific recognition as an organisation pursuant to Regulation No 1991/92. 50% of the aid granted is reimbursed by the European Agricultural Guidance and Guarantee Fund (EAGGF), Guarantee Section.

3 Article 6 of Commission Regulation (EEC) No 2252/92 of 30 July 1992 laying down detailed rules for applying that scheme (OJ 1992 L 219, p. 19) supplements Article 2(2) of Regulation No 1991/92 and states that for the purposes of granting the flat-rate aid to each producers' organisation the volume of produce marketed means the quantity actually sold by its members for processing during the first marketing year following the date of specific recognition. It adds that where poor weather conditions in the production region result in a reduction of more than 20% in the harvest of the producers' organisation, the quantity marketed is to be that actually sold for processing during the second marketing year following the date of specific recognition.

4 Under Article 10(1) of Regulation No 2252/92, 70% of the provisional amount of the flat-rate aid to recognised producers' organisations which have presented a

programme to improve competitiveness approved by the competent national authorities is to be paid to them by those authorities not later than two months after the programme is approved. Under Article 10(2), the provisional amount is to be determined, where necessary, on the basis of the quantity marketed by each producers' organisation as shown in the application for recognition.

5 The definitive amount of the aid depends on either the quantities actually sold for processing during the first marketing year following the date of specific recognition or, in the event of poor weather conditions in the production region resulting in a reduction of more than 20% in the harvest of the producers' organisation, the quantity actually sold during the second marketing year following the date of recognition. Article 10(3) of Regulation No 2252/92 provides that the definitive amount of the aid is to be fixed and the balance — the difference between the definitive amount and the sum advanced — to be paid not later than one month following the communication by the producers' organisation to the competent national authority of the quantity marketed during the first marketing year following its recognition.

6 In accordance with Article 14 of Regulation No 2252/92, where any aid has been paid in error, the Member States are to recover the amounts paid, together with interest thereon from the date when the aid was paid out until the date when it is recovered.

Background to the dispute

7 The applicant, Scottish Soft Fruit Growers Ltd, is a Scottish corporation, registered under the Industrial and Provident Societies Act 1965, whose members are producers of raspberries intended for processing. It was formed in 1992 to carry on business as the raspberry producers' organisation for the United Kingdom, and was recognised in April 1993. Having submitted a programme to improve the

competitiveness of raspberry production for processing, pursuant to Article 2(2) of Regulation No 1991/92, it was entitled, in accordance with Article 2(3) thereof, to aid of ECU 50 per tonne of raspberries marketed during — normally — the marketing year 1 June 1993 to 31 May 1994, the first marketing year following the date of specific recognition.

8 The applicant's programme was approved on 28 May 1993 and, in accordance with Article 10(1) of Regulation No 2252/92, on 2 July 1993 it was paid 70% of the flat-rate grant by the competent national authority — the Intervention Board. The provisional amount of the grant (£246 755.10) was determined, in accordance with Article 10(2), on the basis of the quantity marketed by the organisation, as shown in its application for recognition (7 350 tonnes of raspberries). However, the definitive amount of the grant was in principle to be fixed after the end of the marketing year 1 June 1993 to 31 May 1994.

9 Owing to unusual weather conditions during that period, the applicant marketed some 4 000 tonnes of raspberries only. Since the circumstances specified in Article 6 of Regulation No 2252/92 (poor weather conditions) were present, the quantity used for calculating the definitive amount of the grant was thus to be that actually sold during the second marketing year (from 1 June 1994 to 31 May 1995). However, as a result of further adverse weather conditions, the applicant's sales for the 1994/95 marketing year amounted to only 3 539 tonnes. The definitive amount of start-up aid thus came to £163 009.21.

10 By letter of 3 April 1995, the Intervention Board, the national intervention agency in the United Kingdom, requested the applicant to repay the overpaid amount of £83 745.90, pursuant to Article 14 of Regulation No 2252/92. An invoice dated 25 April 1995 indicated that the remittance was due by 10 May 1995.

11 After that invoice was issued, the Agriculture, Environment and Fisheries Department of the Scottish Office wrote to a Director in the Commission's Directorate-General for Agriculture ('DG VI'), explaining the applicant's problem and asking him to be sympathetic towards it. The Scottish Office suggested, as a means of avoiding repayment, that Regulation No 1991/92 could be interpreted as permitting recognition of a situation of *force majeure*, on account of particularly adverse weather conditions, and as allowing the marketing year which served as the basis for recognition of the group — 1992/93 — to be treated as the definitive marketing year for the purposes of the start-up aid. In that letter, the Scottish Office acknowledged that such a solution would probably require a slight amendment to Article 6 of Regulation No 2252/92. The Intervention Board took no action to recover the sum invoiced on 25 April 1995 pending the Commission's reply.

12 By letter of 16 October 1997, the Director-General of DG VI informed the Scottish Office that the Commission had reached a definitive view on its request, and that it was unable to accede to it.

Procedure and forms of order sought

13 By application lodged at the Registry of the Court of First Instance on 21 January 1998, the applicant brought the present action for annulment of the Commission's decision of 16 October 1997 refusing to accede to the request made by the Scottish Office concerning the interpretation and application of Regulations No 1991/92 and No 2252/92, with regard to the demand for repayment of start-up aid addressed to the applicant by the Intervention Board.

14 By separate document lodged at the Registry on 6 March 1998, the Commission raised a preliminary objection of inadmissibility pursuant to Article 114(1) of the

Rules of Procedure of the Court of First Instance. On 29 April 1998, the applicant lodged its observations on that objection.

15 In its application the applicant claims that the Court should:

— annul the Commission's decision expressed in its letter of 16 October 1997; and

— order the Commission to pay the costs.

16 The Commission contends that the Court should:

— dismiss the application as inadmissible; and

— order the applicant to pay the costs.

17 In its observations on the objection of inadmissibility, the applicant claims that the Court should:

— dismiss the objection of inadmissibility raised by the Commission; and

— order that the case be allowed to proceed.

Admissibility

Arguments of the parties

18 The Commission maintains, in the first place, that the application is inadmissible because the letter in issue in no way changes the applicant's legal position; the obligation to reimburse the aid overpaid by the authorities is a consequence of the application of Article 6 of Regulation No 2252/92 and not of the letter from the Director-General of DG VI stating that the Commission could not accede to the Scottish Office's request for that article to be amended. The contested letter is thus not a measure which has brought about a distinct change in the applicant's legal position. The Commission points out that, according to the case-law of the Court of Justice and the Court of First Instance, only measures which produce binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his legal position may be the subject of an action for annulment (Case T-541/93 *Connaughton and Others* v *Council* [1997] ECR II-549, paragraph 30). It considers, therefore, that since the contested act was not capable of producing binding legal effects, it could not be the subject of an action for annulment.

19 Second, the Commission argues that the letter in question constitutes a negative response to a request seeking in substance to secure an amendment to a measure of general application, namely Regulation No 2252/92. However, according to settled case-law, 'an action for annulment brought by an individual against a negative decision is inadmissible in so far as it is directed against a refusal to adopt a regulation having general application' (Case T-5/96 *Sveriges Betodlares Centralförening and Henrikson* v *Commission* [1996] ECR II-1299, paragraph 28).

20 In this respect, the Commission submits that in the present case both Regulation No 2252/92 and Regulation No 1991/92 are legislative in character and general in application, since they concern raspberry producers' organisations throughout the Community. Article 6 of Regulation No 2252/92, which deals with the grant of

flat-rate aid to recognised producers' organisations in an objective manner, involves legal consequences for categories of persons viewed in a general and abstract manner, and thus affects the applicant by virtue solely of its capacity as a raspberry producers' organisation and not by virtue of any more specific characteristics.

21 Lastly, the Commission observes that, if the request had been granted, the amendment requested would also have had to take the form of a regulation of general application. Since the Court of First Instance has ruled in Case T-5/96 *Sveriges Betodlares Centralförening*, cited above (paragraph 28), that 'an action brought by a natural or legal person against a Commission refusal retroactively to rectify a measure will be inadmissible if the rectification requested would have had to be adopted in the form of a generally applicable regulation', it is in the Commission's view unarguable that the application in this case is itself inadmissible for that reason. Here, it points out that the Scottish Office itself acknowledged in its letter of 25 October 1995 that amendment of the regulation was necessary.

22 In its application, the applicant maintains that its action is admissible inasmuch as the contested decision, although addressed to the Scottish Office, is of direct and individual concern to it. That decision is of direct concern in that its effects on the applicant do not depend on the exercise of a discretionary power by a third party, and of individual concern in that it affects the applicant by reason of certain attributes which are peculiar to it or by reason of circumstances in which it is differentiated from all other persons, thus distinguishing the applicant individually just as in the case of the person addressed. The applicant stresses that it alone is affected by the contested decision since it is the only raspberry producers' organisation in the Community.

23 In its observations on the plea of inadmissibility, the applicant claims that the contested decision did change its legal position and, consequently, did produce binding legal effects such as to make its application admissible. In reply to the Commission's argument that it was not the contested decision that led to its having to

repay the sum of £83 745.90, it states that the national authorities stayed any action to recover that sum, pending the Commission's decision. It points out that the Court of Justice has held an application for annulment of an act of the Commission to be admissible even though that act required implementing measures to be adopted by the national authorities (Case 11/82 *Piraiki-Patraiki* v *Commission* [1985] ECR 207, paragraph 7). Consequently, in the applicant's view, the contested decision as such definitively laid down the view of the law taken by the Commission and thus affects its own legal position, thereby rendering that decision liable to judicial review pursuant to Article 173 of the Treaty (see Joined Cases T-10/92, T-11/92, T-12/92 and T-15/92 *Cimenteries CBR and Others* v *Commission* [1992] ECR II-2667).

24 In addition, the applicant relies on Case C-395/95 P *Geotronics* v *Commission* [1997] ECR I-2271, paragraphs 12, 14 and 15, in which the Court of Justice held that an action brought against a decision of the Commission was admissible notwithstanding the fact that the applicant's legal relations were with the competent national authorities alone and that, according to previous case-law, the Commission could not substitute its own decision for that of the national authorities. Since the contested decision had been taken by the Commission in the exercise of its powers and was specifically directed to the applicant, which thereby lost any real chance of being awarded the contract, it had thus produced binding legal effects as regards the applicant and could be the subject of an action for annulment under Article 173 of the EC Treaty. In the present case, the applicant argues by analogy that since the Commission took the contested decision in the exercise of its powers and since the decision was specifically directed to the applicant, which thereby lost any chance of succeeding in its claim, the same result should be produced in this case and the application held admissible.

25 The applicant also challenges the other arguments put forward by the Commission, albeit treating them as subsidiary points.

26 In response to the Commission's argument, drawn from the order in Case T-5/96 *Sveriges Betodlares Centralförening*, cited above, that no action for annulment may lie against a refusal to adopt a regulation having general application, the applicant claims that the situation of the applicant in that case cannot be compared with its own since in the present case the contested act is not merely a letter providing information confined to explaining briefly to the addressee why a previous legislative position was taken, but a detailed rebuttal following a long series of negotiations between the parties.

27 It also challenges the argument which the Commission bases on that order, concerning the nature of the request which gave rise to the contested decision, to the effect that the applicant is seeking a legislative amendment to the relevant Community legislative provisions. The letter from the Scottish Office of 25 October 1995 (Annex 5 to the application) does not necessarily comprise a request for amendment of Regulation No 2252/92. In the applicant's submission, it can be seen from that letter that the request relied on *inter alia* interpreting the word 'normally', used in Regulation No 1991/92, as including an exception on grounds of *force majeure* to the legislative provisions as laid down. That would not necessarily require an amendment to those provisions. Accordingly, the case-law relied on by the Commission has no bearing on this case.

28 If, however, the Court were to take the view that the nature of the request did necessarily call for amendment of the legislation, the applicant argues that the amendment envisaged is such as to be capable of permitting an action for annulment to be brought against a refusal to adopt it. Such an amendment could, in its view, only apply by its nature to one producer — the applicant — since, during the relevant period, it was the only producer concerned by the original legislative provisions. It notes that in an analogous situation the Court of Justice held that a regulation which denied a specific class of traders the benefit of an increase in export refunds was of direct and individual concern to those traders (Case 100/74 *CAM* v *Commission* [1975] ECR 1393).

29 In addition, the applicant challenges the application to the present case of the judgment in *Buckl* (Joined Cases C-15/91 and C-108/91 *Buckl and Others* v *Commission* [1992] ECR I-6061), which was followed in Case T-5/96 *Sveriges Betodlares Centralförening*, cited above. It claims that the present case is very different since, in contrast to the facts in *Buckl*, in which the Court of Justice held that the amending regulation sought would concern importers of ducks and geese, breeders of ducks and geese and all poultry slaughterhouses without distinction, the relevant amendment in the present case would affect retroactively just one producer in the whole Community.

30 In support of the admissibility of its action, the applicant claims that its application is analogous, rather, to that in Joined Cases 41/70, 42/70, 43/70 and 44/70 *International Fruit Company and Others* v *Commission* [1971] ECR 411, referred to by the Court of First Instance in Case T-197/95 *Sveriges Betodlares Centralförening and Henrikson* v *Commission* [1996] ECR II-1285. Accordingly, it considers that the grounds relied on by the Court of Justice in finding that action admissible are apposite and relevant in the present case. It points out that in *International Fruit* the Court held that the contested regulation did not have general application and was therefore liable to review under Article 173 of the Treaty on the grounds that, when it was adopted, the number of import licence applications capable of being affected by it was known, no further applications could be made, and that the regulation had been adopted after account had been taken of the total quantity for which applications had been made and in the light of the specific situation of certain parties. In the applicant's submission, any amending legislation would satisfy all the conditions which led the Court of Justice to find that application admissible in that judgment and therefore, in the circumstances of this case, the decision refusing to adopt such legislation must be deemed capable of review under Article 173 of the Treaty.

31 Lastly, the applicant states that the Commission's argument that other organisations could have been covered by the regulation and might be covered in the future

is quite irrelevant because the question must be appraised on the basis of the actual facts rather than of hypotheses. The amendment could only ever have affected one producer — Scottish Soft Fruit Growers.

Findings of the Court

32 Under Article 114 of its Rules of Procedure, the Court of First Instance may give a decision on admissibility, without going into the substance of the case, where a party has made an application to that effect. In the circumstances of this case, the Court considers that it has sufficient information available to it from the documents before it and decides that it can rule on the application without opening the oral procedure or considering the merits of the case.

33 In the circumstances, the Court must first establish whether the contested decision is an act which may be the subject of an action for annulment.

34 According to settled case-law, the mere fact that a letter is sent by a Community institution to its addressee in response to a request made by the latter is not enough for it to be treated as a decision within the meaning of Article 173 of the Treaty, thus entitling its recipient to bring an action for its annulment (Case C-25/92 *Miethke* v *Parliament* [1993] ECR I-473, paragraph 10, Case T-277/94 *AITEC* v *Commission* [1996] ECR II-351, paragraph 50, and Case T-5/96 *Sveriges Betodlares Centralförening*, cited above, paragraph 26). It is also settled case-law that only a measure which produces binding legal effects so as to affect the interests of an applicant by bringing about a distinct change in his legal position is an act or decision which may be the subject of an action for annulment under

Article 173 (Case 60/81 *IBM* v *Commission* [1981] ECR 2639, paragraph 9, Case T-541/93 *Connaughton and Others*, cited above, paragraph 30, and Case T-5/96 *Sveriges Betodlares Centralförening*, cited above, paragraph 26).

35 In the circumstances, the Court holds that the applicant's obligation to repay was the consequence of application of the rules in force and that the applicant therefore owed that sum to the Intervention Board before the Scottish Office submitted its request to the Commission and continued to owe it after the Commission's reply.

36 Furthermore, when the Scottish Office wrote to the Commission on 25 October 1995, the applicant had already received the Intervention Board's letter of 3 April 1995 informing it of the definitive amount of the start-up aid to which it was entitled and indicating the exact sum overpaid which it had to repay on the basis of an invoice to be submitted in the next few days. The invoice, which was actually sent by the Intervention Board on 25 April 1995, required the applicant to pay the sum of £83 745.90 by 10 May 1995.

37 The applicant's argument to the effect that the contested letter had brought about a change in its legal position because the national authorities had not taken any further action for recovery of part of the aid pending the Commission's decision cannot be upheld. If the Intervention Board, the competent authority for the recovery of sums paid in error under Article 14 of Regulation No 2252/92, in fact took no action to enforce the liquid debt so claimed until the Commission adopted a view, as requested by the Scottish Office, this was merely an informal decision taken unilaterally by the United Kingdom authorities, and has no bearing whatsoever on the competence of the Commission in this sphere. The regulations applicable in this case do not envisage any possibility of amending the rules which they

establish or of providing exceptional treatment for the grant and recovery of aid as decided on by the national authorities, nor do they provide for any suspension of recovery such as the unilateral decision taken in this case by the Intervention Board.

38 It follows that the fact that the national authority did not take action to recover the sum in question pending the Commission's adoption of a position does not support the applicant's argument that its legal position as regards the debt depended on the answer to be given by the Commission to the Scottish Office's request of 25 October 1995.

39 In those circumstances, the applicant had no reason to expect that the Commission's answer to the Scottish Office would entail a change in its legal position as a debtor of the Intervention Board.

40 In the light of the foregoing, the Court concludes that the letter in issue did not affect the applicant's legal position.

41 It must also be borne in mind that an action for annulment brought by an individual is inadmissible in so far as it is directed against a refusal to adopt a regulation having general application (see, to this effect, Case T-5/96 *Sveriges Betodlares Centralförening*, cited above, paragraph 28). Similarly, an action brought by a natural or legal person against a refusal by the Commission to rectify a measure retroactively will be inadmissible if the rectification requested would have had to be adopted in the form of a generally applicable regulation (Case C-87/89 *Sonito and Others* v *Commission* [1990] ECR I-1981, paragraphs 8 and 9, and Case T-5/96 *Sveriges Betodlares Centralförening*, cited above, paragraph 28).

42 Regulations No 1991/92 and No 2252/92, which are applicable to this case, are legislative measures of general application since they concern all raspberry producers' organisations in the Community and, in providing for the grant of specific aid, lay down the conditions on which such organisations may be recognised. In particular, Article 6 of Regulation No 2252/92 provides for the grant of flat-rate aid on the basis of an objective situation, namely, that of a producers' organisation which produced more than 1 000 tonnes in the marketing year before the application for recognition, and which has submitted a programme to improve the competitiveness of the sector producing raspberries for processing approved by the competent national authorities. Consequently, it entails legal effects for the persons contemplated in a general and abstract manner. The fact that when the Scottish Office submitted its request the applicant was the only raspberry producers' organisation recognised under those regulations in no way alters their legislative nature or general application, since the number of organisations affected is not decisive in this respect (see, to this effect, Case 231/82 *Spijker Kwasten* v *Commission* [1983] ECR 2559, paragraph 10). It also follows that an amending regulation would therefore have had to be a regulation of general application.

43 In those circumstances, it is clear that in so far as the letter in issue is to be regarded as a refusal to amend the regulation, it is not open to the applicant to challenge that refusal by means of an action for annulment.

44 Nor, moreover, may the applicant rely on the case-law it has cited, which relates to cases in which the legal context and factual circumstances are not comparable to those in the present case, and thus cannot detract from the finding that there is nothing to bring about a change in the applicant's legal situation.

45 As far as concerns, first, the judgment in *Piraiki-Patraiki*, cited above, it is enough to note that, by contrast with that case, the measure in issue here is not a safeguard measure involving derogations from the rules of the Treaty as of a particular moment and for a limited period, and that neither the Council nor the Commis-

sion could have attempted or been expected to identify the traders before the act was adopted.

46 As regards, second, the judgment in *Cimenteries CBR*, cited above, the Court considers that the applicant is wrong to deduce therefrom that the Commission's decision in the present case is subject to judicial review under Article 173 of the Treaty just because it sets out the Commission's position definitively, given that the judgment itself makes it clear that it is necessary that the act should bring about a marked change in the applicant's legal position.

47 Finally, the Court considers that the reference to the judgment in *Geotronics*, cited above, is irrelevant because, unlike the present case, that case concerned an individual decision, without general application, adopted by the Commission in the exercise of the specific powers expressly conferred on it in that respect by the applicable regulation. Furthermore, in the *Geotronics* case, the Commission had powers which it was supposed to exercise in relation to each tender submitted for the contract, with the result that its decisions could produce, as the Court of Justice held in that judgment, definitive and binding legal effects such as the exclusion of the applicant from taking part in the tender procedure. In the present case, by contrast, the Commission played a part only because of the entirely unprompted and unexpected request made by the Scottish Office that it should adopt a quite exceptional measure for which no provision had been made, such as amending a legislative measure of general application with retroactive effect. Those were the circumstances in which the Commission took the decision not to accede to the request and, consequently, not to amend the legal rules to which the applicant was already subject. Accordingly, the Court considers that no comparison can be drawn between either the legal contexts or the material facts of the two cases.

48 In the light of all the foregoing, it must be concluded that the contested letter is not an act against which an action may be brought under Article 173 of the Treaty and, therefore, that the present action must be declared inadmissible.

Costs

49 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been asked for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby orders:

1. The application is dismissed as inadmissible.

2. The applicant shall pay its own costs and those incurred by the Commission.

Luxembourg, 11 December 1998.

H. Jung — Registrar

J. D. Cooke — President